

STATE OF WISCONSIN
Board of Regents of University of Wisconsin System

IN THE MATTER OF RULEMAKING PROCEEDINGS BEFORE THE
Board of Regents of the University of Wisconsin System

PROPOSED ORDER OF THE BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM
ADOPTING RULES
(CLEARINGHOUSE RULE 15-061)

PROPOSED ORDER

An Order of the Board of Regents of the University of Wisconsin System to amend the Wisconsin Administrative Code, Chapters UWS 4, Procedures for Dismissal of Faculty and UWS 7, Dismissal of Faculty in Special Cases.

Analysis prepared by the University of Wisconsin System Administration.

ANALYSIS

Statutory Authority and Rule Overview

The University of Wisconsin System (UW System) Administration seeks to modify Board of Regents (Board) administrative rules, known as Chapters UWS 4, Procedures for Dismissal of Faculty and UWS 7, Dismissal of Faculty in Special Cases.

The Board of Regents has statutory authority for Chs. UWS 4 and 7, as articulated in s. 36.13(3), Wis. Stats., and s. 36.13(5), Wis. Stats.

Section 36.13(3), Wis. Stats., reads as follows:

Rules. The board and its several faculties after consultation with appropriate students shall promulgate rules for tenure and probationary appointments, for the review of faculty performance and for the non-retention and dismissal of faculty members. Such rules shall be promulgated under ch. 227.

Section 36.13(5), Wis. Stats., reads as follows:

Procedural Guarantees. Any person having tenure may be dismissed only for just cause and only after due notice and hearing. Any person having a probationary appointment may be dismissed prior to the end of the person's

contract term only for just cause and only after due notice and hearing. The action and decision of the board in such matters shall be final, subject to judicial review under ch. 227. The board and its several faculties shall develop procedures for the notice and hearing which shall be promulgated by rule under ch. 227.

On June 19, 2014, the Board submitted a Scope Statement to the Governor's Office for authority to propose legislative changes pursuant to the Wisconsin Legislative Rulemaking Process for Wisconsin Administrative Code, Chapters UWS 4, 7, 11 and 17. The purpose of this request was to initiate changes to Chapters UWS 4 and 7 to comply with federal guidance issued by the U.S. Department of Education Office for Civil Rights as it relates to Title IX of the Education Amendments of 1972 ("Title IX") (guidance issued by the U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, April, 2011). The proposed revisions are also intended to address the regulatory amendments under the Violence Against Women Reauthorization Act of 2013 ("VAWA") and the Campus Sexual Violence Elimination Act ("Campus SaVE Act").

On July 7, 2014 and pursuant to s. 227.135, Wis. Stats., Governor Scott Walker approved the scope statement. The scope statement was submitted to the Legislative Reference Bureau for publication on July 31, 2014, and thereby published in Register No. 703, pursuant to s. 227.135(3), Wis. Stats.

On April 10, 2015, the Board of Regents adopted Resolution I.1.b.(1), approving the Revisions to Administrative Code Ch. UWS 4 Procedures for Dismissal of Faculty and Ch. UWS 7 for pursuing dismissal of faculty in special cases of serious criminal misconduct, including sexual assault.

Economic Impact

The Board of Regents hereby determines that the proposed rules shall have minimal to no economic impact locally or statewide. A fourteen (14) day comment period was provided to the general public in order 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.

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 fiscal effect on the private sector and no anticipated costs incurred by the private sector in complying with the rules. This fiscal estimate determination has been conducted in accordance with s. 224.14(4), Wis. Stats.

14 day Comment Period

The “Notice of Public Comment Period on Economic Impact and Fiscal Estimate” for Chapters UWS 4 and 7 was available on the UW System homepage: <https://www.wisconsin.edu/> (Look under “News, Events, & Announcements”) and the Board of Regents page: <https://www.wisconsin.edu/regents/>. The notice remained open from April 17, 2015 to May 1, 2015. No comments were received during this period.

Agency Contact Person

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TEXT OF RULE

Section 1. UWS 4.015 is created to read:

UWS 4.015 Definitions.

The following terms shall have the meaning given below:

- (1) “Clear and convincing evidence” means information that would persuade a reasonable person to have a firm belief that a proposition is more likely true than not true. It is a higher standard of proof than “preponderance of the evidence.”
- (2) “Complainant” means one or more individuals allegedly harmed as a result of sexual harassment, sexual assault, dating violence, domestic violence or stalking as defined in subparagraphs (5), (6), (9), (10) and (11).
- (3) “Complaint” means an allegation against a faculty member reported to an appropriate university official.
- (4) “Consult” or “consulting” means thoroughly reviewing and discussing the relevant facts and discretionary issues.

(5) "Dating violence" means violence committed in a "dating relationship" as defined in s. 813.12(1)(ag), Stats.

(6) "Domestic violence" means conduct defined as "domestic abuse" in ss. 813.12(1)(am) and 968.075, Stats.

(7) "Preponderance of the evidence" means information that would persuade a reasonable person that a proposition is more probably true than not. It is a lower standard of proof than "clear and convincing evidence."

(8) "Reporting Party" means one or more individuals or groups filing a complaint as defined in subparagraph (3). A reporting party may also be a complainant as defined in subparagraph (2).

(9) "Sexual harassment" means conduct defined in s. 111.32, Stats.

(10) "Sexual assault" means conduct defined in s. 940.225, Stats.

(11) "Stalking" means conduct defined in s. 940.32, Stats.

Section 2. UWS 4.02(1) and (3) are amended to read:

- (1) Whenever the chancellor of an institution within the university of Wisconsin system receives a complaint against a faculty member which he/she deems substantial and which, if true, might lead to dismissal under s. [UWS 4.01](#), the chancellor, or designee, shall within a reasonable time initiate an investigation and shall, prior to reaching a decision on filing charges, offer to discuss the matter informally with the faculty member. For complaints involving sexual harassment, sexual assault, dating violence, domestic violence or stalking, the chancellor, or designee, shall appoint the Title IX Coordinator, or designee, to initiate an investigation in accordance with applicable policies. The chancellor, or designee, shall also offer to discuss the matter informally with the complainant, and provide information regarding rights under this chapter. Both the faculty member and the complainant shall have the right to be accompanied by an advisor of their choice at any meeting or proceeding that is part of the institutional disciplinary process. A faculty member may be dismissed only after receipt of a written statement of specific charges from the chancellor as the chief administrative officer of the institution and, if a hearing is requested by the faculty member, in accordance with the provisions of this chapter. If the faculty member does not request a hearing, action shall proceed along normal administrative lines but the provisions of ss. [UWS 4.02](#), [4.09](#), and [4.10](#) shall still apply.

- (3) The statement of charges shall be served personally or by certified mail, return receipt requested. If such service cannot be made within 20 days, service shall be accomplished by first class mail and by publication as if the statement of charges were a summons and the provisions of s. 801.11 (1) (c), Stats., were applicable. Such service by mailing and publication shall be effective as of the first insertion of the notice of statement of charges in the newspaper. If the statement of charges involves sexual harassment, sexual assault, dating violence, domestic violence, or stalking, the statement shall be provided to the complainant upon request, except as may be precluded by applicable state or federal law.

Section 3. UWS 4.05(1) (d) and (e) are amended to read:

- (d) A right to an advisor, counsel and/or other representatives, and to offer witnesses;
- (e) A right to confront and cross-examine adverse witnesses. If the complaint involves sexual harassment, sexual assault, dating violence, domestic violence or stalking, the hearing committee may reasonably restrict the faculty member or the complainant from questioning each other;

Section 4. UWS 4.05(2) is created to read:

- (2) If the complaint involves sexual harassment, sexual assault, dating violence, domestic violence, or stalking, the complainant shall have all the rights provided to the faculty member in section 4.05(1)(a-h), except as may be precluded by applicable state or federal law.

Section 5. UWS 4.06(1)(am) is created to read:

- (am) For complaints involving sexual harassment, sexual assault, dating violence, domestic violence or stalking, the standard of proof shall be a preponderance of the evidence;

Section 6. UWS 4.06(1)(d) is amended to read:

- (d) The faculty hearing committee may, on motion of either party, and, if the complaint involves sexual harassment, sexual assault, dating violence, domestic violence or stalking, on the motion of the complainant, disqualify any one of its members for cause by a majority vote. If one or more of the faculty hearing committee members disqualify themselves or are disqualified, the remaining members may select a number of other members of the faculty equal to the number who have been disqualified to serve, except that alternative methods of replacement may be specified in the rules and procedures adopted by the faculty establishing the standing committee under s. UWS 4.03;

Section 7. UWS 4.06(1)(i) is amended to read:

- (i) ~~Nothing in par. (h)~~ Nothing in this section shall prevent the settlement of cases by mutual agreement between the administration and the faculty member, with board approval, at any time prior to a final decision by the board;

Section 8. UWS 4.06(1)(j) is amended to read:

- (j) Adjournment shall be granted to enable ~~either party~~ the parties, including the complainant, to investigate evidence as to which a valid claim of surprise is made.

Section 9. UWS 4.07 (1) and (2) are amended to read:

- (1) The faculty hearing committee shall send to the chancellor and to the faculty member concerned, as soon as practicable after conclusion of the hearing, a verbatim record of the testimony and a copy of its report, findings, and recommendations. The committee may determine that while adequate cause for discipline exists, some sanction less severe than dismissal is more appropriate. Within 20 days after receipt of this material the chancellor shall review it and afford the faculty member an opportunity to discuss it. The chancellor shall prepare a written recommendation within 20 days following the meeting with the faculty member, unless his/her proposed recommendation differs substantially from that of the committee. If the chancellor's proposed recommendations differ substantially from those of the faculty hearing committee, the chancellor shall promptly consult the faculty hearing committee and provide the committee with a reasonable opportunity for a written response prior to forwarding his/her recommendation. If the recommendation is for dismissal, the recommendation shall be submitted through the president of the system to the board. A copy of the faculty hearing committee's report and recommendations shall be forwarded through the president of the system to the board along with the chancellor's recommendation. A copy of the chancellor's recommendation shall also be sent to the faculty member concerned and to the faculty committee. For complaints involving sexual harassment, sexual assault, dating violence, domestic violence or stalking, the complainant shall have all rights provided to the faculty member in this paragraph, including the right to receive a copy of the chancellor's recommendation, except as may be precluded by applicable state or federal law.
- (2) Disciplinary action other than dismissal may be taken by the chancellor, after affording the faculty member an opportunity to be heard on the record, except that, upon written request by the faculty member, such action shall be submitted as a recommendation through the president to the board together with a copy of the faculty hearing committee's report and recommendation. For complaints involving sexual harassment,

sexual assault, dating violence, domestic violence or stalking, the complainant shall have all the rights provided to the faculty member in this paragraph.

Section 10. UWS 4.08(1) is amended to read:

- (1) If the chancellor recommends dismissal, the board shall review the record before the faculty hearing committee and provide an opportunity for filing exceptions to the recommendations of the hearing committee or chancellor, and for oral arguments, unless the board decides to drop the charges against the faculty member without a hearing or the faculty member elects to waive a hearing. This hearing shall be closed unless the faculty member requests an open hearing (see subch. V of ch. 19, Stats., Open Meeting Law). For complaints involving sexual harassment, sexual assault, dating violence, domestic violence, or stalking, the complainant shall have the same opportunity for filing exceptions to the recommendations of the hearing committee or chancellor, and for oral arguments, as the faculty member.

Section 11. UWS 4.08(1) is created to read:

- (4) For complaints involving sexual harassment, sexual assault, dating violence, domestic violence, or stalking, the faculty member and complainant shall be simultaneously notified of the board's final decision.

Section 12. UWS 7.015 is created to read:

UWS 7.015 Definitions.

- (1) "Clear and convincing evidence" means information that would persuade a reasonable person to have a firm belief that a proposition is more likely true than not true. It is a higher standard of proof than "preponderance of the evidence."
- (2) "Complainant" means one or more individuals allegedly harmed as a result of sexual assault, dating violence, domestic violence or stalking, as defined in s. UWS 4.015.
- (3) "Complaint" means an allegation against a faculty member reported to an appropriate university official.
- (4) "Consult" or "consulting" means thoroughly reviewing and discussing the relevant facts and discretionary issues.
- (5) "Preponderance of the evidence" means information that would persuade a reasonable person that a proposition is more probably true than not. It is a lower standard of proof than "clear and convincing evidence."
- (6) "Serious criminal misconduct" is defined in s. UWS 7.02.

Section 13. UWS 7.025 is repealed.

Section 14. UWS 7.05(1) (a) and (b) are amended to read:

- (a) Within 3 working days of receipt of the report or information, inform the faculty member of its receipt and, after consulting with appropriate institutional governance representatives, appoint an investigator to investigate the report or information and to advise the chancellor as to whether to proceed under this section or ch. UWS 4. In cases involving sexual assault, dating violence, domestic violence or stalking, the complainant shall be notified by the chancellor of the receipt of the report or information at the same time as the faculty member.
- (b) Upon appointing an investigator and notifying the faculty member, afford the faculty member 3 working days in which to request that the investigator be disqualified on grounds of lack of impartiality or other cause. In the event that the chancellor determines that a request for disqualification should be granted, the chancellor shall, within 2 working days of the determination, appoint a different investigator. The faculty member shall have the opportunity to request that any second or subsequent investigators be disqualified on grounds of lack of impartiality or other cause. In cases involving sexual assault, dating violence, domestic violence or stalking, the complainant shall have the disqualification rights that are afforded to the faculty member in this subsection.

Section 15. UWS 7.05(5)(c) is amended to read:

- (c) Disciplinary action other than dismissal may be taken by the chancellor, whose decision shall be final, unless the board at its option grants a review on the record at the request of the faculty member. The faculty member shall receive a copy of the chancellor's final decision. In cases involving sexual assault, dating violence, domestic violence or stalking, the complainant shall receive a copy of the chancellor's final decision at the same time as the faculty member and shall have the same right to a review on the record as the faculty member.

Section 16. UWS 7.05(6) is amended to read:

- (6) Upon receipt of the chancellor's recommendation, the full board shall review the record before the institutional hearing committee, and shall offer an opportunity for filing exceptions to the recommendation, and for oral argument. In cases involving sexual assault, dating violence, domestic violence or stalking, the complainant shall have all the rights provided to the faculty member in this paragraph. The full board shall issue its decision on the matter within 15 working days of receipt of the chancellor's recommendation.

Section 17. UWS 7.05(8) is repealed and recreated to read:

- (8) The administration or its representatives shall have the burden of proof to show that just cause exists for dismissal under this chapter. The administration must demonstrate by clear and convincing evidence that the faculty member engaged in serious criminal

misconduct, as defined in s. UWS 7.02, except in cases involving sexual assault, dating violence, domestic violence or stalking, in which the evidentiary standard shall be by a preponderance of the evidence.

Section 18. EFFECTIVE DATE:

The rules adopted in this order shall take effect on the first day to the month following publication in the Wisconsin administrative register, pursuant to s. 227.22(2(intro.)), Stats.

(END OF TEXT OF RULE)

Dated _____ Agency _____
(Member of the Board or Secretary)
(board or department name)