

APPROVAL OF RULE REVISIONS TO CHAPTERS UWS 11 DISMISSAL OF ACADEMIC STAFF FOR CAUSE, WIS. ADMIN. CODE

BACKGROUND

As explained in the Background section in Agenda Item I.1.b.(1), the University of Wisconsin System (UW System) Administration seeks to modify several Board of Regents (Board) administrative rules, known as Ch. UWS 4, Wis. Admin. Code, "Procedures for Dismissal of Faculty;" Ch. UWS 7, Wis. Admin. Code, "Dismissal of Faculty in Special Cases;" Ch. UWS 11, Wis. Admin. Code, "Dismissal of Academic Staff for Cause;" and Ch. UWS 17, Wis. Admin. Code, "Nonacademic Student Misconduct."

All UW System institutions are affected by the proposed rule revisions. This document describes the general background, the procedures used to determine the proposed changes, detailed descriptions of campus comments and responses, and outlines the implications of the action requested for the adoption of Resolution I.1.b.(2), the revisions to Ch. UWS 11 under the conditions outlined in the resolution below.

The Board has statutory authority for Chapter UWS 11. Section 36.15(3), Wis. Stats., reads as follows:

Procedural Guarantees. A person having an academic staff appointment for a term may be dismissed prior to the end of the appointment term only for just cause and only after due notice and hearing. A person having an academic staff appointment for an indefinite term who has attained permanent status may be dismissed only for just cause and only after due notice and hearing. In such matters the action and decision of the board, or the appropriate official authorized by the board, shall be final, subject to judicial review under ch. 227. The Board shall develop procedures for the notice and hearing which shall be promulgated as rules under ch. 227.

The background regarding the processes and Regent actions taken prior to this request for the approval of Ch. UWS 11 are described in detail in Agenda Item I.1.b.(1) and are not repeated here if they pertain to all four chapters presented to the Board for approval.

Any of the proposed changes to UWS Ch. 11 presented for review by the Board at this point are consistent with the narrow scope statement. The proposed changes address only those changes necessary to comply with Title IX and spell out VAWA in regard to offenses of sexual harassment, sexual assault, dating violence, domestic violence and stalking.

The drafting committee's proposed edits and changes to UWS Ch. 11 were compiled and, together with additional background materials, sent by Interim Senior Vice President Ward on December 17, 2014, as a "tracked changes" document to Chancellors, Provosts, and governance bodies at each UW institution for review and comments. Senior Vice President Crist shared the

proposed changes with the Chief Business Officers and the Human Resources Directors on December 23, 2014.

Responses to the proposed changes to UWS Ch. 11 were received by Senior Vice President Ward by the deadline on March 6, 2015. (See Appendix A for a compilation of all campus responses received for UWS Ch. 11.)

On March 11, 2015, the drafting committee chaired by Associate Vice President Stephen H. Kolison, Jr. and Senior Vice President Al Crist reviewed all comments, edits, and questions received by the campus and made recommendations for the final re-written version of UWS Ch. 11.

As requested by the Regents on August 23, 2014, UWSA established the following assurances that support the requested adoption of Resolution I.1.b.(2) below.

Economic Impact

The Board of Regents hereby determines that the proposed rules shall have minimal to no economic impact locally or statewide. We hereby direct System Administration, pursuant to Wis. Stat. § 227.137, to initiate a comment period of at least fourteen (14) calendar days to solicit information and advice from businesses, business sectors, associations representing business, local governmental units, and individuals that may be affected by the proposed rule in order to determine what, if any, economic impact the rule will have locally or statewide. UW System Administration is hereby authorized to take any and all additional action necessary to comply with this statutory requirement.

Fiscal Estimate

The Board of Regents hereby determines that the proposed rules shall have minimal to no fiscal impact or effect on county, city, village, town, school district, technical college district and sewerage district fiscal liabilities and revenues. There is minimal to no anticipated state fiscal effect during the current biennium and no projected net annualized fiscal impact on state funds. There is minimal to no anticipated fiscal effect on the private sector and no anticipated costs incurred by the private sector in complying with the rules. We hereby direct System Administration to prepare a fiscal estimate in accordance with this determination as directed under Wis. Stat. § 224.14(4). UW System Administration is also authorized to take any and all additional action necessary to comply with this statutory requirement.

Public Hearing

The Board of Regents hereby authorizes System Administration to proceed with scheduling a public hearing in accordance with Wis. Stat. § 227.17. UW System Administration is hereby authorized to take any and all additional action necessary to comply with this statutory requirement.

REQUESTED ACTION

Adoption of Resolution I.1.b.(2)., approving the Revisions to Administrative Code UWS 11 “Dismissal of Academic Staff for Cause.” By approving the revisions to Ch. 11, the Board determines that the proposed rules shall have minimal to no economic impact locally or

statewide; minimal to no fiscal impact; that UWSA will schedule a public hearing; and that UWSA is authorized to take additional action to comply with the statutory requirement, as necessary.

DISCUSSION

Ch. UWS 11 provides a process for pursuing dismissal of academic staff in cases of serious criminal misconduct, such as sexual assault. A web link to the current existing versions of UWS Ch. 11 is available at (link). The following (link) contains the tracked changes version of UWS Ch. 11 with all revisions clearly marked. (Link) contains the clean version showing how UWS Ch. 11 would read with all revisions incorporated.

Proposed Changes by Subject Matter

- A. *Definition Section:*** The proposed changes include a number of additional terms.
- “Complainant” has been added to clarify that only persons who are allegedly harmed by sexual harassment, sexual assault, stalking, domestic violence or dating violence would have the additional procedural protections under Title IX.
 - “Reporting Party” has been added to distinguish between an actual complainant versus a person who may only be filing a complaint on behalf of the complainant (e.g., the reporting party may be a dean of a college, but not the person allegedly harmed by the noted offenses).
 - “Preponderance of the Evidence” has been added to define the standard under which Title IX offenses would be adjudicated.
 - “Clear and Convincing Evidence” has been added to define the standard that applies in special cases involving serious criminal misconduct (e.g., UWS 7) and to show how the “Clear and Convincing Evidence” standard of proof differs from a “Preponderance of the Evidence” standard of proof.
 - “Dating violence,” “domestic violence,” “sexual assault,” “sexual harassment,” and “stalking” have been defined with references to state law definitions for purposes of consistency and clarity. When an alleged violation involves any of these five specific offenses, the complainant is provided with additional rights.
- B. *Role of Title IX Coordinators:*** Institutions must designate at least one qualified or trained employee to coordinate the institution’s efforts to comply with and carry out its responsibilities under Title IX. As stated in UWS 4 and 11, the institution must include the Title IX Coordinator in the initial processing of the complaint and investigation in cases involving sexual harassment, sexual assault, stalking, dating violence and domestic violence.

C. Evidentiary Standard of Proof: Allegations involving sexual harassment, sexual assault, stalking, dating violence and domestic violence shall have an evidentiary standard of proof of a preponderance of the evidence. UWS 4 and 11 states that there must be “just cause” to dismiss an employee; however, neither codes specify the standard of proof that should be used in evaluating the evidence. The Committee discussed whether to add language that would specify the use of a “clear and convincing” standard of proof for all other offenses, which would be consistent with UWS 7. However, there was a concern that such clarification would be beyond the scope of the Committee’s role. Therefore, the Committee elected only to address the standard of proof for the VAWA 5 offenses to comply with the federal guidance.

D. Access to Information during the Proceeding: Both the complainant and the accused should be afforded similar and timely access to information that will be used at a hearing. Access to this information must be provided in a manner that is consistent with state and federal privacy laws. For example, prior disciplinary action, student educational records or medical information that is revealed during an investigation or hearing process should not be disclosed to the aggrieved party unless a specific legal exception applies under state or federal law. In cases of sexual harassment, sexual assault, stalking, dating violence and domestic violence, the proposed Administrative Code would provide the complainant with the same information as the accused, unless such disclosure is prohibited by state or federal law.

E. Rights of Aggrieved Party during the Hearing Process: As stated in the OCR Guidance, during an investigation related to the VAWA 5 offenses, the complainant and the accused should be afforded equal rights. The proposed Administrative Code would provide parity of rights in the following manner:

- The complainant and the accused would have an equal opportunity to present relevant witnesses and other evidence.
- The parties would be afforded similar and timely access to any information used at the hearing, excluding information that would be excluded from disclosure under state or federal law, such as private or confidential information relating to student educational records, medical records or other employment personnel records.
- Both the complainant and the accused would be provided with written notification of the outcome of the complaint/proceedings.
- Under the existing codes, an accused party has the right to confront or cross-examine witnesses (which usually include the complainant). However, the Office for Civil Rights strongly encourages institutions to prevent the accused and the complainant from personally cross examining each other. Instead, OCR suggests that the parties be allowed to submit questions directly to a trained third party, such as the hearing committee, for consideration. The Committee determined that language should be added to give a hearing body the authority to restrict cross-examination of the parties in a manner that would allow for questioning of the parties but avoid an intimidating or hostile hearing environment.

- Both the complainant and the accused would have the right to an advisor of his/her choice during the proceedings.

In summary, these proposed revisions to Chapter UWS 11 are intended to reconcile any potential inconsistencies between the Administrative Code and the federal standards regarding institutional obligations in addressing issues of sexual harassment, sexual assault, stalking, dating violence and domestic violence.

RECOMMENDATION

Approval from the Education Committee and the full Board for revisions to Ch. UWS 11, Wis. Admin. Code, is recommended to recognize U.S. Department of Education guidance to institutions of higher education on how they should address on campus and respond to sexual misconduct and sexual assault allegations involving a student or an employee. The modifications that are proposed reflect, among other things, changes to the language contained in UWS Ch. 11 that would alter the burden of proof and evidence in disciplinary processes and the role of a complainant in those disciplinary processes.