

UNIVERSITY COMMITTEE ON PRIVILEGE & TENURE
Minutes of Meeting
Friday, November 20, 2020

I. Chair's Comments/Consent Calendar

Jorge Hankamer, UCPT Chair

A. Approval of the agenda

The Chair had members introduce themselves. The agenda was approved.

The Chair announced that he would have to leave before the end of the meeting and appointed the Vice Chair to run the meeting in his absence.

II. Federal SVSH Regulations: Implications for P&T

A. Systemwide Review of a Proposed Bylaw Change to use the "Preponderance" Standard

The recent requirement from the Department of Education that SVSH cases be decided according to the same standard of evidence for faculty, staff, and students, together with the state of California law that states that the standard for students be "preponderance of the evidence," puts Bylaw 336 in non-compliance. Last year a patch was put in place by sending advice to P&T committees in the case of SVSH cases to report to the Chancellor their judgement on both standards. UCPT now needs to do something permanent. The proposal is to change the wording of Bylaw 336 so that the standard of evidence that is applied in SVSH cases is "preponderance of the evidence."

One possibility is to revise the Bylaw as suggested and leave it to be understood that the discipline recommended might depend on how strong that case was. The other possibility is to explicitly say in the Bylaw that in a case where the committee has determined that the argument has been made by a preponderance of the evidence, the committee can decide what discipline to recommend - whether or not it had been established by the "clear and convincing" standard.

The committee discussed the options. The Chair noted that it is also conceivable that one might be driven to a point where P&T says a particular hearing must be confined to one type of charge or the other which would require – in some cases - more than one hearing.

The committee came to an agreement to the proposed revision of the Bylaw which says that in cases of alleged SVSH cases, the preponderance of evidence standard will be applied.

B. Title IX Phase Hearing - Approach for P&T

The Chair explained that this item was much more difficult than the preceding one. In SVSH cases, there is a mandated Title IX process that involves an investigation and a hearing where the accused and the accuser confront each other, call witnesses, and are advised by attorneys. The issue is that since there is a mandated Title IX process in SVSH cases that now involve a hearing, should the committee change anything about the P&T process which also requires a hearing. The two hearings are quite different in nature. The Title IX hearing is a hearing in which the opposing sides are moderated by a Title IX officer, at the end of which time, the hearing makes a finding. As a result of that, the administration may decide to issue a letter of intent to discipline. After that happens, the P&T process starts. The Academic Senate Bylaws state that a faculty member may not be disciplined before having had an opportunity to have a hearing before an appropriately constituted committee of the Academic Senate. There is a

worry that having two hearings will place an undue burden on accusers. The committee has a proposal that was sent to it that gives two alternatives, both of which essentially eliminate the P&T hearing.

The Vice Chair observed that the issue is that there is fact finding and then the recommendation for the sanction. In principle those two stages can be separate. The problem is even if the two are separated, the parties in the hearing are going to be different. In the Title IX stage – which will be the fact-finding stage - the administration has no role. But when the discipline stage is reached, the administration is involved. The problem is trying to avoid duplication at the fact-finding stage. The second issue goes back to the APM. APM 015 calls for faculty involvement through the disciplinary process. It looks as if the APM requires a divisional hearing committee to make findings on the evidence presented. Can P&T or some faculty committee be part of the fact-finding process during Title IX and in that way meet the requirements of APM 015? Trying to avoid duplication of hearings seems to be a good thing but faculty involvement needs to be respected.

Members weighed in with the following thoughts:

It is a bit misleading to say that the P&T committee hearing will be eliminated. Both hearings can be merged into one and just say that the hearing has two phases and P&T would participate in both phases. There would be one part where the accuser and the accused have to give evidence and that is the part that can be very traumatic. But once that part is done, the other parts could be part of the same hearing.

The parties to the first hearing are the accuser and the faculty member and the part of P&T is to intervene in cases where discipline has already been imposed by the administration. P&T does not have a role in the fact-finding process because it is not its job to defend faculty when they are being accused by somebody of wrongdoing. P&T's job to decide if APM 016 or other disciplinary measures are being appropriately applied.

It looks like on some campuses the fact finding is not part of what P&T does and on others they do the fact-finding, and charges only looks at probable cause. One might say that P&T only has a role outwardly in the imposition of discipline and whether they do any fact finding has to do with variations on the campuses.

If the fact finding were separated from the discipline, and it was just brought to P&T to determine what kind of discipline should be imposed, do P&T members feel like they have enough to go on without hearing the evidence again?

If it is accepted that the evidentiary part should not be in the P&T bailiwick, only discipline, then the problem is that there are two hearings. This conflicts with the idea of making the practice less onerous for the complainant.

A disciplinary hearing comes before P&T because the faculty member is appealing the discipline meted out by the chancellor. How much do P&T committees want to go back into the evidence? It would be wrong to “handcuff” P&T when they are considering an appeal of a discipline that is imposed.

Members also shared how these situations are currently handled on their campuses.

The Chair stated that there is a difficulty with assuming that there would be P&T members in the Title IX process because the P&T hearing committee does not exist until there has been a letter of intent to discipline, and that comes after the Title IX process. He said that someone suggested that if faculty involvement was wanted in the fact-finding process of the Title IX effort, maybe it should be faculty members who are not on P&T. He observed that he could not see any way to combine the P&T process with the Title IX process.

Academic Senate Executive Director Baxter mentioned that the campuses that do charges committees want to separate those two functions and campuses that don't have charges committees are accustomed to all of the members of the hearing panel doing both. It seems that the question may be in order to make allowances and not make things too burdensome for the complainant or the respondent - and to consider Senate division office workload - there may be an advantage to trying to integrate the hearings. The question is whether the campuses that have charges committees see a problem with merging those functions. That would be helpful because when it came to the discipline phase, there would be confidence that the relevant evidence had been explored.

After time had been exhausted for this topic, the Chair asked for volunteers to create a task force to decide what should be done about this issue. Vice Chair Ferrero and members Simon and Gill volunteered. The task force will meet in the next few weeks and report back to the committee.

IV. Consultation with Academic Senate Leadership

Robert Horwitz – Academic Senate Vice Chair

(The Leadership Update was cut short by the overrun from the previous agenda item.)

The Academic Senate Vice Chair said that on Monday there will be an announcement about the specifics of the curtailment plan. There is a lot of flexibility for campuses. Individual campuses will be given a target and they can do what they want to meet that.

There was a Regents meeting and the budget was approved. The feasibility study working group on a possible replacement of the SAT is getting close to a decision and there will be a report out of that committee at the next session. There is a report on ILTI that has been sent out for review to the campuses. The SVSH standard of evidence has been sent to the campuses. There will be a council meeting on Monday where there will be a session on physician morale on the medical center campuses; UCSF has a particular problem.

V. Consultation with the Systemwide Title IX Director

Suzanne Taylor, Systemwide Title IX Director

The Director said that the US Department of Education issued new Title IX regulations in May and they went into effect August 14. They specify how schools should respond to allegations of sexual harassment and are extremely prescriptive. They require that the University have hearings as part of fact-finding for employees. They also require that they offer an appeal. In order to hold someone accountable there is a very thorough investigation in which both parties have significant rights, followed by the right to a hearing and an appeal and possibly a second hearing. It is potentially a long and arduous process and the Director is worried that complainants will not come forward or see the process through. The other issue is around the evidentiary standards. The University must use the same standard, regardless of the person accused. Under the SVSH policy, the University uses the "preponderance" standard. The conflict is that in the P&T hearing, the "clear and convincing" standard is specified. There was a temporary resolution put in place.

The Chair interjected that the committee had decided to propose a change to the Bylaw.

The Director said that leaves the University with the prospect of two hearings and how to go about resolving that. One possible resolution of this issue is to make a change to the Bylaws that would provide that representatives from P&T participate in the Title IX hearing and be part of a panel that decides if the respondent is responsible for violating the policy. That decision would go to the P&T committee and that would go to the chancellor to recommend sanctions.

The Chair explained that the committee had spent some time in discussion about those issues and has established a task force so it can have a more structured discussion in the winter.

The Director continued and said that the Title IX office is involved in the investigative stage, and at the end of the investigation, the Title IX investigator will make a preliminary determination as to whether there was a violation. If the preliminary determination is yes, then it would go to the chancellor (or designee) to propose a possible sanction. Then the parties have the opportunity to accept that decision. If either party doesn't, then it goes to the Title IX hearing which is run by an independent hearing officer who makes a determination at the end of the process. The federal regulations do make clear that the hearing officer should not be the Title IX investigator. The regulations are very specific about what evidence can be considered.

A peer review committee is formed and that group will consider the findings of the hearing officer and make a recommendation to the chancellor.

VI. Consultation with the Academic Personnel

Susan Carlson, Vice Provost – Academic Personnel & Programs

Amy K. Lee - Associate Vice Provost and Deputy to the Vice Provost

The Vice Provost remarked that the thing that most marks the work of her department right now is that it is really in a time of making exceptions. The exceptions have been done for the right reasons, but it raises questions about policies and practices and whether they need to change. A lot of those exceptions have to do with leave because of the pandemic and because of workload and dependent care; her office has also made it easier for individuals to extend the tenure clock to a third year.

Yesterday at the Regents' meeting there was an open session on a faculty termination case. This is the first time in at least a decade that a faculty member has chosen an open session and it was about two hours. One of the things that was notable about the case was how important the interpretation of policy was. There has not been an announcement yet about their decision. There have been six cases that have been brought to the Regents in the past 20 years.

The Vice Provost discussed the draft document from the Title IX Office entitled the Guidelines on Responsible Employee Investigations. What she found in her discussion with the campus academic personnel offices is that they did not interpret the document the same way. There appear to be two options on how you might process a possible violation of the SVSH policy. One option would be to route the investigation through the Title IX office or to route it through Employee and Labor Relations or Academic Personnel. There was more than one interpretation about how the decision would be made and what the consequences would be. The Vice Provost was also concerned that there was no mention of APM 015 and 016 and when and how those would come into play. The other part of the discussion is what other processes the campuses have for policy violation that might be similar to what was being proposed. The challenge is finding the right compass to decide when something is a guideline and something is a policy. The Vice Provost asked for comment from UCPT on the Guidelines.

VIII. California State Audit 2018 Report on SVSH: UC Follow Up on Bylaw 336 Timelines for P&T Hearings

Systemwide Academic Senate Executive Director Hilary Baxter

Executive Director Baxter explained that there was an audit by the California State Auditor in 2018 that resulted in specific recommendations to the Academic Senate regarding timelines within the Privilege and Tenure process: there is the 60 day interval between when charges are filed and the hearing begins and 30 days between the time a hearing is concluded and the issuance of the Privilege and Tenure report. The recommendation from the Auditor did allow

for extensions for good cause and the University was to establish a definition around good cause extensions and also around the conclusion of the hearing. Conclusion of the hearing was defined in Bylaw 336 as the receipt of the transcripts or the post-hearing briefs, whichever comes later. The Regents formally requested that the Senate amend the Bylaws to incorporate these timelines and it did so. Another part of the recommendations was for the Title IX office to do an annual review of how the Senate was doing with these. When this went into effect, the directors and analysts came together and created a template so there would be some consistency in the way information was tracked. The information was submitted toward the end of summer.

The Executive Director pointed out that the chart that was sent to the committee was a summary of the seven cases that fell into the timeframe on which the Senate was reporting. The changes in the Bylaws went into effect July 1, 2019 and the Senate was to track cases through June 30, 2020. There was considerable concern on the part of the directors and analysts about how this would work and she commended her colleagues on their hard work to make sure these time frames were met. The one area that needed a little clarification is formalizing the process for good cause extension and making sure it is consistent and that appropriate documentation is included. There could be quite a few number of cases coming in the next year.

There was a review of the Title IX process as well; the Title IX process is different from P&T and the timeframes that were given were all in business days rather than calendar days. This raised a question about curtailment days and how they are supposed to be counted. Ms. Baxter said that holidays (curtailment days) should not be counted.

VII. Consultation with the Attorney Advisor to UCPT

Chad Pimentel – Office of the General Counsel

Josh Meltzer - Office of the General Counsel

Mssrs. Pimentel and Meltzer answered questions from committee members about cases that had taken place on the campuses. Many of these questions had to do with the discoverability of P&T discussions and emails.

IX. Roundtable: Reports from the Divisions

Members reported on P&T matters within their divisions.

X. Other Topics/New Business

The Berkeley member asked if faculty member from one campus bring a grievance case on another campus. The Chair replied that a faculty member cannot bring a grievance against another faculty member; the only target of a grievance has to be an arm of the administration. [Upon review of the minutes, the Chair wishes to retract this statement.]

The committee adjourned at 2:45.

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