

Clearinghouse Rule 06-078

PROPOSED ORDER OF THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM AMENDING AND CREATING RULES

[INTRODUCTORY CLAUSE]

The Board of Regents of the University of Wisconsin System proposes an order to amend UWS 2.02 and UWS 11.01(1); to create ch. UWS 7, relating to procedures for dismissal of faculty in special cases; and to create UWS 11.01(3), UWS 11.101, UWS 11.102, UWS 11.103, UWS 11.104, UWS 11.105 and UWS 11.106, relating to procedures for dismissal of academic staff in special cases.

[RULE SUMMARY]

1. Statute interpreted: Sections 36.09(1), 36.11(1) and 36.13(3), Stats.
2. Statutory authority: Sections 36.09(1), 36.11(1) and 36.13(3), Stats.
3. Explanation of agency authority: The Board of Regents of the University of Wisconsin System has the authority under Sections 36.09(1), 36.11(1) and 36.13(3), Stats., to issue rules for the dismissal of faculty and academic staff members.
4. Related statute or rule: Current Wis. Admin. Code chs. UWS 4 and UWS 11.
5. Plain language analysis: The purpose of the proposed rules is to add provisions to Board rules regarding dismissal of faculty and academic staff to deal specifically with circumstances in which faculty and academic staff members have engaged in serious criminal misconduct, a category of just cause under the rule. The proposed rules would define serious criminal misconduct, provide protection for constitutionally-protected conduct, expression, or beliefs, and assure adequate due process in the dismissal proceedings.
6. Summary of, and comparison with, existing or proposed federal regulations: There is no existing or proposed federal regulation for summary and comparison.
7. Comparison with rules in adjacent states. There are no corresponding rules in adjacent rules for comparison.
8. Summary of factual data and analytical methodologies: There were no factual data or analytical methodologies used to develop the proposed rules.

9. Analysis and supporting documents used to determine effect on small business: The proposed rules affect only faculty and academic staff of the University of Wisconsin System. They have no effect on small business.
10. Effect on small business: The proposed rules will have no effect on small business.
11. Fiscal estimate: The proposed rules will have no fiscal effect.
12. Agency contact person: Christopher L. Ashley, Senior System Legal Counsel, University of Wisconsin System Administration, 1808 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin 53706. Telephone: (608) 262-3662. Email: cashley@uwsa.edu.
13. Place where comments are to be submitted and deadline for submission: Comments may be submitted to: Christopher L. Ashley, Senior System Legal Counsel, University of Wisconsin System Administration, 1808 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin 53706. Email to cashley@uwsa.edu. The deadline for written comments to the Board is 4:30 p.m. on September 29, 2006.

[TEXT OF RULE]

SECTION 1. UWS 2.02 is amended to read:

UWS 2.02 Delegation. Rules and procedures developed pursuant to chs. UWS 3, 4, 5, 6, 7, and 8 by the faculty of each institution shall be forwarded by the chancellor to the president and by the president to the board for its approval prior to their taking effect. Such policies and procedures, unless disapproved or altered by the regents, shall be in force and effect as rules of the regents.

SECTION 2. UWS 7.01, 7.02, 7.03, 7.04, 7.05, 7.06 and 7.07 are created to read:

UWS 7.01 Declaration of policy. University faculty members are responsible for advancing the university's missions of teaching, research and public service. The fulfillment of these missions requires public trust in the integrity of the institution and in all members of the university community. The university's effectiveness and credibility are undermined by criminal activity that poses a substantial risk to the safety of others, that seriously impairs the public trust in the university or the university's ability to fulfill its missions, or seriously impairs the faculty member's fitness or ability to fulfill his or her duties. Situations involving such serious criminal misconduct by faculty members must be addressed and resolved promptly to ensure that public trust is maintained and that the university is able to advance its missions. The board of regents therefore adopts the procedures in this chapter for identifying and responding to those instances in which a faculty member has engaged in serious criminal misconduct.

UWS 7.02 Serious criminal misconduct. (1) In this chapter, "Serious Criminal Misconduct" means:

(a) Being charged with, pleading guilty or no contest to, or being convicted of a felony, in state or federal court, that involves:

1. Causing serious physical injury to another person;
2. Creating a serious danger to the personal safety of another person;
3. Sexual assault;
4. Theft, fraud or embezzlement;
5. Criminal damage to property; or
6. Stalking or harassment; and that

(b) Clearly poses a substantial risk to the safety of members of the university community or others; or

(c) Seriously impairs:

1. The public trust in the university;
2. The university's ability, or the ability of the charged faculty member's colleagues, to fulfill teaching, research or public service missions;
3. The charged faculty member's fitness or ability to fulfill the duties of his or her position; or
4. The opportunity of students to learn, do research, or engage in public service.

(2) Conduct, expressions, or beliefs which are constitutionally protected, or protected by the principles of academic freedom, shall not constitute Serious Criminal Misconduct.

(3) Except as otherwise expressly provided, a faculty member who has engaged in behavior that constitutes Serious Criminal Misconduct shall be subject to the procedures set forth in ss. UWS 7.03-7.06.

(4) Any act required or permitted by ss. UWS 7.03-7.06 to be done by the chancellor may be delegated to the provost or another designee pursuant to institutional policies approved by the Board of Regents under s. UWS 2.02.

UWS 7.03 Dismissal for cause. (1) Any faculty member having tenure may be dismissed only by the board and only for just cause and only after due notice and hearing. Any faculty member having a probationary appointment may be dismissed prior to the end of his or her term of appointment only by the board and only for just cause and only after due notice and hearing.

(2) Just cause for dismissal includes, but is not limited to, Serious Criminal Misconduct, as defined in s. UWS 7.02.

UWS 7.04 Reporting responsibility. Any faculty member who is charged with, pleads guilty or no contest to, or is convicted of a felony, in state or federal court, shall immediately report that fact to the chancellor.

UWS 7.05 Expedited process. (1) Whenever the chancellor of an institution within the university of Wisconsin system receives a report under s. UWS 7.04 or other credible information that a faculty member has engaged in Serious Criminal Misconduct, or where the chancellor has determined to impose a suspension without pay pending the final decision as to dismissal under s. UWS 7.06, the chancellor shall:

(a) Within three working days of receipt of the report or information, inform the faculty member of its receipt and, after consultation with appropriate institutional governance representatives, appoint an investigator to investigate the report or information;

(b) Upon appointing an investigator, afford the faculty member three working days in which to request that the investigator be disqualified on grounds of lack of impartiality. In the event that the chancellor determines that a request for disqualification should be granted, the chancellor shall, within two working days of the determination, appoint a different investigator.

(2) The investigation shall be completed and a report filed with the chancellor not later than ten working days following the time allowed for the faculty member to request an investigator's disqualification, or the naming of a different investigator, whichever is later.

(3) Within three working days of receipt of the investigator's report, the chancellor shall consult with appropriate institutional governance representatives and decide whether to seek dismissal of the faculty member pursuant to this chapter, to seek dismissal of the faculty member pursuant to ch. UWS 4, to seek an alternative disciplinary sanction, or to discontinue the proceedings.

(a) If the chancellor decides to seek dismissal of the faculty member pursuant to this chapter, the chancellor shall file charges within two working days of reaching the decision.

(b) If the chancellor decides to seek dismissal of the faculty member pursuant to ch. UWS 4, the chancellor shall file charges and proceed in accordance with the provisions of that chapter and implementing institutional policies.

(c) If the chancellor decides to seek an alternative disciplinary sanction, the procedures under ch. UWS 6, and implementing institutional policies, shall be followed.

(4) If charges seeking dismissal are filed under par. (3)(a), the faculty member shall be afforded a hearing before the institutional standing committee charged with hearing dismissal cases and making recommendations under s. UWS 4.03. The hearing shall provide the procedural guarantees enumerated under s. UWS 4.05-4.06, except that the

hearing must be concluded, and written findings and a recommendation to the chancellor must be prepared, within 15 working days of the filing of charges.

(5) Upon receipt of the findings and recommendation of the committee under par. (4), the chancellor shall, within three working days, prepare a written recommendation on the matter.

(a) If the chancellor's recommendation is for dismissal, the recommendation shall be transmitted to the board of regents for review.

(b) 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.

(6) Upon receipt of the chancellor's recommendation, the full board shall review the record before the institutional hearing committee, and may offer an opportunity for filing exceptions to the recommendation, or for oral argument. The full board shall issue its decision on the matter within 15 working days of receipt of the chancellor's recommendation.

(7) If a faculty member whose dismissal is sought under par. (3)(a) does not request a hearing, the board shall take appropriate action within 10 working days of receipt of the statement of charges and the recommendation of the chancellor.

(8) The burden of proving just cause in this chapter shall be clear and convincing evidence.

(9) (a) The time limits set forth in this section may be enlarged if the parties are unable to obtain, in a timely manner, relevant and material testimony, physical evidence or records, or where due process otherwise requires.

(b) Enlargements of time under this section may be granted by the chair of the faculty hearing body, subject to the approval of the chancellor.

UWS 7.06 Temporary suspension from duties. (1) The chancellor, after consultation with appropriate faculty governance representatives, may suspend a faculty member from duties without pay pending the final decision as to his or her dismissal where:

(a) The faculty member has been charged with a felony and the chancellor finds, in addition, that one or more of the elements of serious criminal misconduct listed in s. UWS 7.02(1) are present, and that there is a substantial likelihood that the faculty member has engaged in the conduct as alleged; or

(b) The faculty member is unable to report for work due to incarceration, conditions of bail or similar cause; or

(c) The faculty member has been convicted of serious criminal misconduct.

(2) Before imposing a suspension without pay, the chancellor shall evaluate the available information to determine whether the conditions specified in par. (1) are present. If the chancellor finds that the conditions in par. (1) are present, he or she shall immediately notify the faculty member, in writing, of the intent to impose a suspension without pay, and shall, within two working days, provide the faculty member with an opportunity to be heard with regard to the matter. The faculty member may be represented by counsel or another at this meeting.

(3) If, after affording the faculty member the opportunity to be heard, the chancellor determines to suspend without pay, the chancellor shall inform the faculty member of the suspension, in writing. The chancellor's decision to suspend without pay under this section shall be final, except that:

(a) If the chancellor later determines that the faculty member should not be terminated, the chancellor may discontinue the proceedings, or may recommend a lesser penalty to the board, or may order the payment of back pay, as appropriate;

(b) If the board later determines that the faculty member should not be terminated, the board may order a lesser penalty and/or the payment of back pay.

(4) If, after affording the faculty member the opportunity to be heard, the chancellor determines that the conditions in par. (1) are not present or that a suspension without pay is otherwise not warranted, the provisions of s. UWS 4.09 shall apply.

UWS 7.07 Initial Applicability. The provisions of this chapter shall first be applicable to conduct occurring on or after the effective date.

SECTION 3. UWS 11.01(1) is amended to read:

(1) A member of the academic staff holding an indefinite appointment may be dismissed only for just cause under ss. UWS 11.02 through ~~11.10~~ 11.106 or for reasons of budget or program under ch. UWS 12.

SECTION 4. UWS 11.01(3) is created to read:

(3) Just cause for dismissal includes, but is not limited to, Serious Criminal Misconduct, as defined in s. UWS 11.102.

SECTION 5. UWS 11.101, 11.102, 11.103, 11.104, 11.105, and 11.106 are created to read:

UWS 11.101 Dismissal for cause in special cases – indefinite academic staff appointments. A member of the academic staff holding an indefinite appointment may be dismissed for Serious Criminal Misconduct, as defined in s. 11.102.

UWS 11.102 Serious criminal misconduct. (1) In this chapter, "Serious Criminal Misconduct" means:

(a) Being charged with, pleading guilty or no contest to, or being convicted of a felony, in state or federal court, that involves:

1. Causing serious physical injury to another person;
2. Creating a serious danger to the personal safety of another person;
3. Sexual assault;
4. Theft, fraud or embezzlement;
5. Criminal damage to property; or
6. Stalking or harassment; and that

(b) Clearly poses a substantial risk to the safety of members of the university community or others; or

(c) Seriously impairs:

1. The public trust in the university;
2. The university's ability, or the ability of the charged academic staff member's colleagues, to fulfill teaching, research or public service missions;
3. The charged academic staff member's fitness or ability to fulfill the duties of his or her position; or
4. The opportunity of students to learn, do research, or engage in public service.

(2) Conduct, expressions, or beliefs which are constitutionally protected, or protected by the principles of academic freedom, shall not constitute Serious Criminal Misconduct.

(3) Except as otherwise expressly provided, an academic staff member who has engaged in behavior that constitutes Serious Criminal Misconduct shall be subject to the procedures set forth in ss. UWS 11.103 – 11.106.

(4) Any act required or permitted by ss. UWS 11.103 - 11.106 to be done by the chancellor may be delegated to the provost or another designee pursuant to institutional policies forwarded to the Board of Regents under s. UWS 9.02.

UWS 11.103 Reporting responsibility. Any academic staff member who is charged with, pleads guilty or no contest to, or is convicted of a felony, in state or federal court, shall immediately report that fact to the chancellor.

UWS 11.104 Expedited process. (1) Whenever the chancellor of an institution within the University of Wisconsin System receives a report under s. UWS 11.103 or other credible information that an academic staff member has engaged in Serious Criminal

Misconduct, or where the chancellor has determined to impose a suspension without pay pending the final decision as to dismissal under s. UWS 11.106, the chancellor shall:

(a) Within three working days of receipt of the report or information, inform the academic staff member of its receipt and, after consultation with appropriate institutional governance representatives, appoint an investigator to investigate the report or information;

(b) Upon appointing an investigator, afford the academic staff member three working days in which to request that the investigator be disqualified on grounds of lack of impartiality. In the event that the chancellor determines that a request for disqualification should be granted, the chancellor shall, within two working days of the determination, appoint a different investigator.

(2) The investigation shall be completed and a report filed with the chancellor not later than ten working days following the time allowed for the academic staff member to request an investigator's disqualification, or the naming of a different investigator, whichever is later.

(3) Within three working days of receipt of the investigator's report, the chancellor shall consult with appropriate institutional governance representatives and decide whether to seek dismissal of the academic staff member pursuant to ss. UWS 11.101- 11.106, to seek dismissal of the academic staff member pursuant to ss. UWS 11.02 - 11.10, to seek an alternative disciplinary sanction, or to discontinue the proceedings.

(a) If the chancellor decides to seek dismissal of the academic staff member pursuant to ss. UWS 11.101-11.106, the chancellor shall file charges within two working days of reaching the decision.

(b) If the chancellor decides to seek dismissal of the academic staff member pursuant to ss. UWS 11.02 -11.10, the chancellor shall file charges and proceed in accordance with the provisions of those sections of this chapter and implementing institutional policies.

(c) If the chancellor decides to seek an alternative disciplinary sanction, the procedures under ch. UWS 13, and implementing institutional policies, shall be followed.

(4) If charges seeking dismissal are filed under par. (3)(a), the academic staff member shall be afforded a hearing before the institutional standing committee charged with hearing dismissal cases and making recommendations under s. UWS 11.03. The hearing shall provide the procedural guarantees enumerated under ss. UWS 11.05-11.06, except that the hearing must be concluded, and written findings and a recommendation to the chancellor must be prepared, within 15 working days of the filing of charges.

(5) Upon receipt of the findings and recommendation of the committee under par. (4), the chancellor shall, within three working days, prepare a written decision on the matter. In the decision, the chancellor may order dismissal of the staff member, may impose a

lesser disciplinary action, or may find in favor of the staff member. This decision shall be deemed final unless the Board, upon request of the academic staff member, grants a review based on the record.

(6) The burden of proving just cause in this section shall be clear and convincing evidence.

(7) (a) The time limits set forth in this section may be enlarged if the parties are unable to obtain, in a timely manner, relevant and material testimony, physical evidence or records, or where due process otherwise requires.

(b) Enlargements of time under this section may be granted by the chair of the academic staff hearing body, subject to the approval of the chancellor.

UWS 11.105 Temporary suspension from duties. (1) The chancellor, after consultation with appropriate academic staff governance representatives, may suspend a academic staff member from duties without pay pending the final decision as to his or her dismissal where:

(a) The academic staff member has been charged with a felony and the chancellor finds, in addition, that one or more of the elements of serious criminal misconduct listed in s. UWS 11.102(1) are present, and that there is a substantial likelihood that the academic staff member has engaged in the conduct as alleged; or

(b) The academic staff member is unable to report for work due to incarceration, conditions of bail or similar cause; or

(c) The academic staff member has been convicted of serious criminal misconduct.

(2) Before imposing a suspension without pay, the chancellor shall evaluate the available information to determine whether the conditions specified in par. (1) are present. If the chancellor finds that the conditions in par. (1) are present, he or she shall immediately notify the academic staff member, in writing, of the intent to impose a suspension without pay, and shall, within two working days, provide the academic staff member with an opportunity to be heard with regard to the matter. The academic staff member may be represented by counsel or another at this meeting.

(3) (a) If, after affording the academic staff member the opportunity to be heard, the chancellor determines to suspend without pay, the chancellor shall inform the academic staff member of the suspension, in writing. The chancellor's decision to suspend without pay under this section shall be final, except that:

(b) If the chancellor later determines that the academic staff member should not be terminated, the chancellor may discontinue the proceedings, or may impose a lesser penalty, or may order the payment of back pay, as appropriate;

(4) If, after affording the academic staff member the opportunity to be heard, the chancellor determines that the conditions in par. (1) are not present or that a suspension without pay is otherwise not warranted, the provisions of s. UWS 11.08 shall apply.

UWS 11.106 Board Review. A member of the academic staff on indefinite appointment who has been dismissed for Serious Criminal Misconduct may appeal this action to the board as provided in s. UWS 11.10

SECTION 6. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2) (intro.), Stats.