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Professor Miceal F. Vaughan
Chair, Advisory Committee on Faculty Code and Regulations
University of Washington

Via e-mail

Dear Professor Vaughan,

The *Draft Response of the Advisory Committee on Faculty Code and Regulations to the Senate Executive Committee's Questions (from its meeting of 15 November 2010)*, to which you were a contributor, primarily focuses on three questions arising from the case of former Research Assistant Professor Dr. Andrew Aprikyan.[1] However, it also addresses an issue that was not raised by the Aprikyan matter, and for which I bear some credit (or blame) for bringing to the attention of the SEC. I refer in particular to Question 4 as set forth in your cover letter of January 6, 2011 to Professor Harrington. That question states as follows:

> 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?

Although the Advisory Committee's position on this question is internally contradictory, its "final answer" to the first part of question 4 appears to be "No." With all due respect to the Committee, this answer is demonstrably incorrect. From the point of view of the UW faculty this is not a harmless error, as it contributes to the erosion of one of their most important procedural rights.

A. The Advisory's Committee's Position is Internally Contradictory.

The Advisory Committee starts off on sound footing by noting that "[t]he Faculty Code is quite explicit in requiring that *any* disciplinary or punitive action against a faculty member (28-32.A) can occur *only* as a result of an adjudication initiated by the Provost."[2]

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[1] The Draft Response of the Advisory Committee is available on the web at http://www.washington.edu/faculty/facsen/sec_minutes/10-11/sec_011011.pdf. I am addressing this letter to you because the names of the other members of the Advisory Committee are not readily available on the web.

[2] Advisory Committee Response, p. 3 (p. 14 of the SEC Agenda for 1/10/11) (emphasis added).

This statement, based in § 28-32.A of the Faculty Code, accurately reflects that provision's conclusion that when there are "reasonable causes . . . to adjudicate charges . . . .then, *before taking any disciplinary or punitive action* 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."[3] By implication, the Advisory Committee's statement plainly answers the first part of Question 4 in the affirmative. After all, "any" and "only" are fairly straightforward terms. From the context in which the Advisory Committee uses those terms, and from the use of "any" in § 28-32.A itself, it appears the Committee must agree that there can be no discipline imposed on a non-consenting faculty member without the Provost first initiating a hearing.[4]

Unfortunately, the Advisory Committee immediately reverses itself by implicitly endorsing the view that a dean can unilaterally impose discipline less severe than "dismissal, reduction of salary, or suspension for more than one quarter" without first having a hearing.[5] Then, when it actually turns to explicitly addressing Question 4, it answers the first part "No" and the second part "Yes."[6] This final answer thus directly contradicts the earlier statement on page 3 of its report.

B. The Advisory Committee's Final Answer to Question 4 is Incorrect.

The members of the SEC have previously had a chance to review a number of arguments, based on the text and structure of the Faculty Code, which support the conclusion that a faculty hearing must be started before any discipline can be imposed on a non-consenting faculty member.[7] I will not repeat all of those arguments here. Instead, I will simply make four key points.

First, there is no express authorization anywhere in the Faculty Code (or in any Executive Order of the President either, for that matter) for any administrative official to impose any sort of disciplinary punishment—"minor" or otherwise—on a non-consenting faculty member prior to a hearing (except in the case of an emergency suspension under § 28-36.D).[8]

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[3] § 28-32.A (emphasis added). The full text of § 28-32 can be found at: http://www.washington.edu/admin/rules/policies/FCG/FCCH28.html.

[4] The restriction of this sentence to "non-consenting" faculty reflects the fact that any punishment, including dismissal, can be imposed on a faculty member without a prior hearing if the faculty member so consents.

[5] Advisory Committee Response, p. 3 (p. 14 of the SEC Agenda for 1/10/11).

[6] Advisory Committee Response, p. 5 (p. 16 of the SEC Agenda for 1/10/11).

[7] See my open letter of November 3, 2010 to President Wise, particularly footnote 5. Arguments from the legislative history of Chapter 28, which support the plain meaning of the "quite explicit" text of the Code, are given at footnotes 9 and 10 of the same letter, and documented in the exhibits attached thereto. The letter and exhibits are available at http://www.davidcorbettlaw.com/uw_faculty_code_materials.

[8] One could easily draft such language. For example, the Washington State University Faculty Manual might serve as a guide. *See* the WSU Faculty Manual, Section II F, Nos. 8 & 9, available at http://facsen.wsu.edu/faculty_manual/FacultyManual2010.pdf. Being neither a Dawg nor a Cougar, I have no firm position on the abstract merits of the two approaches. My points are that they are a different, that this difference matters, that people choosing between them should understand the difference, and should understand the baseline set by the current Faculty Code. For those offended by the possible comparison of

Second, the Advisory Committee bases its conclusion that minor discipline can be imposed prior to a hearing on the fact that § 25-71.D specifies certain modes *of investigation* if "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." The Advisory Committee cites to this passage, and then states that "[t]his *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" (italics in original).[9] This appearance of a possibility is the sum total of the argument offered in support of the Committee's conclusion that deans can unilaterally impose "minor" discipline prior to a hearing. Based on this reasoning, it is just as possible that department chairs, emeritus faculty, assistant Attorneys General or little green men are authorized to impose unilateral discipline on faculty as it is that deans are. All of these "possibilities"—and limitless others—are foreclosed by the "quite explicit" language of Chapter 28 summarized by the Advisory Committee as "requiring that any disciplinary or punitive action against a faculty member . . . can only occur as a result of an adjudication initiated by the Provost."[10]

Third, to require deans to use particular investigative procedures for certain types of serious allegations—as § 25.71.D does—is clearly not the same thing as a grant of authority to deans to impose minor discipline, either for inherently serious allegations or for any other sort.[11] § 25-71 has to be read in conjunction with the rest of the Faculty Code—and in particular, with Chapter 28—and when it is, its obvious meaning is that if allegations are not of a type that could possibly lead to dismissal or other severe punishment, the dean need not follow the same sort of investigative procedures (apart from compliance with §25-71.B and C) as are required for serious allegations. If he or she nonetheless believes punishment is warranted, he or she must still forward the

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UW to WSU, I suggest a look at the faculty disciplinary proceedings used at UC Berkeley. These clearly require a hearing before any discipline is imposed. See http://apo.chance.berkeley.edu/faculty_misconduct_015.pdf, pp. 9-13 and particularly provisions 1(a) and 10, which must be read with Bylaw 336 of the Academic Senate of the University of California, http://www.universityofcalifornia.edu/senate/manual/blpart3.html#bl336.

[9] Advisory Committee Response, p. 3 (p. 14 of the SEC Agenda for 1/10/11).

[10] Advisory Committee Response, p. 3 (p. 14 of the SEC Agenda for 1/10/11).

[11] Under the Faculty Code and other University regulations, certain allegations are arguably inherently serious in the sense that if proven, they expose the accused faculty member to the possibility of dismissal. *See, e.g.*, § 25-51 (specifying grounds for removal) and Executive Order 31, ¶ 8 (establishing that violation of "any aspect" of the non-discrimination policy subjects the violator to possible termination). Does the Advisory Committee believe that deans can unilaterally impose "minor" discipline even when the subject matter of the allegation is inherently serious? If so, this ignores the principle that hearing panels, not deans, are the first to decide the magnitude of punishment. *See* § 28-54.B. It hollows out the provisions for student and staff participation in cases involving them as alleged victims. *See* § 28.31.I (defining "nonparty participant of right") and § 28.51.C (describing procedural rights of nonparty participants). It flies in the face of the clear implication of § 25.71.D(1) that all apparently meritorious allegations of discrimination that are not previously resolved by agreement are to be handled by UCIRO. It may also violate federal regulations governing scientific misconduct investigations. If, instead, the Advisory Committee believes that only inherently minor offenses are properly subject to unilateral imposition of minor discipline by the dean, how does it explain the existence of "brief adjudications," which exist for matters with a "minor impact" on the parties involved? *See* § 28-31.B. All of these difficulties are avoided by adhering to the "quite explicit" language of Chapter 28.

allegations to the Provost with a recommendation that there be an adjudication. Moreover, this is the only reading of § 25-71 that is compatible with the official rationale for the current text as articulated by Professor Tom Andrews and endorsed by then-President Gerberding.[12]

Fourth, the Advisory Committee's view that the Faculty Code is designed to allow *ex post* review by hearing panels of minor discipline ignores the fact that the current version of the Code makes no express provision for such review. In contrast, the pre-1994 Code did expressly provide for *ex-post* review. The pre-1994 Code stated that when a faculty member requested hearing panel review of a prior disciplinary determination, the administration had the burden of proving the charges.[13] It clearly implied that no discipline would go into effect until either the review hearing had concluded or the faculty member missed her chance to initiate an adjudication.[14] Both of these provisions were stripped from the Code when it was amended in 1994. Under the post-1994 (current) Code, although a faculty member can initiate an adjudication if she believes her rights were violated, *the person starting an adjudication bears the burden of proof.*[15] A faculty member subject to "minor" punishment who starts an *ex post* adjudication has to prove that she is innocent; the administration does not have to prove that she is guilty. Moreover, there is no provision in the current code for staying the imposition of discipline until the *ex post* hearing is concluded.[16] Under the Advisory Committee's final answer to Question 4, the Faculty Code thus provides faculty members with significantly *weaker* procedural protections than did the pre-1994 Code. If the Advisory Committee's answer to Question 4 is correct, then when former Faculty Chair Ronald Dear wrote to all faculty on behalf of the SEC and asserted that "[t]hese [1994] revisions offer far greater protection to faculty and other members of the University community [than their predecessors]," he—and the entire university leadership he was representing—were at best grievously misinformed.[17] One can avoid this conclusion only by acknowledging that the Advisory Committee's final answer is wrong. It got it right the first time, when it noted that "[t]he Faculty Code is quite explicit in requiring that *any* disciplinary or punitive action against a faculty member (28-32.A) can occur

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[12] According to Professor Andrews, "the overall objective of the [1994] amendment to Section 25-71 was to have unlawful discrimination, harassment, scientific and scholarly misconduct, *and all other investigations of wrongdoing* result in a reasonable cause to adjudicate finding that is reported to the Provost, for treatment under the proposed new procedures [of Chapter 28]" (emphasis added). Professor Andrews' rationale is entitled to great weight, because it was included in the ballot materials sent to all of the faculty in 1994 when they approved the relevant amendments to the Code. *See* Class "A" Bulletin No. 91, available as Exhibit B at http://www.davidcorbettlaw.com/uw_faculty_code_materials.
Attached hereto as Exhibit 1 is a copy of the 1994 amendments to § 25-71 and Professor Andrews' rationale *which bears former President Gerberding's literal signature of approval*.

[13] See old § 28-33.A (p. 3 of Class "A" Bulletin No. 91, available as Exhibit B (Part 1) on my web site.

[14] See old § 28-42.B (p. 4 of Class "A" Bulletin No. 91). When read in conjunction with old § 28-43.D, this section establishes that prior to 1994 discipline was normally held in abeyance pending the outcome of the appeal to the hearing panel.

[15] § 28-34.

[16] Obviously, this is because the current code states that there will be a hearing before any discipline is decided upon, or imposed on a non-consenting faculty member.

[17] See p. 247 of Exhibit C to my open letter to President Wise, dated November 3, 2010 and available at http://www.davidcorbettlaw.com/uw_faculty_code_materials.

only as a result of an adjudication initiated by the Provost" (italicized and underlined emphasis added).

C. Why This Matters.

Whether a faculty member is entitled to a hearing before her guilt and "minor" punishment have been decided, or instead has to request a hearing afterwards to review a decision already made, is a critical issue.[18] To see this, imagine that you have been accused of discriminating against male students in your classes by using examples that portray males as dimwits. Fortunately for you, your department chair and dean both understand and follow the procedures in § 25-71.B and C. However, your dean ultimately decides that you did in fact violate the University's non-discrimination policy, but that your violation does not warrant dismissal, suspension for more than one quarter, or reduction in pay. What happens next? According to the Advisory Committee's final answer, the dean can come to your office and tell you that you are guilty of discrimination, and that your punishment is that you will lose your upcoming sabbatical and be subject to intrusive monitoring of your classroom—"minor" punishment, according to the administration.[19] The dean further tells you that the decision goes into effect immediately, and that although you can appeal, you will bear the burden of proving your innocence.[20] Appealing will be difficult, costly, and time consuming. Faced with this situation, rational faculty members may well resign themselves to accepting an express or implicit "plea bargain" imposing the "minor" punishments.[21]

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[18] Put another way, the question is whether the default for an accused faculty member is "a hearing prior to any finding of guilt and infliction of punishment, unless you opt out by consenting to punishment," or is it instead "punishment, unless you opt for a hearing"? As Richard H. Thaler and Cass Sunstein argued in Nudge, pp. 85-89 (Penguin, 2009), defaults can have a large effect on outcomes. That is almost surely case here, as is argued below.

[19] And the Advisory Committee. One way the Advisory Committee could reduce the potential harm caused by its answer would be by explicitly stating that deans are not authorized to impose "minor" punishments in cases involving allegations of discrimination or scientific or scholarly misconduct. The administration would, however, almost surely reject this argument. In any case, the straightforward approach would simply be to defend the Code as it is written: there is to be no discipline imposed on non-consenting faculty members in any matter without a prior hearing.

[20] If Professor Rich Christie was accurately quoted in William Dow's January 11, 2011 article in *The Daily* (http://dailyuw.com/2011/1/11/faculty-adjudication-review-continue/), he believes this sort of punishment shouldn't be subject to any sort of review whatsoever. However disconnected this view may be from the actual language and structure of the Faculty Code, it is a very close approximation to how the system is currently implemented by the administration. The option of demanding an *ex post* review, with the burden of starting review and the burden of proof both on the accused professor, is as a practical matter often likely to be no option at all.

[21] It would of course be difficult to find out just how often the University has made use of this (improperly) enhanced bargaining power. According to the administration's own reckoning, it could be dozens and dozens of times a year. This suggests a reason why the administration cares so deeply about this issue. For example, it greatly facilitates the University's efforts to show that it takes discrimination seriously if deans can unilaterally impose "minor" punishments on faculty in the confident expectation that the allegedly guilty professor will not appeal. That innocent professors are likely to be screwed over in this process does not appear to concern the administration at all. Taking the administration's (and the Advisory Committee's) position literally, the provost doesn't even have to agree with the dean's decision to find guilt and impose "minor" punishment! One does not have to believe that deans are inherently evil to think that on average they may not be not well-equipped to determine if certain conduct rises to the level of violating

Now imagine the same story, but the Code requires a hearing before any guilt can be determined or punishment imposed. Assume that most people understand the Code, and that the Code is enforced. The dean still comes into your office, and tells you that she thinks you are guilty of discrimination. She and you both know, however, that there can be no final determination of guilt, and no punishment, without a prior hearing. You further know that there will be no hearing at all unless the Provost agrees with the dean that there is probable cause to support the charges, and that in any hearing the administration will bear the burden of proving your guilt. Now it is the administration that will first have to think carefully about whether it wants to spend the resources to mount a prosecution. It will have a powerful incentive to focus on what it believes are truly meritorious cases, and the Provost will double check the dean's decision to prosecute.[22] Compared to the first scenario, the result may well be not more hearings, but instead, fewer prosecutions carried beyond the investigation stage.

People may honestly disagree about how the balance of bargaining power should be allocated between the administration and faculty in the adjudication process, but there is little room for informed disagreement about how that power is in fact allocated on paper in the current Faculty Code. If the administration and faculty collectively decide they want deans to have the power to unilaterally impose discipline on non-consenting faculty prior to a hearing, they should amend the Code. In the meantime, both basic intellectual integrity and contract law require enforcing the Code as written. How the Code is enforced is of course largely in the hands of the administration. The administration, however, will find it much easier to continue its current practices if faculty leaders themselves fail to understand the consequences of the "quite explicit" language of the Code.[23]

Sincerely,

David Corbett

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state and federal law. This is evidently what the drafters of the Code thought, too: they provided for deans to play a role in investigations, and to make the decision (with the assistance of various advisory committees in certain circumstances) as to whether probable cause exists to prosecute charges, but they also provided for the Provost to double-check the dean's probable cause determination and expressly stated that there was to be no punishment imposed until the Provost initiated a hearing (and in the normal case, no punishment could be imposed until the hearing panel rendered a decision of guilt). *See* current code, § 25-71 and § 28-32.A. *See also* Exhibit F to my open letter to President Wise, dated November 3, 2010.

[22] *See* § 28-32.A.

[23] The next time the administration violates the Faculty Code by imposing "minor" discipline on a non-consenting professor prior to a hearing, it will have a new argument in its defense: the Advisory Committee said it could do so. Since the Advisory Committee is not empowered to amend the Code, I would expect this argument to be unavailing if the matter ever came to court. However, it is extremely difficult and time consuming for a faculty member to actually get to court with a claim that the Code has been violated.

UW Special Collections
President's Records
Accession 05-006
Box 4

charges a written response. The statement of charges delivered to the faculty member shall be accompanied by copies of Chapters 24, 25, 26, 27, and 28 of the Faculty Code. The dean shall deliver a copy of the statement of charges at the same time to the Chairperson of the Adjudication Panel. Upon filing of the statement of charges the case shall be decided in the manner prescribed in Chapter 28.

S-A 36, June 17, 1970: S-A 73, May 24, 1985: S-A 86, December 8, 1992: all with Presidential approval

[Text that is in **bold face print**, or that has been ~~stricken through~~, indicates changes adopted by the SEC at its April 4, 1994 meeting to comply with suggestions from the Advisory Committee on Faculty Code and Regulation.]

Rationale:

The proposed revision of Chapter 28, the "Adjudication Procedures," requires coordination with a number of other statements of University policy. One of the most important of these coordination problems is posed by Chapter 25, Section 25-71, which sets out the procedure under which deans and department chairs, or others, initiate charges against a faculty member.

At its meeting held on December 15, 1992, the Faculty Council on Faculty Affairs approved recommendations for changing Section 25-71, so that it will coordinate with the proposed changes to Adjudication Procedures. In order to fully understand the proposed changes to Chapter 28, the Executive Committee and Senate need to have the proposed changes to Section 25-71 as well.

The overall object of the amendment to Section 25-71 was to have unlawful discrimination, harassment, scientific and scholarly misconduct, and all other investigations of wrongdoing result in a "reasonable cause to adjudicate" finding that is reported to the Provost, for treatment under the proposed new procedures.

Professor Tom Andrews
(Past) Chair, Faculty Council on Faculty Affairs
February 1, 1993

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CLASS "A" LEGISLATION

CERTIFIED AS APPROVED:

Ronald B. Dear, Chair
Faculty Senate

Date

APPROVED:

William P. Gerberding
President

3/11/94
Date