

6 January 2011

Professor J.W. Harrington
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Dear J.W.,

At its 15 November meeting, the Senate Executive Committee requested that the Advisory Committee on Faculty Code and Regulations provide its advice regarding "whether there is a conflict between these two sections of the handbook:

1. The University Handbook Volume 4, Part 9, Chapter 1, Policy for Addressing Allegations of Scientific and Scholarly Misconduct, Section 5.B.1, Investigation; and
2. The Faculty Code Chapter 28, Adjudicative Proceedings for the Resolution of Differences, Sections 28-32, Cases Subject To Adjudications and 28-35, Time Limitations on Initiating Adjudications."

In subsequent communications with you and the Secretary of the Faculty, this general request was focused in four specific questions:

1. Are there any procedural conflicts among the Handbook section on Scientific Misconduct (specifically, Vol. 4, Part IX, Ch.1, Sec. 5.B), the Faculty Code Section 25-71.D.2, and Faculty Code Chapter 28)?
2. According to the Handbook and Code, can deans make findings of academic misconduct that are 'the final decision of the University' and not subject to review by the faculty through the Adjudication Procedure?
3. Under the Code (Chapter 28), the President has the right to overturn the decision of an adjudication panel only with a clear justification specifically by declaring the Panel 1) 'arbitrary and capricious,' 2) 'materially and prejudicially unfair,' or 3) 'not in accordance with the law or University rules or regulations' (28-61.D). How specific must the justification be? Is there any provision or requirement for further review of that decision and justification? Would such a review by the Faculty Senate or other body (e.g. Board of Regents) be against the Code?
4. Must an adjudication hearing (or any other faculty review hearing) be held before a dean or Provost can impose any disciplinary or punitive actions against a faculty member? Or is this required just in cases that meet the standards appearing in 25-71.D.?

The Advisory Committee, after deliberating on these questions, submits to you the attached draft of our responses. We are marking these as *draft* for purposes of distribution to the SEC in advance of Monday's meeting. If we have any substantive changes or additions, we will present them at the meeting.

Collegially yours,

Mícheál F. Vaughan
Chair, Advisory Committee on
Faculty Code and Regulations

**Response of the Advisory Committee on Faculty Code and Regulations
to the Senate Executive Committee's questions
(from its meeting of 15 November 2010)**

Summary

While there are some potential inconsistencies in a few overlapping details of the procedures articulated in *Faculty Code* Section 25-71 (Standard of Conduct) and Executive Order #61 (currently published in the *University Handbook*, Volume Four, Part IX, Chapter 1), there are no overt conflicts in the language of the two. Similarly, there are no overt conflicts between the Executive Order and Chapter 28, though in certain particular details the relations between various procedures could be made much more clear.

The inconsistencies do, nevertheless, leave room for contradictory interpretations and it would be prudent to clarify these matters as they are applied in future cases of alleged scientific or scholarly misconduct.

Responses to SEC Questions

The SEC has asked us to consider a number of specific questions regarding the relations between *Faculty Code* Section 25-71 and Executive Order #61. We shall examine each in turn and provide our responses.

1. Are there any procedural conflicts among the Handbook section on Scientific Misconduct (specifically, Vol. 4, Part IX, Ch.1, Sec. 5.B), the *Faculty Code* Section 25-71.D.2, and *Faculty Code* Chapter 28?

E.O. #61 deals exclusively with procedures to be followed when allegations are made of scientific and scholarly misconduct by faculty, staff, or students; insofar as such allegations may involve faculty, this is but one (D.2) of three distinct kinds of allegations of misconduct addressed by Section 25-71. Chapter 28 delineates procedures for adjudication of differences involving faculty. One of those "differences" subject to adjudication is action by the Provost to discipline faculty for misconduct.

Under 25.71, after being informed of an allegation of misconduct, a department chair (or dean in an undepartmentalized school/college) "shall inform ... and shall offer" to discuss the allegation with the accuser and accused, in hopes of resolving the matter by "mutual consent of all parties" (25.71.B). Moreover, the chair (or dean) or the faculty member "may initiate conciliatory proceedings" (25.71.C), invoking procedures detailed in Section 27-41.

COMMENT: There is some incompatibility here, in the spirit if not in the letter of the "law." This should be addressed and, it would appear, the distinction between "informal" oral allegations and "formal" written allegations would need to be clarified (or completely done away with). Does the initiation of an OSI inquiry *only* occur when a written allegation of misconduct is filed with it? Or is a department chair (or dean) required to report any oral allegations to the OSI immediately, putting them in writing? The latter does not seem to be required, but it may indeed be intended by the "*are to be made in writing*" at the beginning of the E.O.'s Section 4. Does that mean that nothing is to be done if the allegation is not put in writing? Clarification is obviously needed.

If (under 25-71.B and C) there is no "mutual consent" resolving the matter, and if conciliation is not pursued (or subsequently fails), Section 25-71.D implies that the allegation is now reported to the faculty member's dean: "if the dean ... determines that the alleged violation is of sufficient seriousness to justify consideration of the filing of a formal statement of charges that might lead to dismissal, reduction of salary, or suspension for more than one quarter, he or she shall ... proceed as provided in" E.O. #61.

Since the 2003 revision, E.O. #61 now states (Section 4): "Allegations of scientific or scholarly misconduct **are to be made in writing and, submitted to the Office of Scholarly Integrity (OSI)**" (emphasis added). It appears to be incumbent on the dean to provide a written allegation (if the original complainant has not already done so). The previous wording of this sentence read: "Most frequently, allegations of scientific or scholarly misconduct are reported within a department to a chairperson." The earlier version of this sentence was, therefore, more directly compatible with Section 25-71.B, where such allegations are expected to begin with "the department chair or the dean of a non-departmentalized school or college."

Further, while 25-71.D clearly vests the responsibility for the final decision to proceed against a faculty member with the dean of his/her school/college, any previous stages of his/her inquiry and investigation are not spelled out in detail in this *Code* subsection, which simply begins:

If a mutually agreeable resolution is not achieved under Paragraphs B or C of this section, and if the dean (after consultation in the case of a departmentalized school or college with the department chair and the faculty member) determines that the alleged violation is of sufficient seriousness to justify consideration of the filing of a formal statement of charges....

The means by which the dean arrives at this determination are not articulated, beyond the required "consultation." E.O. #61 details both an inquiry stage and an investigation, should the inquiry provide grounds for further proceedings. During the inquiry stage, OSI assumes primary responsibility, while keeping the dean informed; during the investigation, on the other hand, the dean appoints an "ad hoc advisory committee of at least three scholars" to conduct the investigation, and this committee is "supported by the OSI." A written report, detailing the committee's "findings of fact, a preliminary determination, and any recommendations based on those facts," is submitted to the dean and copied to the accused faculty member and the OSI.

COMMENT: Any attempt to clarify the initial stages of dealing with oral allegations raised in the previous COMMENT should take care to reconcile the stages of inquiry and investigation articulated in the E.O. with the procedures less clearly detailed in the opening paragraph of Section 25-71.D. It should also make explicit the point at which and manner by which a department chair shall report an unresolved allegation to the dean.

Having been directed to follow the procedures of E.O. #61, if the dean, after conclusion of the investigation, "determines that scientific or scholarly misconduct has occurred" s/he is directed (E.O. #61, Section 5.B.1) back to the procedures articulated in the *Faculty Code*, being directed to act:

against a faculty member in accordance with the *University Handbook* (Volume Two, Part II, Chapter 25, Section 25-71.E, and Chapter 28), deliver to the appropriate academic administrator a written report stating that reasonable cause exists to adjudicate charges of wrongdoing brought against the faculty member, with enough of the underlying facts to provide the reasons for this conclusion.

The "appropriate academic administrator" in such a case is the Provost, who is responsible (under Section 28-32.A) for initiating an adjudication "before taking any disciplinary or punitive action against such faculty member...."

COMMENT: These stages of the proceedings are quite explicit and unambiguous in integrating the two parts of the Handbook: proceedings up to Code Section 25-71.D.2 are preliminary to those in E.O. #61; AND the inquiry and investigation under E.O. #61 are preliminary to those in Code Section 25-71.E.

2. According to the *Handbook* and *Code*, can deans make findings of academic misconduct that are “the final decision of the University” and not subject to review by the faculty through the Adjudication Procedure?

A dean, the administrative head of the faculty of a school or college, is in no position to make any determination in the name of the University, unless specifically delegated to do so by the President and Regents.

The *Faculty Code* is quite explicit in requiring that any disciplinary or punitive action against a faculty member (28-32.A) can only occur as a result of an adjudication initiated by the Provost.

A dean’s “determin[ation] that scientific or scholarly misconduct has occurred” (E.O. #61, Section 5.B) is clearly only a local determination, since it simply initiates further actions: i.e., “deliver[ing] to the appropriate academic administrator [in 25-71.E: the Provost] a written report stating that reasonable cause exists to adjudicate charges of wrongdoing” (E.O. #61, Section 5.B.1 AND *Code* Section 15-71.E). At that point, should the Provost believe that “such reasonable cause exists, then, before taking any disciplinary or punitive action against such faculty member, the Provost shall initiate an adjudication for resolution of such charges...” (*Code* Section 28-32.A).

COMMENT: The simple answer to this question, therefore, is No. The foregoing account of the relations between Section 25-71 and E.O. #61 makes clear that a dean’s decision is only preliminary to action taken by the Provost by means of the Adjudication procedures spelled out in Chapter 28.

There is, however, one wrinkle here that deserves attention. Section 25-71.D specifies what is to occur if the “formal statement of charges ... might lead to dismissal, reduction of salary, or suspension for more than one quarter.” This *appears* to leave open the possibility of a dean’s imposing a suspension for one quarter or less without having to follow the procedures under D.2 and E, and Chapter 28.

It does not, in fact, accord power to a dean (or Provost) the power to suspend a faculty member for less than a quarter without the faculty member’s consent, or absent formal concerns about public health or safety (in cases of adjudicative proceedings under Section 28-36.D, or RCW 34.05.479: Emergency adjudicative proceedings). A dean *may* move to suspend a faculty member for a quarter (or less)—on grounds of misconduct (or otherwise)—without explicitly being directed to comply with D.2 and E. This cannot, however, be interpreted as a “final decision of the University” unless the faculty member accepts the discipline without demurral.

Any lesser suspension imposed by a dean or other administrative official, for whatever reason, may stand, at least implicitly, as the “final decision of the University” if the faculty member accepts it, and does not initiate an adjudication under Chapter 28. Any administrative actions may, of course, may provide grounds for a faculty member to initiate an adjudication by alleging that the actions taken by the dean were in violation of University regulations or constitute an injustice, and that these action affected “the terms, conditions, or course of employment” of the faculty member (28-32.B.1 and 3).

COMMENT: Only if the accused faculty member accepts a dean’s decision in a matter of scientific or scholarly misconduct that results in suspension for one quarter or less can a dean’s findings of such misconduct be inferred to be the “final decision of the University.” But that inference unnecessarily stretches the scope of such a “decision.”

3. Under the *Code* (Chapter 28), the President has the right to overturn the decision of an adjudication Hearing Panel only with a clear justification specifically by declaring the Panel 1) “arbitrary and capricious,” 2) “materially and prejudicially unfair,” or 3) “not in accordance with the law or University rules or regulations” (28-61.D).

How specific must the justification be? Is there any provision or requirement for further review of that decision and justification? Would such a review by the Faculty Senate or other body (eg. Board of Regents) be against the *Code*?

Faculty Code Section 28-61.D requires the President to "includ[e] specific findings as to why the decision of the Panel was arbitrary or capricious, or why the procedures followed by the Panel in reaching its decision were materially and prejudicially unfair or not in accordance with the law or University rules or regulations" when reversing or amending an adjudication decision.

This clearly requires the justification to be more specific than a simple statement that the in the President's judgment the Panel was, e.g., "arbitrary and capricious." There is no further guidance in the *Code* as to how specific it should be. Since the President's decision becomes at this point final, the "findings" must be "specific" enough to withstand scrutiny should the case be advanced to judicial review outside the University.

On the question about further (internal) review of the President's "decision and justification," Section 28-61.F specifically permits "any party" to file a petition for reconsideration or clarification within 10 days of the mailing of a final decision. This petition is lodged with the President, who will dispose of the matter by "denying the petition, granting the petition and dissolving or modifying the order or decision, or granting the petition and setting the matter for further hearing." If, within twenty days, the President does not take any of these actions, the petition is deemed to be denied.

Section 28-61.F explicitly mentions the possibility of "further administrative review or for judicial review, if available." This is consistent with the introductory paragraphs of Chapter 28, which refers to the Administrative Procedures Act of the Revised Code of Washington: "Subject to the provisions of Chapter 34.05 RCW relating to exhaustion of administrative remedies, parties shall avail themselves of these proceedings prior to seeking review beyond the University." One can confidently presume that the "specific findings" called for in 28-61.D will be the subject to such "review beyond the University."

COMMENT: If the faculty member's petition is denied and s/he considers the President's decision an injustice, that faculty member may initiate a new adjudication against the President under 28-32.B.3. This adjudication would certainly review the President's justifications. In such a case the review process would involve Board of Regents (rather than the President) as the final judge (28-61.C).

The *Faculty Code* does not currently anticipate, and therefore does not permit, any review of the President's decision by either the Faculty Senate or the Board of Regents. It would require revision of the *Code* to allow such review. (The Senate may, of course, investigate or discuss anything it wishes and pass resolutions regarding any issue.)

However, since "any authority delegated by the Board [of Regents] shall always be subject to the ultimate authority of the Board." (Board of Regents Standing Orders, Chapter 1, Section 1), this provision could be interpreted as authorizing the Regents to review and overturn the adjudication decision of the President, if they so choose. But the Board of Regents (Standing Orders, Chapter 1, Section 2) has delegated to the President the "formulating, prescribing and issuing rules, regulations, and executive orders ... for the immediate government of the University" and requires consultation with the "University faculty" regarding the same.

While the SEC is authorized to interpret the *Faculty Code*, it is not empowered to interpret the Board of Regents Standing Orders, or the President's Executive Orders, to mean that an appeal to the Regents may be made of a Presidential decision in an adjudication.

4. Must an adjudication hearing (or any other faculty review hearing) be held before a dean or Provost can impose any disciplinary or punitive actions against a faculty member? Or is this required just in cases that meet the standards appearing in 25-71.D?

As pointed out above in response to the second question, Section 28-31.A states quite unambiguously that action to discipline or punish a faculty member depends on the action of the Provost:

If the University Complaint Investigation and Resolution Office (UCIRO), a dean or any other authorized administrative official files with the Provost a written report that claims reasonable causes exist to adjudicate charges that a faculty member has violated University regulations or state or federal laws pertaining to the faculty member's performance of his or her duties, the Provost shall determine whether such reasonable cause exists.

and

If the Provost believes such reasonable cause exists, then, before taking **any disciplinary or punitive action** (emphasis added) against such faculty member, the Provost shall initiate an adjudication for resolution of such charges by filing a petition in the time and manner specified below.

Any "disciplinary or punitive actions" proposed by a dean that involves "dismissal, reduction of salary, or suspension for more than one quarter" (Section 25-71.D) specifically requires the matter be sent to the Provost (Section 25-71.E) for processing under Chapter 28. Any lesser punishment or discipline imposed by a dean or other administrative official *which the faculty member does not accept* also becomes subject to adjudicative review under Chapter 28 upon petition by the faculty member.

Conclusions

In his letter (May 7, 2003) to Interim President Huntsman transmitting recommended revisions to E.O. #61, Vice Provost Olswang remarked that the revisions incorporated "only the recommendations that were technical in nature." He noted, however, that in the review of the proposed revisions, he had received "recommendations for both technical and substantive changes." In closing his letter, he said that "[t]he proposed substantive changes should be reconsidered at some future date when the policy is more comprehensively reviewed." On the basis of the questions being posed by the SEC, and from their implications, it is clearly now time for the policy to be "more comprehensively reviewed."

Since the last major revision in 1985 of Chapter 28 (Adjudicative Procedures) a number of administrative changes have been made that have direct bearing on these procedures. Specifically, two new offices have been established: the Office of Scholarly Integrity (OSI) and the University Complaint Investigation and Resolution Office (UCIRO). There is, however, no direct reference to the OSI in the *Faculty Code*, and the role of UCIRO is ostensibly limited to cases covered by Section 25-71.D.1 (i.e., to address "allegations of unlawful discrimination or sexual harassment"). However, the multiple references to UCIRO in Chapter 28 and in the most recent revision of E.O. #61 seem to imply broader scope to its role.

If nothing else results from this review of the relations between Section 25-71 and E.O. #61, we recommend that the SEC go on record to require a thorough reconsideration of both these sections of the *Handbook*, and a concerted effort to regularize their underlying policies and procedures.

