

UNIVERSITY COMMITTEE ON PRIVILEGE & TENURE
Minutes of Meeting
Friday, May 28, 2021

I. Chair's Comments/Consent Calendar

Jorge Hankamer, UCPT Chair

Action Taken: The agenda and minutes were approved 8-0-0.

The Chair told the committee that the Academic Council had approved UCPT's proposed change to Bylaw 336 with some slightly amended language.

II. Consultation with Academic Senate Leadership

Mary Gauvain – Academic Senate Chair

Robert Horwitz – Academic Senate Vice Chair

The Academic Council Chair reported that there was a Regents' meeting in mid-May and an announcement was made about a leadership change for the Board. The incoming chair of the Board of Regents will be Cecilia Estolano. The Council is very pleased with her appointment; she is a supporter of the Senate and also is very interested in climate issues. There was a preliminary discussion of the cohort tuition models and there was some realization on the part of the Board that the University needs a solid footing in core funds. There was a lot of discussion around the budget - there has been a big revenue influx, and the UC budget has been restored. Much of it is one-time money and a lot of that will be used for infrastructure projects and for some specific program development such as student mental health. There has been a discussion with the Regents about affiliations with religious hospitals and there will be a meeting that will go into detail about this issue in June. It is expected that there will be a split view.

The Senate has been conducting a survey about remote instruction; it will provide useful information going forward. The Senate has submitted a set of fall reopening guidelines as well as a preliminary vaccine mandate policy.

The Academic Council Vice Chair said that the Senate has two working groups active at the moment. One is about mitigating COVID impacts on faculty, and the other is about standardized testing. UCEP had a meeting with representatives from Chegg. The organization does not devote very many people to the cheating problem. The Senate has approached UC Legal to see if it will engage in an institutional response. There is danger to the integrity of a UC degree.

III. Consultation with the Systemwide Title IX Director

Suzanne Taylor, Systemwide Title IX Director

The Chair, Vice Chair, and Systemwide Title IX Director attended a Council meeting where Council discussed a revision to Bylaw 336.F.3. The Chair explained to the committee that the approved wording is almost exactly the same as what was submitted, with one word change and the addition of one sentence at the end. The language approved by Council is:

For cases in which there was a hearing at the Title IX stage regarding violation of the University's policy on Sexual Violence and Sexual Harassment ("SVSH Policy"), the Hearing Committee shall accept into evidence the record and written determination from the Title IX process. Other evidence, including witness testimony, regarding whether there was a violation of the SVSH Policy will not be permitted unless the Hearing Committee determines before the hearing that the evidence pertains to newly discovered facts or circumstances that might significantly affect the determination of whether there was a violation of the Faculty Code of Conduct and that were not reasonably discoverable at the time of the Title IX process. The P&T Hearing Committee may carry out any investigation it deems appropriate for the determination of a potential violation of the Faculty Code of Conduct.

The Chair said that the language places a responsibility on the hearing committee and the chair to pay attention to the need to avoid duplicative evidence and calling witnesses who have already testified. However it also makes clear that a hearing committee has the authority to investigate allegations of violations of the Faculty Code of Conduct.

The Chair told the committee that he could think of a few cases where a hearing committee might disagree with the outcome of a Title IX hearing. One would be if new evidence was available, another would be if there was a disagreement about whether one side has met the standard of preponderance of the evidence, and a third - which was brought up at Council - would be when campus faculty do not trust their Title IX process to be fair. Committee members had questions and there was considerable discussion.

Systemwide Director Taylor remarked that the idea of the Bylaw amendment was to provide some assurance that there would not be duplicative fact-finding hearings. She expressed concern about the new language adding ambiguity to the process. She asked if it were still the case that the hearing committee would only consider evidence if it was not new or reasonably available previously. She stated that UCPT - when developing hearing committee guidelines - should make it clear that this condition is the expectation; the new language does not make it as clear as it had been before. The Chair replied that the new language is to make it clear that the hearing committee itself that determines what to hear. The Director said that she was concerned that the committee doesn't have constraints and that future investigations may devolve into a broader fact-finding mission. Some members expressed agreement with Director Taylor's concerns. The Chair responded that the job of the PT hearing committee is to review the evidence and make a judgement about whether - and to what extent - the faculty member has violated the Faculty Code of Conduct. The Council Vice Chair commented that hearing committee guidelines that are under development should be "tight" so that a lawyer could not use the new language of the Bylaw to re-litigate. The Council Chair said that the Bylaw amendment had been approved by Council but it had yet to be approved by the Assembly. The Assembly has the power to change language again.

The committee discussed the possible ramifications of the sentence that was added by Council. The Chair held a straw poll to see if UCPT should request that Assembly remove the last sentence before they vote to approve the Bylaw revision. The poll was not unanimous. Later in the meeting, the committee took a vote as to whether UCPT should send a letter to Academic Assembly requesting that - in their discussion of the bylaw change - they approve the language with the removal of the final sentence.

Action Taken: The committee voted against the action 2-10-0.

IV. UCPT Task Force Report

The committee reviewed the draft Hearing Committee Guidelines which were shared on the Zoom screen. Members expressed concern about the timeline for the hearing committee process. The Chair told UCPT that the hearing committee needs to demand that it get a transcript of the Title IX procedures at the same time that it receives the notice of intent to discipline. He also said that the Guidelines were not meant to be an exhaustive list of the chair's powers.

The committee discussed at length the need to avoid duplicative processes and testimony. The Vice Chair pointed out that Bylaw 336.F.4 states that, "The Hearing Committee may, upon an appropriate showing of need by any party or on its own initiative, request files and documents under the control of the administration." Attorney Adviser Meltzer likewise informed the committee that Bylaw 336.F.12 says, "The Hearing Committee may reconsider a case if either party presents, within a reasonable time after the decision, newly discovered facts or circumstances that might significantly affect the previous decision and that were not reasonably discoverable at the time of the hearing."

The members discussed the draft Guidelines extensively and raised questions about possible hearing scenarios. The Task Force will meet again to revise the Guidelines based on the advice from the discussion and will embellish and tighten the document.

V. Consultation with the Attorney Adviser to UCPT

Chad Pimentel – Office of the General Counsel

Josh Meltzer - Office of the General Counsel

Attorney Adviser Meltzer remarked that questions had been raised about confidential reports being maintained by systemwide Senate staff. He had checked into the possibility that these documents would be "discoverable" through Public Records Act requests.

Another item mentioned by Mr. Meltzer was the change that was made to Bylaw 336 regarding the "preponderance of the evidence" standard. He said that a case the University had yet to face was one where the charges are filed with the new standard in place, but the alleged conduct took place when the "clear and convincing" standard was in place. UC will have to resolve that issue when it arises. Mr. Pimentel said the standard of proof does not change that often. Mr. Meltzer added that the items that fall under the new Title IX process will very likely also fall within the new preponderance of the evidence standard.

The Attorney Advisers engaged in discussion with committee members about elements of - and variables in - the hearing process. The Chair asked if the committee felt it should draft some guidelines to advise hearing committees regarding the handling of cases that arose after August 2020, but wherein the alleged activity occurred before that date. Vice Chair Ferrero said that he was in favor of the committee making a preemptive decision before the issue arises. The Vice Chair agreed to draft some guidance for the campus P&T committees.

VI. Hearing Reports: Archiving and Use

The Chair told the committee that he had assumed – before he became chair – that there would be an archive of hearing committee reports because bylaws 335 and 336 said that such reports would be copied to the chair of UCPT. To his surprise, there is no such archive. Submission of

hearing reports hasn't been consistent and when they have been submitted, they have not been copied to any responsible agent to be saved. Chair Hankamer tried to rectify that by having the hearing reports copied to him and Analyst Harms for archiving.

The Chair said that worries have arisen as to what would be done with the reports. It is unclear what purpose that line in the Bylaw serves. The committee discussed the issue at length, with concerns about personally identifiable information, confidentiality, and the Freedom of Information Act requests being aired. After several minutes, the Chair observed that no one had presented any practical way to make use of the archive. He stated that the committee had three options: 1) Continue with the status quo and have reports copied to the Chair and Analyst for archiving; 2) Take action to get rid of this requirement that hearing committee reports be sent to the chair; and 3) Revert to previous practice of having the requirement but "ignoring" that line in the Bylaw. The committee voted to support option three.

VII. Roundtable: Reports from the Divisions

Members reported on P&T issues from their divisions.

VIII. Other Topics/New Business

Member Julia Simon reminded the committee that in February, it had discussed what to do when encountered by a simultaneous misconduct hearing and promotion review process. The interim action was to pause the personnel action until the misconduct case was completely resolved. The personnel action could then be run retroactively. This is just one solution that was on the table. Regret was expressed that Vice Provost Carlson was not able to attend the meeting and weigh in on this discussion. Member Philip Gill expressed concerns about faculty being innocent until proven guilty. He suggested that the promotion/merit action move forward, but that the final decision be delayed until the case is resolved. Members discussed the possibilities. The Chair remarked that the issue could be taken up in 2021-22.

The meeting adjourned 2:22 p.m.

Minutes taken by Fredye Harms, Committee Analyst
Attest: Jorge Hankamer, Committee Chair