

STATE OF WISCONSIN
Board of Regents of the University of Wisconsin System

**IN THE MATTER OF RULEMAKING PROCEEDINGS BEFORE THE BOARD OF
REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM**

**ORDER OF THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM
AMENDING AND ADOPTING RULES (CR 15-059)**

ORDER

The Board of the University of Wisconsin System orders the amendment UWS 11.02(1) and (2) and 11.05(1)(c) and (d) and 11.06(1)(f) and (2)(a) and 11.07 and 11.10 and 11.104(1)(a) and (b) and 11.104(5) and 11.11; the repeal and recreation of UWS 11.015 and 11.104(6); the creation of UWS 11.05(2) and 11.06(1)(dm), relating to dismissal of academic staff for cause.

Analysis by the Board of Regents of the University of Wisconsin System

ANALYSIS

Statute interpreted: s. 36.15 (3), Stats.

Statutory authority: s. 36.15 (3), Stats.

Explanation of agency authority:

s. 36.15(3). Stats.: "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."

Related statute or rule: N/A

Plain language analysis:

The current version of ch. UWS 11 provides a disciplinary process for pursuing dismissal of academic staff, including cases of serious criminal misconduct, such as sexual assault.

The U.S. Department of Education has issued guidance related to sexual assaults at higher education institutions and has reaffirmed that Title IX protects students from sexual harassment carried out by school employees. Some of the expectations of the U.S. Department of Education may require modifications to the provisions under the current ch. UWS 11 in order for them to be met.

The modifications contemplated by this rulemaking would incorporate into law some of the published expectations of the U.S. Department of Education. In particular, the new provisions would reflect the evidentiary burden of proof and the role of a complainant in the process.

If modifications are not made to ch. UWS 11, the UW institutions will continue to adhere to the provisions of ch. UWS 11 and to the federal guidance, but only to the extent that a conflict does not arise between the two. Further, following both policy guidance and the law may lead to confusion.

Summary of, and comparisons with, existing or proposed regulations:

Title IX of the Education Amendments of 1972 provides that "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Currently, there are no federal regulations interpreting this law with respect to addressing allegations of sexual misconduct; however, the U.S. Department of Education has issued guidance through Dear Colleague Letters which establish the federal agency's expectations for institutions of higher education that receive federal funding. This guidance is being enforced by the U.S. Department of Education through the Office for Civil Rights.

Comparison with rules in adjacent states: N/A

Summary of factual data and analytical methodologies: N/A

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

This rule was posted for 14 days for economic impact comments and none were received.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis is attached.

Anticipated costs incurred by private sector:

There are no anticipated fiscal costs on the private sector.

Effect on small business:

The proposed rules do not have an economic impact on small businesses.

Agency contact person: (including email and telephone)

Jane Radue

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Board of Regents of University of Wisconsin System

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Place where comments are to be submitted and deadline for submission:

The “Notice of Public Comment Period on Economic Impact and Fiscal Estimate” for ch. UWS 11 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.

Public comments may be submitted to the agency in one of the following locations: (1) on the web at <https://www.wisconsin.edu/regents/public-comment-form/> or adminrules.wisconsin.gov; (2) by email to board@uwsa.edu; (3) at a public hearing scheduled from 10:00 a.m. to 1:00 p.m. on October 26, 2015 in the Overture Room, Gordon Dining and Event Center, 770 W. Dayton Street, Madison, Wisconsin; or (4) by mail to Jane Radue, Executive Director, Office of the Board of Regents, 1860 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin. The deadline for submission of comments is November 2, 2015.

TEXT OF RULE

Section 1. UWS 11.015 is repealed and recreated to read:

UWS 11.015 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 any individual who is reported to have been subject to 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 an academic staff 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 by an employee against another person with whom they are 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 11.02 (1) and (2) are amended to read:

- (1) Whenever the chancellor of an institution receives an allegation which concerns an academic staff member holding an indefinite appointment which appears to be substantial and which, if true, might lead to dismissal under s. UWS 11.01, the chancellor shall request within a reasonable time that the appropriate dean, ~~or~~ director, or designee investigate the allegation. For complaints involving sexual harassment, sexual assault, dating violence, domestic violence or stalking, the chancellor shall direct the Title IX Coordinator, or designee, to initiate an investigation in accordance with applicable policies. The dean, director, or designee shall offer to discuss it informally with the individual, and provide information of rights to which members of the academic staff are entitled under this chapter academic staff member, and, if the allegation involves sexual harassment, sexual assault, dating violence, domestic violence or stalking, with the complainant and provide information of rights under

this chapter. Both the academic staff 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. If such an investigation and discussion does not result in a resolution of the allegation and if the allegation is deemed sufficiently serious to warrant dismissal, the dean, or director, or designee shall prepare a written statement of specific charges. A member of the academic staff may be dismissed only after receipt of such a statement of specific charges and, if a hearing is requested by the academic staff member, after a hearing held in accordance with the provisions of this chapter and the subsequently adopted procedures of the institution. If the staff member does not request a hearing, dismissal action shall proceed along normal administrative lines but the provisions of ss. UWS 11.02, 11.08, and 11.09 shall apply. In those cases where the immediate supervisor of the academic staff member concerned is a dean or director, the chancellor shall, to avoid potential prejudice, designate an appropriate administrative officer to act for the dean or director under this section.

- (2) Any formal statement of specific 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 formal statement of specific charges involves sexual harassment, sexual assault, dating violence, domestic violence, or stalking, the formal statement shall be provided to the complainant upon request, except as may be precluded by applicable state or federal law.

Section 3. UWS 11.05(1) (c) and (d) are amended to read:

- (c) A right to an advisor, counsel ~~and~~/or other representative, and to offer witnesses;
- (d) A right to confront and cross-examine adverse witnesses. For complaints involving sexual harassment, sexual assault, dating violence, domestic violence or stalking, the hearing committee may reasonably restrict the academic staff member and the complainant from questioning each other;

Section 4. UWS 11.05(2) is created to read:

- (2) For complaints involving sexual harassment, sexual assault, dating violence, domestic violence, or stalking, the complainant shall have all the rights provided to the academic staff member in s. UWS 11.05(1)(a-g), except as may be precluded by applicable state or federal law.

Section 5. UWS 11.06(1)(dm) is created to read:

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

Section 6. UWS 11.06(1)(f) is amended to read:

(f) ~~Nothing in par. (e)~~ Nothing in this section shall prevent the settlement of cases by mutual agreement between the administration and the staff member, with the chancellor's approval, at any time prior to a final decision by the chancellor; or when appropriate, with the board's approval prior to a final decision by the board;

Section 7. UWS 11.06(2)(a) is amended to read:

(a) The 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 hearing committee members disqualify themselves or are disqualified, the remaining members may select a number of replacements equal to the number who have been disqualified to serve, except that alternative methods of replacement may be specified in the policies and procedures adopted by the institution;

Section 8. UWS 11.07 is amended to read:

UWS 11.07 Recommendations: to the chancellor. The hearing body shall send to the chancellor and to the academic staff member concerned, as soon as practicable after conclusion of a hearing, a verbatim record of the testimony and a copy of its report, findings, and recommendations. After reviewing the matter on record and considering arguments if submitted by the parties, the chancellor shall issue a decision. In that decision, the chancellor may order dismissal of the academic staff member, may impose a lesser disciplinary action, or may find in favor of the academic staff member. The academic staff member shall be notified of the chancellor's decision in writing. In cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall be notified of the chancellor's decision at the same time as the academic staff member. This decision shall be deemed final unless the board, upon request of the academic staff member, grants review based on the record. For complaints involving sexual harassment, sexual assault, dating violence, domestic violence or stalking, the complainant shall have all rights provided to the academic staff member in this paragraph.

Section 9. UWS 11.10 is amended to read:

UWS 11.10 Board review. A member of the academic staff on indefinite appointment who has been dismissed for cause by the chancellor following a hearing may appeal this action to the board. Any appeal must be made within 30 days of the date of the decision of the chancellor to

dismiss. Upon receiving an appeal the board shall review the case on the record. Following such review the board may confirm the chancellor's decision, or direct a different decision, or approve a further hearing before the board with an opportunity for filing exceptions to the hearing body's recommendations or the chancellor's decision and for oral argument on the record. If further review with opportunity for oral argument on the record is provided, this review shall be closed unless the staff member requests an open hearing. (See sub ch. V of ch. 19, Stats., Open Meeting Law.) All decisions of the board, whether after review on the record or after oral argument, shall be expressed in writing and shall indicate the basis for such decision. For complaints involving sexual harassment, sexual assault, dating violence, domestic violence, or stalking, the complainant shall have the same opportunity to appeal, file exceptions to the recommendations of the hearing committee or chancellor, and oral arguments, as provided to the academic staff member.

Section 10. UWS 11.104(1)(a) and (b) are amended to read:

- (a) Within 3 working days of receipt of the report or information, inform the academic staff member of its receipt and, after consulting with appropriate institutional governance representatives, appoint an investigator to investigate the report or information and advise the chancellor as to whether to proceed under this section or ss. UWS 11.02 to 11.10. For 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 academic staff member.
- (b) Upon appointing an investigator and notifying the academic staff member, afford the academic staff member three 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 academic staff member shall have the opportunity to request that any second or subsequent investigators be disqualified on grounds of lack of impartiality or other cause. For cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall have the disqualification rights that are afforded to the academic staff member in this subsection.

Section 11. UWS 11.104 (5) is amended to read:

- (5) Within 3 working days of receipt of the findings and recommendation of the committee under sub. (4), the chancellor shall 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. The staff member shall be notified of the chancellor's decision in writing. In cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall be notified of the chancellor's decision at the same time as 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. In cases

involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall have the same right to a review on the record as the academic staff member.

Section 12. UWS 11.104 (6) is repealed and recreated to read:

- (6) ~~The burden of proving just cause in this section shall be clear and convincing evidence.~~ 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 academic staff member engaged in serious criminal misconduct, as defined in s. UWS 11.102, except in cases of sexual assault, dating violence, domestic violence or stalking, in which the evidentiary standard shall be by a preponderance of the evidence.

Section 13. UWS 11.11 is amended to read:

UWS 11.11 Dismissal for cause-fixed term or probationary academic staff

appointments. A member of the academic staff holding a probationary appointment, or a member of the academic staff holding a fixed term appointment and having completed an initial specified period of time, may be dismissed prior to the end of the contract term only for just cause or for reasons of budget or program under ch. UWS 12. A nonrenewal of such an appointment is not a dismissal under this section. A dismissal shall not become effective until the individual concerned has received a written notification of specific charges and has been offered an opportunity for a hearing before the appropriate dean or director or his/ or her designee. If such hearing is requested, a determination of just cause and notification of dismissal shall be made by the dean or director or designee. If no hearing is requested the dismissal is effected by the specifications in the original notification of charges. The hearing before the dean, director, or designee shall provide the academic staff member with an opportunity to present evidence and argument concerning the allegations. Dismissal shall be effective immediately on receipt of written notification of the decision of the dean or director or designee unless a different dismissal date is specified by the dean or director. Dismissals for cause shall be appealable by filing an appeal with the hearing body established under s. UWS 11.03. The burden of proof as to the existence of just cause on appeal shall be on the administration or the authorized official. The provisions of s. UWS 11.04, procedural guarantees, contained in ss. UWS 11.05 and 11.06 and the review provisions of s. UWS 11.07, shall be applicable to the appeal proceeding. In no event, however, shall a decision favorable to the appellant extend the term of the original appointment. If a proceeding on appeal is not concluded before the appointment expiration date, the academic staff member concerned may elect that such proceeding be carried to a final decision. Unless such election is made in writing, the proceeding shall be discontinued at the expiration of the appointment. If the chancellor ultimately decides in favor of the appellant, salary lost during the interim period between the effective date of dismissal and the date of the chancellor's decision or the end of the contract period, whichever is earlier, shall be restored. In those cases where the immediate supervisor of the academic staff member concerned is a dean or director, the chancellor shall, to avoid potential prejudice, designate an appropriate administrative officer to act for the dean or director

under this section. For complaints involving sexual harassment, sexual assault, dating violence, domestic violence or stalking, the complainant shall have all procedural rights provided to the academic staff member in this section and the standard of proof shall be by a preponderance of the evidence.

Section 14. EFFECTIVE DATE:

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

(END OF TEXT OF RULE)

This rule shall take effect on July 1, 2016 as provided in s. 227.22 (2) (intro.), Stats.