

TO: FACULTY ASSEMBLY
FROM: EXECUTIVE COMMITTEE
DATE: NOVEMBER 16, 2015
RE: PROPOSED AMENDMENTS TO THE FACULTY HANDBOOK

As discussed at the October meeting, the Personal Policy Committee (“PPC”) has approved changes to the Faculty Handbook and a new Faculty Discrimination, Harassment, and Retaliation Grievance / Complaint Procedure. This memo reflects the views of the Executive Committee on this proposal.

Suggested Motions for November 17 Meeting

The Executive Committee is not making a formal recommendation either for or against the proposal. In order to bring the PPC proposal before us, however, the Executive Committee suggests the following motions at the November 17 meeting:

Suggested Motion #1: “On October 13, 2015, the Provost communicated to the President of the Assembly certain proposed amendments to the Faculty Handbook and a proposed Faculty Discrimination, Harassment, and Retaliation Grievance / Complaint Procedure as approved by the Personnel Policy Committee. I move that the Faculty Assembly approve and adopt both the proposed amendments and the proposed procedure.”

This motion would then require a second. At that time, the PPC proposals would be before the Assembly for debate and further amendment.

The Executive Committee has suggested some specific modifications to the Handbook and to the proposed procedure. These modifications are set forth in in the Appendix to this memo. The Executive Committee suggests the following motion for the November 17 meeting:

Suggested Motion #2: “I move that the motion before us be amended as set forth in the Appendix to the November 16 memo that Faculty Assembly received from the Executive Committee.”

This motion would require a second and would modify the initial proposal upon a majority vote of those present. Doing so *only modifies* the initial motion; it still needs

approval. Under the Handbook, 2/3 of the membership of the Faculty Assembly (i.e., 14 members) must approve the PPC proposal.

Further Motions to Amend

Members of the Faculty Assembly are free to propose additional motions to amend the proposal. Such motions would require a second and would need a majority vote to modify underlying motion. Again, successful motions to amend do not result in the approval of the proposal; they simply modify what will come up for the ultimate 2/3 vote.

Secret Balloting

The Executive Committee believes that the ultimate vote on the proposal should be by secret ballot. Under the bylaws, 5 members of the Assembly can demand a secret ballot.

Discussion of Appendix

The Appendix addresses one issue we have previously discussed. Definitions of misconduct should be contained in either the Handbook or the new Procedure. They should not be contained in external College policies.

Since the last meeting, the Executive Committee has discussed and approved additional changes contained in the Appendix.

- a) The current proposal does not clearly designate whether the Handbook or the new Procedure applies to claims of retaliation. The Appendix attempts to address this problem via a change to the Procedure, stating that it applies to retaliation only if the Procedure applies to the initial claim. (E.g., retaliation against a sexual harassment claim is covered by the Procedure; retaliation in for claiming a procedural defect in a promotion denial case is not.)
- b) The proposed Procedure empowers new committees to mandate training for behavior that is not misconduct but that violates “university expectations.” The Appendix eliminates this power.

Remaining Issues

The Executive Committee did not attempt to resolve every issue that we discussed at the October meeting of the Assembly. Moreover, the modifications in the Appendix may not adequately clarify the whether the Handbook or the proposed procedure applies to claims of retaliation.

- a) *Standard of Review*: Should Faculty Assembly insist on a clear-and-convincing standard for all cases? The Executive Committee considered language that would apply the preponderance-of-evidence standard only to cases involving students. However, Kiersten Boyce informed us that the DOE does have jurisdiction over claims brought by students, faculty, and staff. Thus, we have not distinguished student claims from faculty/staff claims.
- b) *Right to Counsel*: The proposed procedure allows both the accuser and accused to bring a silent supporter to any hearings (including a lawyer). Thus, the lawyer would not actively participate as one would in a courtroom.
- c) *Right to Confront and Cross-Examine Witnesses*: The proposed procedure eliminates the right to confront and cross examine witnesses. Currently, the Handbook allows for this.
- d) *Retaliation*: The amended Handbook refers the reader to the new procedure for claims of discrimination or harassment, but there are no changes to the Handbook's retaliation provisions. Both the proposed procedure and the Handbook seem to cover retaliation claims. We believe that the PPC's intent was for retaliation to go to the new procedure if the underlying claim is under the new procedure (e.g., retaliation against harassment claim) but would stay under the Handbook otherwise (e.g., retaliation against claim of procedural defect in a promotion case). Cf. Handbook Sections III(F)(1)(b)(ix) (defining retaliation); III(F)(1)(d) (identifying retaliation as misconduct); III(F)(4) (setting forth procedures dealing with "Incompetence, Neglect of Duty, or Misconduct").

APPENDIX
MODIFICATIONS TO THE PROPOSED AMENDMENTS TO THE FACULTY HANDBOOK

The Faculty Assembly adopts the amendments to the Faculty Handbook, as proposed by the Personnel Policy Committee, subject to the following modifications:

Handbook Modification #1:

Text: PPC’s Proposed Amendment #3 is amended by striking the words “the procedure for investigation of discrimination complaints” and replacing them with “the Faculty Discrimination, Harassment, and Retaliation Grievance / Complaint Procedure”.

Explanation: The stricken language is vague, and the modification identifies the appropriate procedure.

Handbook Modification #2:

Text: PPC’s Proposed Amendment #4 is amended by striking the words “the College procedures for investigating discrimination” and replacing them with “the Faculty Discrimination, Harassment, and Retaliation Grievance / Complaint Procedure”.

Explanation: The stricken language is vague, and the modification identifies the appropriate procedure.

**MODIFICATIONS TO THE PROPOSED FACULTY DISCRIMINATION, HARASSMENT,
AND RETALIATION GRIEVANCE / COMPLAINT PROCEDURE**

The Faculty Assembly adopts the Faculty Discrimination, Harassment, and Retaliation Grievance / Complaint Procedure as proposed by the Personnel Policy Committee (the “Proposed Procedure”), subject to the following modifications:

Proposed Procedure Modification # 1:

Text: Section III of the Proposed Procedure is amended to read as follows in its entirety:

III. Definitions

Irrelevant personal factors are race or color, citizenship, national origin or ethnicity, ancestry, religion or creed, political affiliation or belief, age, sex or sexual orientation, gender identity or expression, physical or mental disability, marital status, pregnancy status, parental status, height, weight, military service, veteran status, caretaker status, family medical or genetic information,

Discrimination consists of any conduct directed against a person because of the person's irrelevant personal factors where the conduct deprives the person of any benefit or advantage at the College. **Harassment** consists of unwelcome, offensive verbal or physical conduct based on a person's irrelevant personal factors where

- ▯ • submission to the conduct is made or threatened to be made the basis for an evaluation, employment or other College decision affecting that person; or
- the conduct creates an intimidating, hostile or offensive work or study environment, such that a reasonable person, similarly situated, would consider it sufficient to interfere with academic, educational, or employment performance or participation in a College program or activity or residential environment.

Retaliation, under this procedure, refers to any action taken by the College or by a faculty member or group of faculty members against an individual or individuals because the latter have, in good faith, made or provided evidence in support of an allegation otherwise covered by this procedure.

Good faith means honest belief. Good faith does not include reckless disregard for or willful ignorance of facts that would disprove the allegation.

Misconduct is any form of discrimination, harassment, and retaliation, including sexual harassment, sexual misconduct, discriminatory harassment on the basis of irrelevant personal factors or other reported violations investigated under this procedure.

Report is any complaint, report, allegation, accusation, or grievance of misconduct.

Reporting party refers to the person who was discriminated or retaliated against, harassed, assaulted, or otherwise personally and directly experienced

the misconduct. See Section IV(A) for third-party reports.

Respondent means the person named, suspected, accused, or alleged to have engaged in misconduct. Reports may have multiple respondents.

Review Team is the body that initially reviews a report to make initial determinations as to mandatory reporting and processing of the report, as described in Section V.

Definitions of **sexual misconduct** (including sexual assault and other forms of sexual violence) can be found in the Sexual Misconduct Policy.

Explanation: The changes are intended to define misconduct directly, rather than relying on external procedures to do so. This change would simplify the Proposed Procedure and ensure that faculty (via the Faculty Assembly) have the power to review and approve any future changes to the definitions of misconduct.

Proposed Procedure Modification #2:

Text: Section IV of the Proposed Procedure is amended by striking Section IV(D) (Retaliation) and renumbering Section IV(E) (Relationship to Criminal Proceedings) accordingly.

Explanation: The Proposed Procedure contains an ambiguous and overly broad definition of retaliation. Not all forms of retaliation should be covered by the Proposed Procedure (e.g., if the retaliation relates to a claimed failure to follow procedures in a retention / tenure / promotion case). Modification #1 defines retaliation and limits it to cases in which retaliation relates to claims otherwise covered by the Proposed Procedure.

Proposed Procedure Modification #3:

Text: Section V(A) of the Proposed Procedure is amended by striking the following language:

- Remedial but not disciplinary action. Remedial actions may include remedies offered to the reporting party as well as actions designed to address possible areas of concern such as educational or awareness activities, targeted training, or increased oversight of specific departments or activities. This course of action may be appropriate for reports that do not have sufficient information to initiate an investigation, reports where the person reported to have experienced the misconduct has requested

no investigation and the Team’s assessment concludes that this request may be honored, or reports that do not allege conduct that violates applicable university policy but do allege conduct not consistent with university expectations, such as harassing conduct that has not become severe or pervasive enough to create a hostile environment.

Furthermore, Section V(B) of the Proposed Procedure is amended by striking the following language:

- Remedial but not disciplinary action. Remedial actions may include remedies offered to the reporting party as well as actions designed to address possible areas of concern such as educational or awareness activities, targeted training, or increased oversight of specific departments or activities. This course of action may be appropriate for reports that do not have sufficient information to initiate an investigation, reports where the person reported to have experienced the misconduct has requested no investigation and the Equity Review Team’s assessment concludes that this request may be honored, or reports that do not allege conduct that violates applicable university policy but do allege conduct not consistent with university expectations, such as harassing conduct that has not become severe or pervasive enough to create a hostile environment.

Explanation: The stricken language is vague and potentially arbitrary as it turns on “university expectations.” Moreover, it does not fit within the scope of the Proposed Procedure (which focuses on disciplinary action).

Proposed Procedure Modification #4:

Text: Section XI of the Proposed Procedure is amended by inserting the following language at the end of the section:

This Procedure shall be interpreted for consistency with applicable laws and regulations and with the Faculty Handbook. In the event of a conflict, applicable laws and regulations and the Faculty Handbook shall control.

Persons acting under this Procedure shall also give consideration to other policies of the College (including its Discrimination Policy and Sexual Misconduct Policy). In the event of a conflict, however, this Procedure shall control.

ACTIONS NON-SEVERABLE

The approval of the proposed amendments to the Faculty Handbook and of the Proposed Procedure constitutes a single, non-divisible undertaking.