

JUST HOUSEKEEPING?

How important procedural rights were intentionally scrubbed out of the on-line version of the UW Faculty Code¹

“The Rules Coordination Office publishes simple housekeeping amendments to the *Faculty Code and Governance* that correct typographical errors; make address, name, or contact information changes; or clarify language without changing its effect. All housekeeping amendments to the *Faculty Code and Governance* are first reviewed and approved by the Secretary of the Faculty.”²

From 1994 until early 2016, UW Faculty Code Section 25-71, dealing with the faculty standard of conduct and the initiation of investigations into alleged misconduct, remained effectively unchanged. Then, on February 12, 2016, Section 25-71 was substantially revised, ostensibly as a “housekeeping” measure to “conform[] . . . the *Faculty Code* to revised EO 61.”³ However, the revisions also extend well beyond the research misconduct proceedings which are the subject of EO 61.⁴ Before the revisions, if a dean or department chair received a complaint that a faculty member had violated any “rule or regulation of the University,” the dean or chair had to “fully inform the faculty member of the nature and specific content of the alleged violation” before the matter could be investigated further.⁵ After the revisions, this requirement to first “fully inform” the accused faculty member no longer applies either to complaints alleging research misconduct or to complaints alleging unlawful discrimination, harassment, or

¹ This document is a revised and updated version of an earlier document that was given a limited circulation in May 2017. At that time, the public records attached as Exhibits below were not available to the author.

² *Introduction to Faculty Code and Governance*, at ¶ 3, available on-line at <http://www.washington.edu/admin/rules/policies/FCG/FCGIntro.html> (visited 1/21/17).

³ See Memo from Rolf B. Johnson to Rebecca Deardorff, dated February 11, 2016, a copy of which is attached hereto as **Exhibit A**.

⁴ EO 61 is available on-line at: <http://www.washington.edu/admin/rules/policies/PO/EO61.html>.

⁵ See the “before and after” comparison table in the **Appendix** below. See also: <https://web.archive.org/web/20160119155044/http://www.washington.edu/admin/rules/policies/FCG/FCCH25.html> (showing Section 25-71 as it existed on January 19, 2016).

retaliation.⁶ Under the revised 25-71, research misconduct claims brought initially to a chair's or dean's attention are now to be sent directly to the Office of Research Misconduct Proceedings (ORMP), and claims of discrimination or harassment are to be sent directly to UCIRO.

In the abstract, the policies expressed in these changes *might* make sense.⁷ But the changes clearly amount to substantive alterations of 25-71, and therefore cannot be justified as “housekeeping.” This is true even of the change to procedures regarding research misconduct. If federal rules and regulations governing research misconduct, principally codified at 42 C.F.R. Part 93, are in fact incompatible with the pre-revision version of 25-71, then of course the University must follow federal law.⁸ But the mere existence of an incompatibility between federal and state law—and the Faculty Code is part of Washington State administrative law—doesn't give *any* state official the right to change the state law as she or he sees fit. The procedures for making substantive amendments to the Faculty Code are specified in Faculty Code Chapter 29, and the failure to follow these provisions with regard to the changes to Section 25-71 renders those changes null and void.⁹

⁶ See the current purported version of 25-71(C), available on-line at: <http://www.washington.edu/admin/rules/policies/FCG/FCCH25.html#2571>.

⁷ There are many factors that could bear on the issue of what constitutes due process for faculty members accused of wrongdoing. It might be time for the faculty and administration to revisit that issue in an open, thorough discussion.

⁸ 42 C.F.R. Part 93 is available on-line here: https://www.ecfr.gov/cgi-bin/text-idx?SID=10e4e4223cb92cc0e3e0e6ea6fd29c0c&mc=true&node=pt42.1.93&rgn=div5#se42.1.93_125 (it is of some interest that this Federal Regulation has been substantially unchanged since 2005).

⁹ Put another way, the authors of the changes to section 25-71 published online February 12, 2016 acted in usurpation of the right of the entire faculty, the Faculty Senate, and the President to collectively control the substantive amendment of the Code.

To see why the resulting changes to the Code are null and void, consider the following analogy. Imagine that the U.S. Government Publishing Office (GPO) decided to publish a version of the U.S. Constitution missing the Sixth Amendment (a part of the Constitution that may well have been a model for the valid version of 25-71). Even if the GPO had previously received the approval of the President of the United States and the Speaker of the House, its truncated version of the Constitution would be invalid, because the President, the Speaker, and the GPO are not authorized to amend the Constitution. Similarly, the UW Rules Coordination Office, the

As for the changes to the procedures for handling complaints of discrimination, harassment, or retaliation, they reveal a deeper problem. *Assistant Vice Provost for Academic Personnel Cheryl Cameron and then-Secretary of the Faculty Marcia Killien intentionally concealed the intent of these changes from the faculty, and possibly the President.* Emails and other documents provided in response to public records requests demonstrate the following: (1) Cameron and Killien knew how to limit the proposed changes to 25-71 to only affect the processing of research misconduct charges, and began by considering draft amendments that would do just that (*see Exhibit B*). (2) On or about October 28, 2015, Cameron for the first time mentioned to Killien “**possibly wanting to handle UCIRO processes similarly to research misconduct**” (*see Exhibit C*). (3) Although one of Cameron’s subordinates who was assisting with the drafting process initially decided to “plow[] ahead, confining our suggested 25-71 changes to EO 61” (*see Exhibit D*), Cameron overruled her and by November 10, 2015, Cameron and Killien were exchanging drafts that also affected UCIRO processes (*see Exhibit E*). (4) On January 5, 2016, Killien presented the final version of the proposed changes to the President’s Office, describing them as necessitated by EO 61 and “mandatory to comply with Federal Regulations”:

The changes in EO 61 will necessitate changes in Sections 25-51 and 25-71 of the Faculty Code to remove inconsistencies among them. Suggested revisions are attached. Prior conversations with Rules Coordinator [] suggested that these Faculty Code changes might be made as housekeeping changes rather than through Class A legislation, since the changes are considered mandatory to comply with Federal Regulations.

(*See Exhibit F*).¹⁰ Both Killien and Cameron knew that this statement was not true. (5) When Cameron made the final call to proceed with the “housekeeping” changes, she did so “with the

President of the University, and the Secretary of the Faculty are not authorized to make substantive amendments to the Faculty Code.

Of course, the analogy between the U.S. Constitution and the UW Faculty Code has its limits. In particular, the President or Board of Regents of the University of Washington *may* have the power to unilaterally overrule (but critically, not amend) the Faculty Code. But this is not what happened here.

¹⁰ I have seen no evidence that the Rules Coordinator was informed of the intent to use housekeeping to change the handling of UCIRO claims; the only substantive discussion with the

understanding that the revised version of 25-71 improves matters from where they have stood with respect to Title IX considerations, etc.” (see **Exhibit G**). (6) However, when the Office of the President, apparently at Cameron’s direction, instructed the Rules Coordinator to publish the revisions, it stated in part as follows:

Also attached are housekeeping revisions to the Faculty Code, Chapter 25 (Sections 25-51 and 25-71). *These housekeeping changes, which also were approved by the Faculty Senate Chair and the Secretary of the Faculty, are aimed at conforming these two sections of the Faculty Code to revised EO 61.* (Italicized emphasis added).

(See **Exhibit A**). The italicized portion of this statement is also not true. The revisions to Section 25-71 were not just aimed at conforming it to EO 61, but rather also changed its treatment of UCIRO complaints. Whether the Office of the President understood that this statement was not true, or had instead been misled into making it, is currently an open question. In any event, Cameron’s actions in this matter are difficult to reconcile with her role in leading the “University’s efforts to hold ourselves to the highest standards of ethics, integrity and compliance with institutional policy and regulatory obligations.”¹¹

This entire episode should give pause to anyone who purports to care about the Faculty Code or the principle of shared governance. How can it not be a serious indictment of the possibility of meaningful shared governance under the current legal framework if the Vice Provost for Academic Personnel comes to believe she can change the substance of the Code in the dark of the night without faculty noticing? What does it say about the incentives confronting faculty leadership when the changes actually *do* go unnoticed for an entire year, and when finally discovered, are greeted with a collective shrug of the shoulders? I am aware that some faculty do care about this episode, and that there might be an effort underway to amend the Code. That will take years, and thousands of person-hours of work. In any event, the key message of this

Rules Coordinator revealed in the public records pre-dates Cameron’s and Killien’s decision to include changes to UCIRO processes in the “housekeeping” amendments.

¹¹ See <https://ap.washington.edu/>.

episode is not that the Code needs to be amended; rather, it is that the Code needs to be respected and—where compatible with other state and federal law—enforced. Attempting to amend the Code, without first receiving some tangible commitment from the Administration that it will respect what is written (and without creating stronger institutional incentives to ensure that respect endures) promises at best to be a giant waste of time.

December 12, 2017

A handwritten signature in black ink that reads "David J. Corbett". The signature is written in a cursive, flowing style.

David Corbett

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APPENDIX

Before-and-after versions of Section 25-71 are printed side-by-side in the table below.

Section 25-71 as of January 19, 2016 ¹²	Section 25-71 as of February 18, 2016 ¹³
<p>A. The University is an institution having special public responsibility for providing instruction in higher education, for advancing knowledge through scholarship and research, and for providing related services to the community. As a center of learning, the University also has the obligation to maintain conditions which are conducive to freedom of inquiry and expression in the maximum degree compatible with the orderly conduct of its functions. For these purposes the University is governed by rules and regulations which safeguard its functions, and which, at the same time, protect the rights and freedoms of all members of the academic community. All members of the academic community, including members of the faculty, have an obligation to comply with the rules and regulations of the University and its schools, colleges, and departments.</p>	<p>A. The University is an institution having special public responsibility for providing instruction in higher education, for advancing knowledge through scholarship and research, and for providing related services to the community. As a center of learning, the University also has the obligation to maintain conditions which are conducive to freedom of inquiry and expression in the maximum degree compatible with the orderly conduct of its functions. For these purposes the University is governed by rules and regulations which safeguard its functions, and which, at the same time, protect the rights and freedoms of all members of the academic community. All members of the academic community, including members of the faculty, have an obligation to comply with the rules and regulations of the University and its schools, colleges, and departments.</p>

¹² See

<https://web.archive.org/web/20160119155044/http://www.washington.edu/admin/rules/policies/FCG/FCCH25.html>.

¹³ The February 18, 2016 version Section 25-71 was taken

from: <https://web.archive.org/web/20160218183951/https://www.washington.edu/admin/rules/policies/FCG/FCCH25.html>. It is identical to the version currently available on line at: <http://www.washington.edu/admin/rules/policies/FCG/FCCH25.html>.

<p>B. If a member of the faculty is alleged to have violated a rule or regulation of the University, its schools, colleges, or departments, the department chair or the dean in a non-departmentalized school or college shall fully inform the faculty member of the nature and specific content of the alleged violation and shall offer to discuss the alleged violation with the faculty member and with the party raising the issue. The faculty member and the party raising the issue may each be accompanied by one person. The matter may be concluded at this point by the mutual consent of all parties.</p>	<p>B. In cases concerning allegations of research misconduct against a member of the faculty, the procedures outlined in Executive Order No. 61 shall apply.</p>
<p>C. If he or she so wishes, the department chair, the dean, or the faculty member may initiate conciliatory proceedings at any time by contacting the University Ombud as provided in Chapter 27, Section 27-41.</p>	<p>C. In cases concerning allegations of unlawful discrimination, harassment or sexual harassment, or retaliation against a member of the faculty, where the dean has determined under Executive Order No. 31 that the allegations require an institutional investigation, the matter shall be referred to the University Complaint Investigation and Resolution Office (UCIRO).</p>
<p>D. If a mutually agreeable resolution is not achieved under Subsections 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 that might lead to dismissal, reduction of salary, or suspension for more than one quarter, he or she shall follow one of the following procedures:</p>	<p>D. In cases where a member of the faculty is alleged to have violated another rule or regulation of the University, its schools, colleges, or departments, the following procedure shall apply:</p>
	<p>1. The department chair or the dean in a non-departmentalized school or college shall inform the faculty member of the nature and specific content of the alleged violation and</p>

	<p>1. In cases concerning allegations of unlawful discrimination or sexual harassment, the dean shall request an investigation by the University Complaint Investigation and Resolution Office (UCIRO) as provided in Administrative Policy Statement 46.3.</p>		<p>shall offer to discuss the alleged violation with the faculty member and with the party raising the issue. The faculty member and the party raising the issue may each be accompanied by one person. The matter may be concluded at this point by mutual consent of all parties.</p>
	<p>2. In cases concerning allegations of scientific and scholarly misconduct as defined in Section 25-51, the dean shall proceed as provided in Executive Order No. 61, "Policy for Addressing Allegations of Scientific and Scholarly Misconduct."</p>		<p>2. If he or she so wishes, the department chair, the dean, or the faculty member may initiate conciliatory proceedings at any time by contacting the University Ombud as provided in Chapter 27.</p>
	<p>3. In all other kinds of cases the dean shall appoint a special investigating committee of three faculty members who are not directly involved in the matter being considered. The committee shall assist the dean in the informal and confidential gathering of information and documentation and shall advise the dean in its interpretation. If as a result of the foregoing investigation the dean concludes that further action is not merited, then the matter shall be dropped (although a faculty member aggrieved as a result of these activities has recourse to the conciliatory proceedings of Chapter 27 and to the adjudicative proceedings described in Chapter 28, Section 28-32, Subsection A).</p>		<p>3. If a mutually agreeable resolution is not achieved under Subsections D.1 or D.2 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 that might lead to dismissal, reduction of salary, or suspension for more than one quarter, then:</p>
	<p>E. If, after engaging in the procedures specified in</p>		<p>a. The dean shall appoint a special investigating committee of three faculty members who are not directly involved in the matter being considered.</p>

<p>Subsection D.2 or D.3 above, the dean concludes that further action is warranted, he or she shall deliver to the Provost a written record stating that reasonable cause exists to adjudicate charges of wrongdoing brought against the faculty member, with enough of the underlying facts to inform the Provost of the reasons for this conclusion. Upon filing of the written report with the Provost, the case shall be decided in the manner prescribed in Chapter 28.</p>	<p>b. The committee shall assist the dean in the informal and confidential gathering of information and documentation and shall advise the dean in its interpretation.</p>
<p><i>S-A 36, June 17, 1970; S-A 73, May 24, 1985; S-A 86, December 8, 1992; S-A 91, July 11, 1994: all with Presidential approval; RC, June 28, 2010; RC, March 3, 2013.</i></p>	<p>c. If as a result of the foregoing investigation the dean concludes that further action is not merited, then the matter shall be dropped.</p>
	<p>d. A faculty member aggrieved as a result of these activities has potential recourse through the conciliatory proceedings of Chapter 27 and the adjudicative proceedings described in Chapter 28, Section 28-32, Subsection A.</p>
	<p>E. If, after engaging in the procedures specified in Subsection B or D.3 above, the dean concludes that further action is warranted, he or she shall deliver to the Provost a written record stating that reasonable cause exists to adjudicate charges of wrongdoing brought against the faculty member, with enough of the underlying facts to inform the Provost of the reasons for this conclusion. Upon filing of the written report with the Provost, the case shall be decided in the manner prescribed in Chapter 28.</p>
	<p><i>S-A 36, June 17, 1970; S-A 73, May 24, 1985; S-A 86, December 8, 1992; S-A 91, July 11, 1994: all with Presidential approval; RC, June 28, 2010; RC, March 3, 2013; RC,</i></p>

	January 22, 2016; RC, February 12, 2016.
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Comparing the two columns, at first glance it appears that the old “B” from the left-hand column has completely disappeared, and been replaced by something totally different:

<p>B. If a member of the faculty is alleged to have violated a rule or regulation of the University, its schools, colleges, or departments, the department chair or the dean in a non-departmentalized school or college shall fully inform the faculty member of the nature and specific content of the alleged violation and shall offer to discuss the alleged violation with the faculty member and with the party raising the issue. The faculty member and the party raising the issue may each be accompanied by one person. The matter may be concluded at this point by the mutual consent of all parties.</p>	<p>B. In cases concerning allegations of research misconduct against a member of the faculty, the procedures outlined in Executive Order No. 61 shall apply.</p>
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In fact, closer inspection reveals that *something like* the old “B” is now included in the new “D(1)”:

<p>B. If a member of the faculty is alleged to have violated a rule or regulation of the University, its schools, colleges, or departments, the department chair or the dean in a non-departmentalized school or college shall fully inform the faculty member of the nature and specific content of the alleged violation and shall offer to discuss the alleged violation with the faculty member and with the party raising the issue. The faculty member and the party raising</p>	<p>D. In cases where a member of the faculty is alleged to have violated another rule or regulation of the University, its schools, colleges, or departments, the following procedure shall apply:</p> <p>1. The department chair or the dean in a non-departmentalized school or college shall inform the faculty member of the nature and specific content of the alleged violation and</p>
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<p>the issue may each be accompanied by one person. The matter may be concluded at this point by the mutual consent of all parties.</p>	<p>shall offer to discuss the alleged violation with the faculty member and with the party raising the issue. The faculty member and the party raising the issue may each be accompanied by one person. The matter may be concluded at this point by mutual consent of all parties.</p>
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(Highlighting and bold emphasis added).

Critically, however, the old “B” covered any allegation of faculty wrong-doing that was brought to the relevant department chair’s or dean’s attention.¹⁴ Read in conjunction with the rest of the old 25-71 (and in particular with old “D”’s statement that “[i]f a mutually agreeable resolution is not achieved under Subsections B or C of this section. . . the dean . . . shall follow one of the following procedures”), old B set forth steps that had to be followed before any UCIRO or ORMP investigation could be commenced by the dean, including the dean “fully inform[ing] the faculty member of the nature and specific content of the alleged violation.”¹⁵ In

¹⁴ Nothing in the argument here asserts, or depends on an assertion, that a complainant could not avoid the application of the old 25-71 by taking their complaint directly to UCIRO or the ORMP (or its predecessor).

¹⁵ This is not just the natural reading of the old Section 25-71. It also fits perfectly with the language used in APS 46.3 to distinguish between “local investigation and resolution” and “UCIRO investigation and resolution.”

Finally, it is important to note that on June 2, 2010 a hearing panel of faculty upheld the plain meaning of Section 25-71 against an argument by the then-administration, holding as follows:

The Panel unanimously found that Vice Chancellor ████████ violated the clear language and spirit of Code Section 25-71 when she initiated a UCIRO investigation without properly informing Professor ██████ of the complaint(s) made against him or offering to meet with Professor ██████ and the complainant(s) to attempt resolution of the issue. The Panel considered the initiation of a UCIRO investigation to have been a very serious action which should only have been taken after following the steps outlined in Section 25-71.

A redacted copy of the entire hearing panel decision is available from the author on request.

contrast, the new D applies only to alleged violations of “another rule or regulation,” and read in conjunction with the rest of the new 25-71, clearly exempts allegations of research misconduct and unlawful discrimination from the scope of the section on required pre-UCIRO or pre-ORMP procedures.