

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 15-061)**

ORDER

The Board of the University of Wisconsin System orders the repeal of UWS 7.025; the amendment of UWS 4.02 (1) and (3) and 4.05 (1) (d) and (e) and 4.06 (1) (d) and (i) and (j) and 4.07 (1) and (2) and 4.08(1) and 7.05 (1) (a) and (b) and 7.05 (5) (c) and 7.05 (6); the repeal and recreation of UWS 7.05 (8); the creation of 4.015 and 4.05(2) and 4.06 (1) (am) and 4.08 (4) and 7.015, relating to procedures for dismissal and dismissal of faculty in special cases.

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

ANALYSIS

Statute interpreted: s. 36.13 (3) and (5), Stats.

Statutory authority: s. 36.13 (3) and (5), Stats.

Explanation of agency authority:

s. 36.13(3), Stats.: "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."

s. 36.13(5), Stats.: "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."

Related statute or rule: N/A

Plain language analysis:

The current version of ch. UWS 4 provides a disciplinary process for pursuing dismissal of faculty for just cause. The current version of ch. UWS 7 provides a disciplinary process for pursuing dismissal of faculty in special cases of serious criminal misconduct, including 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 4 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 chs. UWS 4 and 7, UW institutions will continue to adhere to the provisions of chs. UWS 4 and 7 and the federal guidance, but only to the extent that a conflict does not arise. Further, following both policy guidance and the law may lead to confusion.

Summary of, and comparisons with, existing or proposed federal regulation:

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

Executive Director and Corporate Secretary

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 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 any individual who is reported to have been subjected 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 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 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 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/or 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 of 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 includes 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), (i), and (j) are 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;
- (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;
- (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 7. 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 8. 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 9. UWS 4.08(4) 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 10. 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 any individual who is reported to have been subjected to sexual harassment, sexual assault, dating violence, domestic violence or stalking as defined in 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 11. UWS 7.025 is repealed.

Section 12. 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 13. 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 14. 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 15. 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 16. 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)

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