

## MEMORANDUM

To: Professor Aaron Cramer  
Chair  
University Senate Council

From: Michael P. Healy  
Chair  
Senate Advisory Committee on Privilege and Tenure (SACPT)

Date: June 30, 2020

RE: Report of SACPT Activities for 2019-2020

In accordance with Senate Rule 1.4.4.2.2.6, I am submitting this annual report of the activities of the SACPT for the 2019-2020 academic year.

The Committee considered two cases involving the application of subsection 1 of Senate Rule 1.4.4.2.2.2.1 ("Dismissal from employment"). That subsection involves "cases of termination of appointment for cause of a tenured faculty member arising from allegation of incompetency, neglect of or refusal to perform his/her duty, or for immoral conduct (KRS 164.230)." These cases concerned [REDACTED], members of the [REDACTED]. In each case, the SACPT reviewed documents related to the conduct of each faculty member, including the "Provost's Statement of Charges" against each faculty member, the July 24, 2019, Report of the Investigation Committee, the Appendices to that investigation report, and each faculty member's Response to the Investigation Report. On October 31, 2019, the SACPT met separately with each faculty member. The lawyers representing the faculty members and the University also attended each of the two meetings. The SACPT then met with [REDACTED], the three members of the Investigation Committee, on November 7, 2019. On January 9, 2020, the SACPT recommended unanimously in separate memoranda to President Capilouto that dismissal proceedings should be undertaken against [REDACTED]. Professor Jennifer Bird-Pollan, then Chair of the Senate Council, received copies of the documents related to these cases.

The Committee considered the appeal of [REDACTED]. [REDACTED] brought this case to the attention of the Chair of the SACPT on April 1, 2020, after [REDACTED] resigned [REDACTED] position at the Department's clinic at Turfland Mall in mid-March. I am including as an addendum to this report a memorandum to the file that summarizes how this appeal, which has been resolved informally, proceeded. Professor Jennifer Bird-Pollan received copies of the documents related to this case.

The Chair was also contacted about two other potential cases. In mid-December, Professor Bird-Pollan introduced me via email to [REDACTED]. [REDACTED] had concerns about [REDACTED] tenure process. We met informally in December to discuss [REDACTED] concerns. I communicated with [REDACTED] by email in mid-January expressing my opinion, based on the applicable rules and an opinion of the University's General Counsel (in an unrelated matter), that the SACPT does not have jurisdiction in a tenure case until a final decision has been made. There has not been any new development in this matter.

The other matter was raised by an email from [REDACTED] that I received on this past Friday, June 26, 2020. [REDACTED] claims that at a faculty meeting on April 22, 2020, [REDACTED] violated [REDACTED] right to free speech under the First Amendment to the U.S. Constitution. [REDACTED] is asking that the SACPT act pursuant to Senate Rule 1.4.4.2.2.4 ("Issues of Privilege as Scholars"). I have informed [REDACTED] that the Committee will consider his claim and decide how it will proceed. In short, this matter is not resolved.

# ADDENDUM

## MEMORANDUM

TO: The File

FROM: Michael P. Healy  
Chair  
Senate Advisory Committee on Privilege and Tenure

DATE: June 30, 2020

RE: [REDACTED]  
[REDACTED]

In this memorandum, I will describe the appeal brought by [REDACTED] the Senate Advisory Committee on Privilege and Tenure's (SACPT's) consideration of that appeal pursuant to the University's Governing Regulations and the University Senate Rules, and the resolution of the matter.

[REDACTED]

On April 1, [REDACTED] who had an appointment as an [REDACTED] [REDACTED] contacted the SACPT. Dr. Meek had served as an [REDACTED] [REDACTED] had previously contacted Dr. Jennifer Bird-Pollan, Chair of the University Senate Council, who suggested that [REDACTED] contact the SACPT.

[REDACTED] contacted the SACPT because [REDACTED] believed that [REDACTED] was effectively forced to resign [REDACTED] position in the Department when [REDACTED] was told that [REDACTED] was required to continue working at [REDACTED] without proper personal protective equipment (PPE), despite the significant risks of exposure to Covid-19 at [REDACTED] age [REDACTED] [REDACTED] had at that time great anxiety that, without having access to masks and other protective equipment, [REDACTED] would be infected by the novel coronavirus and also expose others to the virus including [REDACTED] elderly parents for whom [REDACTED] provided care.

[REDACTED] stated in [REDACTED] email that [REDACTED] decided to resign [REDACTED] position in a meeting with [REDACTED] on March 18, 2020, because (1) [REDACTED] was fearful about the risks of exposure to COVID-19 as a result of working [REDACTED] without proper PPE and (2) [REDACTED] supervisor told [REDACTED] that the provision of clinic care through the use of telemedicine was not possible. Soon after [REDACTED] resignation, the clinic moved to the use of telemedicine for regular clinic appointments. [REDACTED] believed that [REDACTED] supervisor must have been considering the use of physically distant medical practice at the clinic before the new policy was announced

and that [REDACTED] supervisor should have told [REDACTED] that this new policy was being considered, presumably because of the serious exposure concerns raised by [REDACTED] and possibly others. Viewed in this light, the supervisor's conduct could be seen as a constructive discharge or termination of [REDACTED] employment. That is, the supervisor may have known or had reason to know that [REDACTED] who was nearing the time when [REDACTED] planned to [REDACTED], would resign based on the imposition of conditions of employment that [REDACTED] would consider unacceptable.

[REDACTED] had communicated with the [REDACTED] before initiating [REDACTED] appeal and requested that [REDACTED] resignation be rescinded, when [REDACTED] learned that telemedicine had been approved for the [REDACTED]. The Department declined to rescind [REDACTED] retirement. [REDACTED] informed the SACPT that [REDACTED] is seeking reinstatement as an [REDACTED] so that [REDACTED] would be able to retire, as [REDACTED] had planned, after completing the seventy days or so of work necessary before [REDACTED] retirement, initially planned for August 17, 2020.

#### B. Determination of SACPT Jurisdiction and Request for a Response from [REDACTED]

With this initial understanding of the appeal presented by [REDACTED] the SACPT considered whether the case was within the jurisdiction of the SACPT. The jurisdiction of the SACPT is defined by the provisions of the University's Governing Regulations and Senate Rules.

For a faculty member who, like [REDACTED] is employed on a non-tenure basis through the use of annual contracts, there are two procedures for the termination of an employee's employment at the University. First, there is the relatively difficult process of termination for cause. The reasons and process for termination of employment are set forth in Governing Regulation (GR) X.B.1.f. In relevant part, that regulation provides:

##### f. Termination of Appointment

###### (1) Reasons for Termination

Except in cases of financial emergency, the termination of a tenured appointment or the dismissal of a person prior to the expiration of a non-tenured appointment shall be, in accordance with KRS 164.230, only for reasons of incompetence, neglect of or refusal to perform duties, or for immoral conduct.

...

###### (2) Procedure

Dismissal of a faculty member with tenure or of a non-tenured faculty member before the end of a specified term of appointment shall be preceded by discussions between the faculty member and the appropriate administrative officer or officers looking toward a mutual settlement. In the event of failure to agree upon settlement, the Provost shall be responsible for the preparation of a reasonably detailed statement of charges which shall

be furnished to the faculty member and the University Senate Advisory Committee on Privilege and Tenure. The committee shall make an informal investigation for the purpose of attempting to affect a resolution and, in the case of failure, shall recommend to the President whether, in its opinion, dismissal proceedings should be undertaken. Its opinion shall not be binding upon the President.<sup>[1]</sup>

...

██████████ case surely did not involve this required procedure and did not involve the articulation of reasons necessary for for-cause termination. If ██████████ supervisors had not been satisfied with ██████ performance, they did not take the steps needed to terminate ██████ employment for cause.

The Governing Regulations define another method for ending the employment relationship with a person who has a non-tenured appointment. GR X.B.1.e provides that an employee who is working pursuant to an annual contract may not be offered a new contract. That regulation, however, requires that an employee receive notice of the award of a terminal contract. For an employee, such as ██████████ who has been employed by the University for more than two years, the notice of non-renewal must be at least twelve months. GR X.B.1.e also provides for appeal to the Provost or to the SACPT “concerning procedural matters, privilege, or allegations of violation of academic freedom” in the case of the award of a terminal contract or related issues. The regulation provides that the SACPT may consider the appeal if it is brought within sixty days of notice of non-renewal of the contract. GR X.B.1.e provides:

e. Notification of Non-Renewal of Appointment: Non-Tenured Appointments

Part-time, visiting, or temporary faculty appointments have explicit one (1) year or less terminal dates that terminate at the expiration of the term without notice.

For those employed year-to-year on a fiscal or academic year basis, notification of non-renewal of appointment at the end of the first year of service shall be given not later than March 1 if the appointment expires at the end of that year or three (3) months in advance if the one-year appointment terminates during the academic year. Notification of non-renewal of appointment at the end of the second year of service shall be given no later than December 15 if the appointment expires at the end of the year or six (6) months in advance if the appointment expires during the year. Notification of non-renewal of appointment after more than two (2) years of service shall be given at least twelve (12) months before expiration of appointment. Non-renewal decisions concerning regular, full-time faculty members shall be reported to the Board of Trustees.

Any related appeal(s) to the Provost concerning procedural matters or privilege and/or to the University Senate Advisory Committee on Privilege and Tenure concerning

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<sup>1</sup> Senate Rule 1.4.4.2.2.1 ("Dismissal from employment") also provides for SACPT review in dismissal cases.

procedural matters, privilege, or allegations of violation of academic freedom must be initiated in writing by the concerned faculty member within sixty (60) days after being notified in writing by the dean about non-renewal of appointment.<sup>[2]</sup>

Regarding ██████ case, one may understand this regulation as providing the department with the procedure for terminating the employment relationship, based on dissatisfaction with performance when there is an insufficient basis for for-cause termination. ██████ was not under the terms of a terminal contract. Even if ██████ was to have been offered such a contract, ██████ employment would have extended for another year under this rule.

The Department, of course, did not take action to terminate ██████ employment under either of the two procedures just described. Rather, ██████ resigned ██████ position. GR X.B.1.h addresses a faculty member's resignation and provides:

#### h. Resignation

Notice of resignation should be given early enough to reduce serious inconvenience to the University. If faculty members desire to terminate existing appointments or to decline renewals in the absence of notices of non-renewal, they shall give written notice of no less than three (3) months if their rank is instructor or assistant professor, and no less than four (4) months if their rank is higher, before the end of their duties during the academic year (exclusive of a summer session) or thirty (30) days after receiving notification of the terms of their appointments for the coming year, whichever date occurs later. However, they may request in writing a waiver of this requirement in cases of hardship or in situations where they would otherwise be denied substantial professional advancement. Resignations of regular, full-time faculty members shall be reported to the Board of Trustees.

This provision permits a faculty member to resign her or his position at the University, but also protects the University against a resignation that is given with little or no notice and, as a result, harms the interests of the University. The rule also provides an exception that allows little or no notice from the employee "in cases of hardship." Unlike the two termination provisions discussed previously, GR X.B.1.h does not offer ██████ procedural protections regarding resignation and provides no role for the SACPT.<sup>3</sup>

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<sup>2</sup> Senate Rule 1.4.4.2.2.2.2 ("Violation of academic freedom or insufficient notice of nonrenewal") also provides for SACPT review in nonrenewal cases.

<sup>3</sup> The resignation provision does state that the resignation must be in writing. The hardship exception provides that the request for an exception to the notice requirement must itself be in writing. As the text discusses, these provisions appear to be intended to protect the University, rather than the resigning employee. In this case ██████ resigned orally, although ██████ did seek the rescinding of her resignation by email. Because there is no provision for SACPT review of a resignation, the SACPT has no role in evaluating the sufficiency of the resignation.



had reviewed ██████ appeal and was initiating the process of “informal vetting” by requesting a response to the appeal. The Committee asked the Department to provide any information that it wished to provide to the Committee in order to facilitate an informal resolution of the matter. The Committee also informed the Department that, if a meeting with the Committee and ██████ were preferred, we would seek to schedule a meeting.

#### C. Response from the ██████

On April 30, ██████ provided the Committee with information for its consideration. This information contradicted the allegations underlying the appeal presented by ██████ position was that the Department had acted properly, that ██████ had acted unprofessionally, and that the Department had properly declined when ██████ asked to rescind ██████ decision to resign ██████ position.

After reviewing the response presented by ██████ the SACPT provided ██████ with the response of ██████ and asked if ██████ wished to provide the Committee with additional information in support of ██████ appeal or to reply to ██████ response. The SACPT also asked whether ██████ wished to meet informally with the Committee and the Department before the Committee makes a final decision on the appeal.

#### D. Reply of ██████

██████ decided to present a reply to the SACPT and to meet informally with the Committee and representatives of the ██████ ██████ who presented ██████ reply on May 12 and attended the informal meeting on May 15. The Chair of the SACPT informed William Thro, the University's General Counsel, that ██████ would be represented by a lawyer at the informal meeting. Ms. Marcy Deaton, Senior Associate Counsel, attended the informal hearing at the request of Mr. Thro.

#### E. The Informal Meeting

On Friday, May 15, at 2 pm, the SACPT met informally with ██████ ██████ about ██████ appeal. The meeting was held through the use of the Zoom remote-meeting platform because of the social distancing rules necessitated by the novel coronavirus pandemic. After brief introductions, ██████ presented an opening statement on behalf of ██████ ██████ then answered questions presented by the SACPT. ██████ then presented the SACPT with their understanding of the facts and answered questions presented by the SACPT. ██████ then provided the SACPT with ██████ concluding remarks. The informal meeting ended and the SACPT met to discuss how to proceed.



## F. Informal Resolution of the Appeal

On Monday, May 18, the SACPT provided the meeting participants with a post-meeting status report. The Committee notified the participants of its intent to “proceed[] according to the procedure defined by Senate Rule 1.4.4.2.2.4. The next step is for the Committee, ‘[w]ith copy to the petitioner, [to] submit to the President its analysis of the alleged violations and [to] recommend to the President what commensurate remedial action, if any, ought to be taken.’ The Committee expects to have this memorandum reviewed and completed for submission to President Capilouto on Tuesday, May 26.” The SACPT concluded this status report by stating that:

Senate Rule 1.4.4.2.2.4 provides that the parties may informally resolve the appeal so that a memorandum to the President is not necessary. If the Committee is notified prior to 5 pm on May 26 that the case has been informally resolved or that there is progress toward informal resolution, the Committee will refrain from presenting its recommendation to the President.

On May 26, Ms. Deaton informed the Committee Chair just before 4 pm that the University was negotiating an informal resolution of ██████ appeal and requested that the Committee refrain from presenting its recommendation to President Capilouto. Submission of the recommendation was accordingly suspended. Just after 4 pm on May 29, Ms. Deaton informed me that the University "reached an agreement with ██████ that resolves this matter satisfactorily for all parties." Because of this resolution of the appeal, the SCAPT, in accordance with Senate Rule 1.4.4.2.2.4, did not submit a recommendation to President Capilouto regarding the appeal.