

# **University of Wisconsin – La Crosse**

## **Faculty Senate Response to the Proposed UWS 7 Policy**

### **Background**

The proposed UWS 7 is a response to perceived deficiencies in the existing UWS 4 policy related to the dismissal of faculty in the case of criminal misconduct. The two identified deficiencies concern 1) the length of time needed to come to a dismissal decision and 2) the inability to withhold salary while the decision process is pending. The proposed UWS 7 creates an alternate policy to UWS 4 that includes these two ideas.

The summary statement provided with the proposed UWS 7 draws a connection between the public attention surrounding recent cases of faculty felony convictions and concerns raised over the effectiveness of the university's internal disciplinary process. This connection implies that the recent cases have occurred because of, or have been exacerbated by, some deficiency in existing policy, and that this deficiency is sufficient to require the development of new policy. The summary does not however provide any analysis or evidence to suggest that the abuses inherent in the recent cases could not have been responsibly addressed through the existing policy. Reasonable discourse and action on this matter should have begun with an analysis of why the recent cases, which have most assuredly damaged the public reputation of the University System, occurred, and identification of those portions of UWS 4 which have contributed to the inability to deal with these cases in a more responsible manner. There is either a problem with existing policy or there is a problem with its application. The summary statement presented with the proposed policy does not answer this question.

### **Recommendations**

The UW-La Crosse Faculty Senate agrees that the recently publicized cases of criminal misconduct, and their handling, have damaged the reputation of the UW-System and its faculty. This damage has been severe and, when coupled with other recent problems, has eroded the confidence and support that the university system has historically enjoyed. However, the Senate finds the specific ways in which expedited decisions and suspension of pay are implemented in the proposed UWS 7, as well as several other significant internal problems, make the proposed policy unacceptable. This document provides a detailed discussion of the proposed policy but the problems can be summarized as:

- Inappropriate and unnecessarily expansive language in the definition of Serious Criminal Misconduct.
- Inadequate care for due process in the expedited timeline.
- Inadequate grounds for suspension of pay.

It is also unacceptable that, thus far, the proposal has been developed by a committee with no voting faculty representation, despite the fact that Chapter 36.09(4) gives faculty primary responsibility in faculty personnel matters. If deficiencies in UWS 4 were clearly articulated and

connected to the recent cases, the faculty could have been requested to develop policy changes to address the deficiencies.

While the discussion below could be used to suggest specific language changes to the proposed policy, the result would still be incomplete and flawed. The UW-La Crosse Faculty Senate believes that the goals of the new policy can be more appropriately accomplished by 1) ensuring that existing policy is followed and 2) making specific changes to UWS 4 to include the possibility of suspension of pay in the obvious and unambiguous cases discussed below, and to allow shorter time periods where appropriate. In the event that pay is suspended the policy should at least require a recommendation from the hearing committee and require that the process conclude within a specific time, unless an extension is requested in writing by the accused.

#### **UWS 4: Procedures for Dismissal**

UWS 4 details the procedures under which the Board of Regents may dismiss tenured (or tenure-track) faculty for just cause. The policy does not expand on what constitutes just cause beyond the accepted legal meaning but does state that faculty members are “entitled to enjoy and exercise all of the rights and privileges of a United States citizen, and the rights and privileges of academic freedom as they are generally understood in the academic community.”

The process for dismissal (4.02) begins with a complaint to the Chancellor. If the Chancellor finds the complaint to be substantial and of a nature that if true might lead to dismissal, the Chancellor is required to initiate an investigation. After the investigation, should the Chancellor decide to proceed with dismissal, the faculty member is to be provided with a written statement of specific charges. The policy indicates that the charges are to be personally served or served by certified mail with a fallback process involving publication of a summons if service cannot be accomplished within 20 days. After receipt of the written charges the faculty member has the right to request a hearing.

Section 4.03 describes the standing faculty committee charged with hearing dismissal cases and the committee’s responsibilities in conducting the hearing, producing a summary of evidence and transmitting the hearing record along with the committee’s findings and decision to the Board of Regents. The faculty member must request a hearing within 20 days of notice of the charges (4.04) with the hearing to be held no later than 20 days after the request except by mutual written request of the parties. Sections 4.05 & 4.06 describe several requirements for a fair hearing and a number of procedural guarantees. In particular, section 4.06 specifies that the burden for providing evidence of just cause lies with the administration.

Section 4.07 describes how recommendations from the hearing are communicated to the Chancellor and ultimately the Board of Regents. The hearing record and committee’s recommendation (finding for dismissal, some lesser sanction or no action) are to be sent to the Chancellor as soon as practicable after the conclusion of the hearing. Within 20 days of receipt of the hearing committee’s recommendation the Chancellor is to review the material and offer to discuss it with the faculty member. Within 20 days of this meeting, the Chancellor is to produce

a written recommendation to be forwarded to the Board of Regents. If the Chancellor's recommendation is substantially different from that of the hearing committee, the hearing committee is to be given an opportunity for written response for inclusion in the record submitted to the Board of Regents. The Chancellor may take disciplinary action short of dismissal unless the faculty member requests, in writing, that the record and recommendations be submitted to the Board of Regents for action. Section 4.08 describes the procedures to be used by the Board in reviewing the recommendation. These include opportunity for filing exceptions to the recommendations of the hearing committee and the Chancellor as well as oral arguments.

Section 4.09 allows the Chancellor, after consultation with appropriate faculty committees, to immediately relieve the faculty member of duties if the Chancellor finds that substantial harm to the institution will result from the faculty member continuing in his/her position. However, if relieved of duties, the faculty member's salary will continue until the Board of Regents makes a decision on dismissal.

### **Proposed UWS 7**

The proposed new policy contained in UWS 7 is intended to specifically address cases of serious criminal misconduct. The document "Summary of Recommended Changes Regarding the Disciplinary Process for Serious Criminal Misconduct" states that the new policy makes several significant changes from current procedures consisting of 1) definition of serious criminal misconduct, 2) expedited time limits, and 3) suspension of pay.

Serious Criminal Misconduct: The point of defining "Serious Criminal Misconduct" is to determine the circumstances under which an expedited process and suspension of pay can be imposed. The definition occurs in 7.02 and requires the conjunction of "behavior that constitutes the commission of a felony" with one of three contributing factors. These are:

- a) Clearly poses substantial risk to safety of the university community.
- b) Seriously impairs the public trust in the university and the university's ability to fulfill its mission.
- c) Seriously impairs the faculty member's fitness or ability to fulfill duties or impairs the efficiency of colleagues and students with whom he or she works.

The first two certainly seem to be included in the factors envisioned in UWS 4.09 that allow a Chancellor to relieve a faculty member of his/her duties pending a final decision on dismissal. The third statement is vague and presents a low subjective standard in its phrase "impairs the efficiency".

The document states that the intent is to describe egregious misbehavior that warrants the new sanctions of this policy. However, it is hard to imagine what "egregious behavior" would fail to fall under a) or b) but would be covered by c).

Expedited Time Limits: UWS 4 contains the following references to time periods involved in the process prior to the point at which the matter is given to the UW-System President for referral to

the Board of Regents. These time periods have customarily been assumed to refer to calendar days.

1. The Chancellor shall investigate the complaint within a *reasonable time*.
2. The statement of written charges shall be served personally or by certified mail unless this cannot be accomplished within *20 days* in which case service is made by first class mail and publication of a summons.
3. The faculty member has *20 days* (or 25 if by publication) after notice of charges in which to request a hearing.
4. The hearing is to occur within *20 days* of the request.
5. Notice of the hearing will be made *10 days* prior to the hearing (note that this is subsumed within the 20 days of #4).
6. The hearing committee sends, *as soon as practicable*, its recommendations to the Chancellor.
7. The Chancellor reviews the hearing recommendation within *20 days* of receipt and offers the faculty member an opportunity to discuss recommendations.
8. The Chancellor prepares a written recommendation within *20 days* of meeting with faculty member.
9. If the Chancellor's decision differs from the hearing committee, the hearing committee is to be provided *reasonable opportunity* to provide a written response.

Reference 2 is really concerned with the method by which legal notice is provided. It is hard to see how this time constraint can be changed unless another method of notice is deemed legally appropriate. Since the proposed policy is concerned with especially egregious behavior it is not clear that a more defensible method of legal notification exists.

Reference 3 is the time in which the faculty member can consider whether to appeal and to begin to gather evidence and documentation to support that appeal, since the hearing could occur as soon as 10 days after the request and would normally occur no later than 20 days (reference 4) after the request.

Reference 6 has to do with the time period in which the hearing committee reports its decision. It is normally understood that the committee deliberates immediately after the hearing. Consequently, the only delay is in collecting together the record of the hearing and the committee's decision. This normally happens the day after the hearing.

The remaining references (#1, #7, #8 and #9) are essentially under the Chancellor's control, especially the open-ended "reasonable time" of #1. The process defined by UWS 4 could, if desired, operate quickly and there is certainly plenty of opportunity for the Chancellor to expedite the process.

Suspension of Pay: Section 7.06 of the proposed policy allows the Provost, after consultation with appropriate faculty governance representatives to suspend the faculty member from duties and to do so without pay pending the final dismissal decision. The policy lists three situations in which suspension without pay is warranted.

- a) The faculty member has been charged with a felony and the Provost finds that the elements of serious criminal misconduct listed in 7.01 apply and further that there is substantial likelihood that the faculty member has engaged in the alleged conduct.
- b) The faculty member is unable to report for work due to incarceration, conditions of bail or similar cause.
- c) The faculty member has been convicted of serious criminal misconduct.

In the case of c), a court has found that the faculty member has committed a felony, and if the felony was connected to the performance of the faculty members duties, this presumably forms adequate cause for the Board to dismiss. In the case of b), a court has at least found sufficient cause to limit, through incarceration or bail restrictions, the movements of the faculty member to the point that they can no longer perform their duties. The inability of the faculty member to perform the duties of his/her position for an extended period of time again is presumably sufficient grounds for the Board of Regents to decide for dismissal. In these two cases the presumption that the Board will find for dismissal may be sufficient to warrant suspension of salary pending the Board's decision. It should be noted, however, that the proposed policy does not actually guarantee that the board will come to a decision in a specific time frame (7.05(9)). Consequently, the suspension of pay may in fact be for an indefinite period.

The situation in case a) is much more problematic. In this case the Provost is asked not only to find that a felony charge corresponds to the requirements of 7.01, but that there is substantial likelihood that the faculty member is guilty. Substantial likelihood is a high standard and if it exists one would expect that the process under UWS 4 could quickly proceed to a dismissal decision by the Board, and consequently presumptive suspension of pay would be unnecessary. Lacking the circumstances of b) or c) suspension of pay should at least require the opportunity for a hearing and a finding for dismissal. This would at least provide some basis under which to believe that the Board would find for dismissal.

### **Other Issues With UWS 7**

Section 7.04 states that "Any faculty member who engages in Serious Criminal Misconduct shall immediately report that fact to the Provost." While the intent of this may be clear there is a subtlety in its interpretation. It can be argued that an act is not a felony until a court has rendered that judgment. Under this interpretation, faculty would be required to inform the Provost whenever they are convicted of a felony and it falls under the parameters of Serious Criminal Misconduct described in 7.02. This might be a reasonable requirement, and consistent with other examples of mandatory reporting, but if this is the intent, there seems to be little hope for compliance, since the consequences of not reporting a conviction cannot be worse than the consequences of reporting an offense that is presumptively sufficient to justify dismissal. If, on the other hand, the intended interpretation is that reporting is required by faculty members who have engaged in an activity that might lead to a felony conviction, then this constitutes a self-incriminating confession and would presumably make the Provost a potential witness to the confession at a trial.

It is odd that by using the phrase “engages in ... Misconduct” this section is clearly not referring to a more obvious and less problematic requirement that faculty report when they have been legally charged with a felony that falls under the parameters of UWS 7.02. It is also odd that there is no requirement that all employees report information pertaining to possible Serious Criminal Misconduct as described in UWS 7.02. It seems likely that this section is included with the expectation that the required report would not occur and that this failure to report would constitute an uncontestable violation of policy that could, itself, serve as the grounds for sanctions.

Section 7.05 defines the parameters of the expedited process. Unlike UWS 4, the Provost has responsibility to receive either reports under 7.04 or other credible information alleging that a faculty member has engaged in Serious Criminal Misconduct. In these cases, or if the Provost has determined to suspend without pay pending a final dismissal decision under 7.06, the Provost is required to follow the following steps.

- 1) Within 3 working days of the receipt of information the Provost is required to inform the faculty member and, after consultation with institutional governance, appoint an investigator.
- 2) Within 3 working days of the appointment of an investigator the faculty member can request disqualification of the investigator on the grounds of lack of impartiality. It is up to the Provost to grant this request and if granted within 2 working days the Provost must appoint another investigator.
- 3) The investigator is required to complete and file a report with the Provost no later than 10 working days after the time allowed for requesting a disqualification or after the naming of an alternate.
- 4) Within 3 working days of receiving the investigator’s report the Provost is required to consult with appropriate institutional governance representatives and decide whether to seek dismissal under UWS 7. As an alternative the Provost may seek dismissal under UWS 4 or other disciplinary action under UWS 6 or discontinue the process.
- 5) Within 2 working days of reaching a decision to seek dismissal under UWS 7 the Provost is required to file charges.

Unlike UWS 4, this section does not specify the method by which the faculty member is to be informed of the initial information or report, nor does it specify whether the information is to be communicated verbally or in writing, nor does it specify the completeness with which the information is to be communicated. It may be presumed that the charges filed at step 5 are to be in writing and provided to the faculty member, but the policy does not say this nor does it say that the charges are to be filed with the Chancellor. The timeline in this section also omits the opportunity for informal discussion with the faculty member that is included in UWS 4.02.

The nature and role of the investigator is also problematic. In UWS 4.02 it is the Chancellor that initiates an investigation that is presumably performed by the Chancellor or by proxy the Chancellor’s staff. In this section, there is no indication as to the group from which the investigator is chosen or the investigator’s qualifications. Is the investigator one of the Provost’s staff, a faculty member or possibly an outside agent? The section also lacks any indication of the

nature of the investigation. Certainly, the investigation should attempt to independently verify, to the satisfaction of the Provost, the information that alleges misconduct. An investigation beyond this scope, in the nature of a criminal investigation, may be problematic especially given the short timeframe. There will, presumably, be a concurrent police investigation that may tend to limit the information that can be discovered by the investigator. There is no need to duplicate a police investigation since that investigation will either lead to charges or not, in a timely manner.

The process timeline continues with

- 6) If charges for dismissal are filed under UWS 7 the faculty member is to be afforded a hearing by the faculty committee described in 4.03 and under the rules enumerated in 4.05 and 4.06 except that the hearing is to be completed and written findings and recommendations prepared for the Chancellor within 15 working days of the filing of charges.
- 7) Within 3 working days of receiving the hearing committee's findings and recommendations the Chancellor must prepare a written recommendation and if the Chancellor recommends dismissal the recommendation is to be transmitted to the Board of Regents. The Chancellor has the same alternatives for lesser sanctions.

Unlike UWS 4, this policy does not specify a time period in which the faculty member may request a hearing. Rather, it seems to presume that a hearing will be requested and that the result of the hearing must occur within a time measured from the filing of charges, as opposed to the time a hearing is requested. However, section 7.05 does mention the possibility that a hearing is not requested, so there is some ambiguity on this point. Also, unlike UWS 4, this policy does not contain the language covering the case where the hearing committee and Chancellor come to different recommendations.

The process concludes with

- 8) The full Board shall review the record before the hearing committee and issue a decision within 15 days of receiving the Chancellor's recommendation.

Unlike 4.08, the Board may, but is not required to, offer opportunity for filing exceptions to the recommendations and for oral arguments. It is also not clear that the Hearing committee recommendations as well as the record of the hearing are to be sent to the Board.

With respect to the time line involved in UWS 4, this policy makes changes in three areas. First, the initial investigation that leads to written charges is now the responsibility of the Provost and must be concluded within 20 days, where in UWS 4 this is done by the Chancellor within a reasonable time. Second, whereas UWS 4 allows 20 days in which the faculty member may request a hearing and 20 days in which the hearing can be scheduled and conducted, the proposed policy condenses this to 15 working days. This means that the faculty member may have as little as 5 days after receiving the specific charges in which to prepare for the hearing (this follows from the 10 day hearing notice required in 4.05). Third, the time allowed for the Chancellor to reach a decision has been reduced to 3 working days and the opportunity to discuss the matter with the faculty member has been removed.

Section 7.05 does contain a provision to enlarge the time limits of the process under certain circumstances. The section states that enlargements of time may be granted by the chair of the hearing committee subject to approval by the Provost. This clause seems to be inadequately developed. Why should the chair of the hearing committee grant extensions to the Provost's initial investigation and why should either need to approve extensions to the time requirement for the Chancellor's decision? Most likely this is intended to apply only to the time allowed for the hearing committee, in which case this marks a substantial change and diminution of due process from UWS 4, where mutual consent of the parties, or order of the hearing committee, is required to extend the time allotment.