

Report from the Senate Ad Hoc Committee

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Operations Manual: III. Human Resources. Section 29.8, "Unfitness".

Section 29.8

NEW LANGUAGE IN CAPITAL LETTERS

a. Introduction.

- (1) Scope. This section establishes procedures to be followed at the University level in actions IN THE EVENT THAT A FACULTY MEMBER FACES A CHARGE OF unfitness during the term of the faculty member's appointment.
- (2) Alternative Conclusions. While the procedures set forth in this section are intended for cases WHICH MAY RESULT IN DISMISSAL, they may AT ANY TIME terminate short of dismissal; for example, they may result in a change of the faculty member's assigned duties, APPOINTMENT TO ANOTHER PRINCIPAL UNIT, or other adjustments in the terms and conditions of the faculty member's employment.
- (3). ACADEMIC FREEDOM. ALL PROCEEDINGS UNDER THIS SECTION MUST BE CONSISTENT WITH THE PRINCIPLES OF ACADEMIC FREEDOM STATED IN THE Statement on Tenure and Academic Vitality at The University of Iowa. (Regents 2/14/74; Operations Manual 10:1 (a) 2.)

X : (NEW). Conditions.

(1.) A TENURED FACULTY MEMBER MAY BE DETERMINED TO BE UNFIT ONLY UNDER THE FOLLOWING CONDITIONS:

- A. WHEN A FACULTY MEMBER'S PERFORMANCE IS JUDGED TO HAVE BEEN SUBSTANTIALLY BELOW THE RELEVANT UNIT'S STANDARDS AND CRITERIA FOR ACCEPTABLE FACULTY PERFORMANCE FOR A SIGNIFICANT PERIOD OF TIME.
- B. WHEN REASONABLE EFFORTS TO ADJUST THE FACULTY MEMBER'S OBLIGATIONS HAVE BEEN MADE IN ACCORDANCE WITH THE UNIVERSITY'S POST-TENURE EFFORT ALLOCATION POLICY, AND HAVE MET WITH NO SUCCESS.
- C. WHEN REASONABLE EFFORTS BEYOND THOSE RECOMMENDED IN THE UNIVERSITY'S POST-TENURE EFFORT ALLOCATION POLICY HAVE BEEN MADE BY UNIVERSITY, COLLEGIATE AND DEPARTMENTAL OFFICERS TO RESOLVE THE QUESTION OF FITNESS THROUGH ADJUSTMENTS IN MERIT PAY, PERCENTAGE APPOINTMENTS, AND OTHER REMEDIES SHORT OF DISMISSAL.
- D. WHEN IT CAN BE DEMONSTRATED BY CLEAR AND CONVINCING EVIDENCE IN THE RECORD AS A WHOLE THAT A DETERMINATION OF ACADEMIC UNFITNESS INVOLVES NO VIOLATION OF THE ACADEMIC FREEDOM OF THE FACULTY MEMBER.

- b. **Prior Determination.** THESE PROCEDURES SHALL APPLY ONLY AFTER A PRELIMINARY DETERMINATION HAS BEEN MADE BY THE COLLEGIATE DEAN THAT A FACULTY MEMBER'S PERFORMANCE IS JUDGED TO HAVE BEEN SUBSTANTIALLY BELOW THE RELEVANT UNIT'S STANDARDS AND CRITERIA FOR ACCEPTABLE FACULTY PERFORMANCE FOR A SIGNIFICANT PERIOD OF TIME.
- (1) The collegiate Dean shall make such a determination following consultation with faculty colleagues in the department or academic unit of the faculty member's principal appointment. CONSULTATION SHALL INCLUDE AN INDEPENDENT REPORT FROM THE DEPARTMENTAL CONSULTING GROUP OF THE FACULTY MEMBER'S PRINCIPAL UNIT, AND AN INDEPENDENT REPORT FROM THE DEO.
 - (2) The collegiate Dean's determination shall be based on a thorough evaluation of the faculty member's overall performance, including POST-TENURE REVIEWS AND OTHER METHODS OF PEER EVALUATION.. The responsible departmental executive officer or the collegiate Dean shall fully inform the faculty member of the grounds for the DETERMINATION OF UNFITNESS AND CONTEMPLATED REMEDIES , and shall explore with the faculty member possible settlements which might preclude the necessity for formal University-level action.
 - (3) The collegiate Dean shall notify the Academic Officer of a determination of unfitness by setting forth in writing the specific findings of unfitness, ADDRESSING EACH OF THE STANDARDS SET OUT IN SECTION X (A-D). The Dean's notification shall include a review of the efforts that have been made to resolve the matter within the established procedures of the college in question, AND SHALL INCLUDE A RECOMMENDATION TO THE ACADEMIC OFFICER OF AN APPROPRIATE SANCTION OR REMEDY..
- c. **Formal Notice by Academic Officer.** On receipt of the dean's notification of a determination of unfitness, the Academic Officer shall:
- (1) send to the Presiding Officer a copy of the collegiate dean's notification, A STATEMENT OF RECOMMENDED SANCTIONS OR REMEDIES, INCLUDING ANY ALTERNATIVES TO THOSE RECOMMENDED BY THE DEAN, AND a request that the Presiding Officer appoint a mediator from the Faculty Judicial Commission.
 - (2) send a copy of the collegiate dean's notification to the faculty member, together with a notice that the matter will proceed to mediation, pursuant to the procedures set forth in III-29.8d.
- d. **Mediation.**
- (1) Proceedings will be suspended for twenty days from the date of the Academic Officer's Formal Notice. During this time, the Presiding Officer shall select a mediator from the list of mediators then serving on the Faculty Judicial Commission. The Presiding Officer shall remove from this list any mediator against whose service the Academic Officer or the faculty member shows cause to the satisfaction of the Presiding Officer. Then the faculty member may indicate the order of preference for mediation by each of the mediators remaining on the Presiding Officer's list. The Presiding Officer will make necessary arrangements with the mediator for whom the faculty member indicated first preference. If this individual declines to serve as mediator, the Presiding Officer will contact the person next in the order of the faculty member's stated preference, and so on until a mediator is selected. If none of the mediators can serve, then the mediator shall be selected by agreement of the faculty member and the Academic Officer. If the Presiding Officer determines that no agreement can be reached, then the Presiding Officer shall select randomly three members of the Faculty Judicial Commission who qualify and are available for such service, placing them on the list of potential mediators. The faculty member and the Academic Officer each may make one peremptory challenge, after which the Presiding Officer shall appoint as mediator that individual remaining on the list, or, if more than one

individual remains on the list, the Presiding Officer shall select the mediator randomly from those remaining.

- (2) Parties. The Academic Officer and the faculty member shall be the parties to the mediation.
 - (3) Mediation shall begin at any time after twenty days after the date of the Academic Officer's Formal Notice. Mediation must be completed or declared unsuccessful by the mediator within thirty days after mediation begins.
 - (4) Preliminary Matters. The Mediator shall meet with the parties at the outset of the mediation to establish the procedures under which the mediation will be conducted.
 - (5) At the conclusion of the mediation, the mediator shall submit a report to the Academic Officer and the Presiding Officer, with copies to the parties involved. Such report shall state only whether the matter was settled or not settled, and if settled, the mediator shall attach to the report a copy of the settlement agreement which shall be signed by the parties.
 - (a) Any settlement achieved through the mediation shall be implemented by the appropriate administrative officers and the case will then be closed. Such settlement shall remain confidential unless the faculty member and the Academic Officer agree otherwise.
 - (b) If the mediator reports that no settlement was achieved, the Academic Officer may, at his or her discretion, dismiss the case or notify the Presiding Officer that a faculty panel will have to be appointed to investigate and decide the case. This notification shall include a summary of actions in the case that occurred since the date of the Formal Notice, AND A STATEMENT OF THE ACADEMIC OFFICERS PROPOSED SANCTION OR REMEDY.
- e. Faculty Panel Appointment. The Presiding Officer shall appoint a faculty judicial panel to review and decide the case. In its discretion, the faculty judicial panel may seek the assistance of the Investigating Officer in investigating the Formal Notice prior to holding a hearing.
- f. Hearing.
- (1) The Investigating Officer shall assist the faculty judicial panel as necessary in obtaining, with notice to the faculty member and the Academic Officer, any non-testimonial evidence the panel may desire before proceeding to hearing. The Investigating Officer also shall assist the panel in making arrangements for the hearing and shall have other duties as described below.
 - (2) Open Hearing. The hearing shall be open unless:
 - (a) both the Academic Officer and the accused faculty member request that it be closed, in which case it shall be closed; or
 - (b) it is necessary to close the hearing temporarily to preserve the confidentiality of documents or other matters or to protect witnesses who fear reprisals.

The decision to close the hearing for any of the reasons specified in this paragraph shall be made by the Investigating Officer in consultation with the panel.
 - (3) Recording. The hearing shall be recorded by videotape and may also be recorded by a stenographic reporter, as the panel may decide. The record of the hearing may, at the discretion of the panel, exclude the discussion of procedural matters. The Investigating Officer shall ensure that the recording process maintains the confidentiality of the proceedings, and that the resulting videotape is maintained in a secure manner, protecting its confidentiality. If either party requests a transcript, that party shall bear its cost. If the panel requests a transcript, the office of the Investigating Officer shall bear its cost.
 - (4) Refusal to Testify. A faculty member against whom a charge has been brought has the right to refuse to testify or even to appear at a hearing on the case. Such a refusal to testify or to appear shall not be taken as indicative of guilt and shall not prejudice the faculty member's case in any way.

- (5) **Sequestration of Witnesses.** Any witness other than the faculty member or the Academic Officer shall be sequestered from the hearing until such witness has completed testifying unless the panel, in the interests of justice, objects to such sequestration.
- (6) **Rights of the Parties.** Subject to the Investigating Officer's power to control the hearing, described in paragraph (7) below, the accused faculty member may be accompanied by another faculty member of his or her choice, AND/OR BY LEGAL COUNSEL, subject to paragraph (5) above, regarding sequestration of witnesses. In addition, the Academic Officer and the accused faculty member shall have the following rights:
- (a) to decide which witnesses to call to testify on behalf of that party;
 - (b) to present evidence through the testimony of a party's own witnesses;
 - (c) to present any other relevant evidence;
 - (d) to cross-examine any witness called by the other party;
 - (e) to make an opening statement before and a closing statement after the presentation of evidence;
 - (f) to submit a written argument at the conclusion of the presentation of evidence; and
 - (g) to be consulted and to present oral and/or written argument for the purpose of influencing any decision made by the Investigating Officer in the exercise of the Investigating Officer's power to control the hearing.
- (7) **Investigating Officer.** The Investigating Officer shall have the power to control the hearing, in consultation with the panel, including but not limited to the power:
- (a) to ask questions of any witness called by either party;
 - (b) to limit the presentation of evidence on grounds of irrelevancy or redundancy when necessary to avoid an excessively long hearing, but the investigating officer shall not exclude evidence on the basis of formal rules of evidence which would govern a judicial proceeding;
 - (c) to limit the length of opening and closing statements;
 - (d) to limit the length of any written arguments submitted;
 - (e) to limit the time after the conclusion of the presentation of evidence for submission of written arguments;
 - (f) to set the date, time, and place for conducting the hearing, including the beginning, ending, adjournments, and any reopenings, in the interest of achieving an expeditious proceeding and accommodating the convenience of the parties;
 - (g) to take such action as seems appropriate to preserve the confidentiality of marked documents or other confidential matters to the maximum extent possible consistent with a full opportunity of each party to present and hear relevant evidence; and
 - (h) to sequester witnesses, pursuant to paragraph (5) above.
- (8) **The Panel.** The panel shall have the power:
- (a) to ask questions of any witness; and
 - (b) to make the findings and recommendations and to write the report described below.

(g) **Burden of Proof and Standards of Judgment.** In all cases brought under this section seeking dismissal or termination, the Academic Officer, on behalf of the University, shall bear the burden of proving, by clear and convincing evidence in the record as a whole, the findings of unfitness set forth in the Dean's notification, AND SHALL BEAR THE BURDEN OF PROVING, BY CLEAR AND CONVINCING EVIDENCE IN THE RECORD AS A WHOLE, THAT THE DETERMINATION OF ACADEMIC UNFITNESS INVOLVES NO VIOLATION OF THE ACADEMIC FREEDOM OF THE FACULTY MEMBER.

- h. Report. The panel shall state its findings and make its recommendations in a written report which shall be prepared and sent to the Presiding Officer as soon as possible after the conclusion of the hearing.
- (1) The report shall be written in a manner that satisfies the requirement of protecting confidentiality to the maximum extent possible as provided in III-29.4i.
 - (2) The report shall contain findings of fact and conclusions drawn from those findings. The report shall specify any sanctions OR REMEDIES that the panel recommends, including termination
of appointment, change in the faculty member's assigned duties, or other adjustments in the terms of the faculty member's employment.
 - (3) In preparing its report, the panel in its discretion may seek the assistance of the Investigating Officer.
 - (4) The panel shall send its report and recommendations, if any, to the Presiding Officer. The Presiding Officer then shall send copies of the report to the faculty member, the President, the Academic Officer, and the Investigating Officer.
- i. President's Review. The President shall determine what action, if any, the University shall take, based on the panel's findings and recommendations. The President may seek advice of counsel concerning the decision, but the Office of General Counsel shall not provide that advice if it had previously advised the Academic Officer or the University Representative concerning the matter.
- (1) Basis for President's Decision. The President's decision shall be based on all documents, testimony, and other matters presented to the panel. The President shall not hold a hearing, but may meet with the panel. Furthermore, either party may submit a brief to the President within ten business days of receiving notice that the Presiding Officer has transmitted the panel's report to the President. In making the decision, the President shall be bound by the burden of proof and standard of judgment stated in PARAGRAPH G above.
 - (2) President Accepts All Findings and/or Recommendations. If the President accepts all of the panel's findings and/or recommendations for sanctions, the President shall direct that the panel's recommendations be implemented. The President shall so inform the Presiding Officer in writing, and shall send a copy thereof to the panel members. The Presiding Officer shall send copies of the President's final decision to the faculty member, the departmental executive officer, the collegiate dean, the Academic Officer, the University Representative, each of the members of the panel, and the Investigating Officer. The case will then be closed.
 - (3) President Does Not Accept the Panel's Findings and/or Recommendations. If the President does not accept one or more of the findings and/or recommendations of the panel, the President shall inform the panel members in writing of the reasons for not accepting such finding(s) and/or recommendation(s) and shall send a copy thereof to the faculty member, the Academic Officer, the Presiding Officer and the Investigating Officer. Within five days of receiving the President's decision, the faculty member and the Academic Officer each may submit a brief to the Investigating Officer for the panel's consideration. The Investigating Officer shall send copies of any brief so submitted to the opposing party, each member of the judicial panel and the Presiding Officer. The panel then shall reconsider its findings and recommendations and shall report the result of its reconsideration to the President in a supplementary written report. The panel shall send copies of its report to the parties, the Presiding Officer and the Investigating Officer. The panel shall respond within ten business days of the date on which the panel's chair receives the President's letter or the parties' briefs, whichever is later. Within five days of receiving the panel's report, the faculty member and the Academic Officer each may submit a brief to the President, with copies to the opposing party, the Presiding Officer and the Investigating Officer. The President then shall make a final decision on the matter. In making this final decision, the President shall give great weight to the views of the panel.

(a) **President Rejects all Findings and/or Recommendations.** If, after panel reconsideration, the President rejects all of the panel's findings and/or recommendations for sanctions, the President shall inform the panel members in writing of the final decision and of any additional reasons supporting the decision and shall send a copy thereof to the Presiding Officer. The Presiding Officer shall send copies of the President's final decision and reasons to the faculty member, the departmental executive officer, the collegiate dean, the Academic Officer, the University Representative, each of the members of the panel, and the Investigating Officer. The case will then be closed, subject only to a decision by the Board of Regents to grant the faculty member further review.

(b) **After Panel Reconsideration, President Accepts At Least One, But Not All, Findings and/or Recommendations.** If, after panel reconsideration, the President accepts at least one, but not all, of the panel's findings and/or recommendations for sanctions, the President shall direct that those recommendations that the President accepts be implemented. The President shall inform the panel members in writing of those findings and/or recommendations that the President accepts, and of those that the President does not accept, and of any additional reasons supporting the decision. The President shall send a copy of the decision to the Presiding Officer. The Presiding Officer shall send copies of the President's final decision to the faculty member, the departmental executive officer, the collegiate dean, the Academic Officer, the University Representative, and the Investigating Officer. The case will then be closed, subject only to a decision by the Board of Regents to grant the faculty member a request for review with regard to those findings and/or recommendations not accepted by the President.

(j) **NEW. APPEAL TO THE BOARD OF REGENTS IN A CASE OF TERMINATION FOR ACADEMIC UNFITNESS. ANY TENURED FACULTY MEMBER TERMINATED FOR ACADEMIC UNFITNESS SHALL HAVE THE RIGHT OF APPEAL TO THE BOARD OF REGENTS.**