



320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

March 12, 2019

ROBERT MAY
Chair, Academic Council

Subject: Proposed amendments to Academic Senate Bylaw 336

Dear Robert,

On February 25, 2019, the Divisional Council (DIVCO) of the Berkeley Division considered the proposal cited in the subject line, informed by commentary of our divisional committees on Faculty Welfare (FWEL), Privilege and Tenure (P&T), and Rules and Elections (R&E). Given the extent of the commentary, including specific textual suggestions, the reports are appended in their entirety.

DIVCO appreciates both the seriousness of sexual violence/sexual harassment (SVSH) complaints, and the inadequacies of UC processes and procedures that led to the California State Auditor's (CSA) recommendations, and ultimately to the proposal under consideration. We believe that campuses should do a better job responding to, investigating, and adjudicating complaints in a timely fashion. That said, DIVCO and the reporting committees identified a number of serious concerns about the proposed bylaw revisions.

While the proposal reflects the Regents' and President's directive to the Senate, we believe that the CSA recommendations should not have been accepted and imposed on the Senate *without consultation*. As a result, it is clear that the Regents' and President have committed the Senate to an untenable position. We believe the Senate should not agree to codify unrealistic timelines and expectations in its bylaws.

Each of the reporting committees raise substantive concerns that the proposed timeline and scheduling expectations will erode the due process rights of accused faculty members, and potentially undermine the credibility of the proceedings in the appeal process. The P&T report describes in detail its concern about the timeline and scheduling—concern informed by its experience conducting disciplinary proceedings. R&E takes exception to the narrow framing of the grounds for granting extensions, that is, “material or unforeseen circumstances related to the complaint and sufficient to justify the extension sought.” R&E points out:

A refusal to grant an extension could lead to a due process violation if the defendant does not have enough time to assemble his or her

defense, such as retaining counsel, securing witnesses, analyzing the facts and law, etc. The proposed deadline here, combined with a standard that could be seen to restrict the granting of extensions, could cause such a due process problem.

We believe the integrity of the disciplinary process should guide reform of our procedures—and by extension, our bylaws. We agree that the Senate should commit to a reasonable timeframe and process for adjudicating SVSH disciplinary cases, but we believe our procedures should be grounded in a commitment to fairness to complainants, as well as due process for the accused.

Accordingly, we recommend (using the delivery of the charges to P&T as a starting point) that the Senate adopt a 30-day timeline for holding a pre-hearing conference, as described in the current bylaw, and a 120-day timeline to begin the hearing. We find the 30-day timeline after completion of the hearing for the panel to submit its recommendation to the chancellor to be reasonable.

We support greater flexibility with respect to the definition of "good cause" for the purpose of granting extensions to the timeline. We agree with FWEL and P&T that the application of the proposed timeline and process to all disciplinary proceedings compounds these serious issues by extending their negative effects to non-SVSH cases. We agree with P&T:

The proposed revisions to the timing and process appear so untenable, however, that we are loathe to extend them, as do the proposed Bylaws, to non-SVSH disciplinary actions for which they have not been mandated.

In sum, DIVCO believes that the Senate should not adopt this untenable position. Instead, the Regents and the President should work with the Senate to develop a reasonable and informed response to the CSA recommendations.

Sincerely,

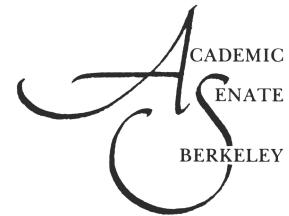


Barbara Spackman
Chair, Berkeley Division of the Academic Senate
Cecchetti Professor of Italian Studies and Professor of Comparative Literature

Encls. (3)

cc: Terrence Hendershott, Kenneth Polse, and Sheldon Zedeck, Co-chairs,
Committee on Faculty Welfare
Marianne Constable, Chair, Committee on Privilege and Tenure
David Milnes, Chair, Committee on Rules and Elections
Andrea Green Rush, Executive Director staffing the Committee on Privilege and Tenure

Sumei Quiggle, Associate director staffing the Committee on Rules and Elections
Sumali Tuchrello, Senate Analyst, Committee on Faculty Welfare



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February 20, 2019

CHAIR BARBARA SPACKMAN
Academic Senate

*Re: FWEL Comments Regarding Proposed Revisions to SV/SH Investigation and
Adjudication Frameworks for Faculty and to Senate Bylaw 336*

Dear Chair Spackman,

The Faculty Welfare Committee met on January 28 and discussed the proposed revisions to the Sexual Violence/Sexual Harassment Investigation and Adjudication Frameworks for Faculty and to Senate Bylaw 336. Our first set of concerns involve the implementation of the decision to apply the procedures for disciplinary cases involving Sexual Violence/Sexual Harassment (SV/SH) to all alleged violations of the faculty code of conduct, irrespective of the nature of the violation in question. We do not question the recommendation of the UC Privilege and Tenure (UCPT) committee that it is best to have a uniform procedure because “there would be quite serious difficulties involved in administering two different sets of procedures.” UCPT, Senate Bylaw 336-Reasons for Proposed Revisions (December 11, 2018), at p. 2.

Most of our concerns could be addressed by modifying Bylaw 336.E.2 to give the Chair of the Committee on Privilege and Tenure (P&T) or the Hearing Committee broader discretion to extend a deadline. In addition, we think the language giving P&T the power to suggest mediation should be reinstated for cases in which an extension of the deadline makes mediation feasible. Both changes in Bylaw 336 are intended to cover cases that do not involve an SV/SH violation and in which the accused did not have fair warning of the need to obtain a lawyer or other representation before the disciplinary charge was filed with P&T.

The proposed revisions to Bylaw 336 shortens the time period in which an accused must file an answer from 21 days to 14 days from the date the accused receives the disciplinary charge (Bylaw 336.C.2). New Bylaw 336.C.3 requires the Chair of P&T to contact the accused within five business days after receiving the charge in order to schedule a hearing, and that the accused provide available dates within 14 calendar days after this. New Bylaw 336.E.1 requires that the hearing begin no later than 60 calendar days from the date the disciplinary charge is filed. New Bylaw 336.F.2 requires that within two business days after the hearing is scheduled, the P&T committee establish a case plan for the hearing. This is described as a prehearing letter. New Section 336.F.10 requires that



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the Hearing Committee submit its findings of fact and conclusions within 30 calendar days after the conclusion of the hearing.

These short deadlines make a great deal of sense when the disciplinary charge involves a SV/SH violation because the SV/SH Investigative Process ensures that the accused will have had formal notice of a charge and an opportunity to respond. As a practical matter, this means the accused will have had a fair warning of the need to obtain a lawyer or other representation, if the accused contests the charge or wants assistance and advice to try to negotiate a favorable resolution. The timeframe of the SV/SH investigative process also provides the lawyer, or other representative, an opportunity to investigate the case. Our concern is that there may be cases in which the filing of a disciplinary charge with P&T is the first time an accused receives fair warning of the need to hire a lawyer or other representative. These deadlines do not give the accused in such a case a reasonable period to obtain a lawyer or other representative, and they do not give the lawyer or representative a reasonable opportunity to investigate the case.

Bylaw 336.E.2 allows the Chair of the Committee on P&T or the Hearing Committee to extend any deadline for “good cause shown.” But good cause is defined narrowly to consist only of “material or unforeseen circumstances related to the complaint and sufficient to justify the extension sought.” This language would stretch to cover the case of concern to us if the filing of the charge can be treated as an “unforeseen circumstance.” But this is not a natural or obvious reading of the rule. Our concern could be dealt with by adding a statement that “good cause” includes the absence of fair warning a disciplinary charge could be filed. It would be unnecessary to change the rule in Bylaw 336.D.1 that “negotiations shall not extend any deadline in this Bylaw.” An extension granted because of the absence of fair warning a disciplinary charge could be filed would provide an opportunity for negotiation without a special rule. The deleted paragraph on mediation could then be reinstated perhaps with a proviso that this is feasible only when the deadline has been extended for good cause.

The committee discussed two other sets of concerns in relation to SV/SH and faculty welfare. First, the resources for faculty who are victims rather than perpetrators are much less developed than the resources available for students. Currently, the person a faculty member would most likely to turn to, that is the Faculty Ombudsperson in the Academic Senate, is not considered a confidential resource and does not receive equivalent training in response to that received by the similar resource staff for students and staff. This could be remedied without creating an entire new bureaucracy, by training the Faculty Ombudsperson on SV/SH prevention and intervention tools as part of their overall training, and by making them a confidential resource. This is a fundamental issue of faculty welfare, and we hope the University will respond to it seriously.



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The last issue raised during the meeting was the question of the classroom. Currently, faculty, as mandated reporters, are required to report incidents of SV/SH among students, in any context in which the faculty learn about such incidents, except in a “public” context such as a Take Back the Night rally or during research. In the interest of protecting the classroom as a place for intellectual development and inquiry, we would like the University to provide a similar carve-out from the faculty’s obligation to act as mandated reporters for information received in the course of classroom discussion. This serves as a way of protecting the University’s most vital educational functions from faculty’s other obligations.

Sincerely,

Terrence Hendershott, Co-Chair
Ken Polse, Co-Chair
Sheldon Zedeck, Co-Chair

TH/KP/SZ/st



February 7, 2019

BARBARA SPACKMAN
Chair, Berkeley Division of the Academic Senate

Subject: Committee on Privilege and Tenure commentary on the proposed Bylaw 336 revisions

Dear Barbara,

The Committee on Privilege and Tenure discussed the proposed Bylaw revisions. Those revisions, as you know, speed up the timeline for P&T hearings regarding disciplinary charges, in SVSH and other cases. The revisions come about as a result of the UC President's and UC Regents' acceptance of recommendations by the State Auditor.

We understand the seriousness of SVSH complaints and misconduct and the need for campuses to respond to any such incidents in a timely and responsible manner. We are cognizant of the inadequacies in campus responses that led the State of California to make particular recommendations. We fear that the strict and rapid timeline to which the President and the Regents have committed us, to which our Bylaws must now conform, may be a setup for failure. The integrity of the disciplinary process and the proper functioning of the University must drive revisions in this area, as in others.

P&T disciplinary hearings are formal proceedings in which the administration brings charges against a Senate faculty member, and the P&T panel (consisting of at least three Senate members) serves as neutral adjudicators. Typically, all parties, including P&T, are represented by counsel, and typically all parties attend the entire proceeding. Recent hearings have lasted three to four days.

I. Timeline and Scheduling Problems

Although beginning a hearing within 60 calendar days of when charges are filed may sound reasonable, it is not. The proposed Bylaws establish the following (variously using business and calendar days):

DAY 0 - charges filed

5 (bus days) - P&T offers choice of scheduled dates

14 (cal days) - respondent must answer charges

19 (approx cal days = 5 bus + 14 cal) - parties must answer re: dates

26 (5 more bus days) - P&T must schedule hearing

28 - (2 bus days) P&T sends pre-hearing letter; assume receipt on day 30

40 - first possible day of a hearing (allowing for minimum of 10 calendar days to prepare)

This timeline is incompatible with the academic calendar. A hearing on charges filed July 1, 2019, for instance, the first day that this revision goes into effect, would have to begin between Aug 12 and 30. P&T would have to know by July 8 or 9 (counting 4th of July as non-business day) the full-day availability for hearings (of up to four or five days) and with optional dates, of three hearing panel members for late August, to make scheduling offers to the parties. Likewise charges filed in October would require beginning within five or six weeks, in late November or December, and so forth.

While faculty can of course clear their calendars, establishing through the Bylaws from the start a narrow period in which a hearing must begin is problematic. Faculty must still give priority to their teaching and research and, given various professional obligations, cannot necessarily clear blocks of time in any given two-week period. P&T committee members generally begin their terms at the beginning of Fall, when a mandatory orientation meeting occurs, and many hold nine-month appointments, so cannot be available just anytime.

We further note an ambiguity or loophole in timing: although the Bylaws establish that a hearing "concludes" after the hearing transcript is received (usually two weeks after the actual hearing is held) or after the post-hearing briefs are received (usually two weeks after that), whichever is later, the Bylaws are silent as to what happens once a hearing "begins" within the 60 days. Under these terms, we can envision a hearing that "begins" on a day during the 60 day period and spreads its remaining days over several weeks. Our sense is that it would be preferable to explicitly lengthen the timeframe within which a hearing may begin, so that P&T has the flexibility to hold the hearing as efficiently and as soon as possible, rather than -- as the revisions provide -- scheduling immediately but holding the hearing over an extended period of time (i.e., one day a month for four months).

As to the panelists submitting their report within 30 (calendar) days after the hearing concludes, the academic calendar may again make this difficult for reasons indicated above. Further, as the additional burdens and pressures placed on faculty taking on this important service become known, we anticipate that fewer faculty members will be willing to serve. (P&T does have some ideas about how to make such service more feasible; these include: jury pools whose members could hold particular days each month, to be released if not used; three-year terms on P&T in which members would rotate in and out of hearing service, with possible course relief during (or to make up for time in) year- of hearing service; etc.)

On a final practical note, the compressed schedule requires additional and unpredictably fluctuating staff time and resources for coordinating and communicating

with the hearing panel and other parties in the case, as well as managing logistics, including, distribution of confidential materials, renting rooms and A/V equipment, securing court reporting services and so on, on very short timelines.

The new schedule also, importantly, has *due process implications*. Rushing a case to a hearing and rushing to produce a panel report are not conducive to a full and fair hearing of evidence, which requires preparation, planning and coordination by and among both parties and the panel members -- which counsel for any losing respondents will no doubt point out on appeal. Alternatively, should the process be fair, yet take longer than what the Bylaws mandate, the Senate can be accused of being out of compliance with its own rules (for more discussion of this last point, see below, II.2 and II.3).

II. Additional Substantive Issues

1. Extension to other disciplinary charges. We recognize the justice of treating like cases alike and the cumbersomeness of creating two tracks of disciplinary proceedings, one for SVSH and one for all else. The proposed revisions to the timing and process appear so untenable, however, that we are loathe to extend them, as do the proposed Bylaws, to non-SVSH disciplinary actions for which they have not been mandated.

2. Senate role and authority. We fear that once the requirements are adopted, the failure of P&T hearing panels to meet them will reflect badly on the Academic Senate and will ultimately undermine the Senate's role and authority in disciplinary cases. (In our more cynical moments, some of us even wonder whether the possibility of diminishing the role of the Senate in matters of faculty conduct may even be something that the UC administration has considered, in capitulating as it has to external recommendations.)

The institutional division of labor revealed in the set of proposed documents we have been sent over the last year reinforces our sense of a shift in influence and decision-making away from the Senate and even to some degree away from the campus' academic administration to the Title IX office. The proposed change to the SVSH Investigation and Adjudication Framework (which P&T members received but did not have time to discuss explicitly) makes one change to the SVSH disciplinary process of relevance to our faculty and underscores this point. At present, after Title IX issues its report following a formal investigation, the report goes to a Peer Review Committee who advises the Chancellor or her/his designee (Ch-designee), at our campus, the Vice Provost for the Faculty or VPF, as to appropriate action. (Before 2017, and as is still the case for non-SVSH charges, a faculty investigative committee carried out this role.) The revised Adjudication Framework now requires, in addition, that the Ch-designee (or VPF) consult with the Title IX officer "on how to resolve the matter."

As we mentioned in Fall 2018, in commenting on the then-proposed Presidential Policy on SVSH, the period granted to the Title IX office, whose staff is dedicated to such matters, to deal with complaints is relatively long. *After* initial assessment and the possibility of alternative dispute resolution, the Title IX office has 60 business (not calendar) days to conduct its Formal Investigation which ultimately results in a determination or finding of whether there is probable cause or whether under a

"preponderance of the evidence," it is "more likely than not" that misconduct occurred), after which the Ch-designee (or VPF) has 40 business days to bring charges. By contrast, the Bylaw 336 revision before us restricts the timing of a P&T hearing (which must begin within 60 calendar days and be reported within 30 calendar days of its conclusion) that is staffed by faculty, who have other competing professional obligations and who must make recommendations based on a higher "clear and convincing" standard. P&T's inability to refer to mediation (as per 12/11/18 UCPT letter) and the impossibility of extending hearing deadlines to accommodate negotiations once charges are brought further constrains P&T's role.

3. Assessment and self-study. The CA State Auditor's report recommended that the Senate carry on an annual review and that UCOP "enforce a more prompt adjudication process" if the process takes longer than the Senate's "written requirements" as to "exact time frames" (p. 26). This particular recommendation does not appear in the Bylaw revisions and, as we have pointed out above, we doubt that the Bylaw's proposed time frames can be met -- or enforced. P&T thus suggests, in the spirit of making the best of an unfortunate situation, that rather than waiting for external assessment or audit of compliance by UCOP or the State of California as to how well the Divisional Senates and committees are satisfying the Bylaw requirements, the Senate or Council proactively include in the revised Bylaws additional provisions to the effect that the Academic Council monitor its (or our) own performance. Council should be required, within a particular timeframe, to submit to the Assembly a report assessing how well the revised Bylaws are working and to use such study, if necessary, as a basis for recommending that Bylaw 336 requirements be recalibrated.

III. Drafting Issues

1. 336 B. "Time Limitation" In the context of the rest of the paragraph, the last sentence of the paragraph ("There is no limit on the time within which a complainant may report an alleged violation") appears to apply to both SVSH and non-SVSH allegations. We think it actually came about in 2017 amendments that concerned only SVSH.
2. 336 D. 2. seems to repeat in other words 336 D.1.b. Need to clarify difference between 336.D.1, negotiated settlement, and how or whether D.2. refers to mediation, given UCPT 12/11/18 letter, point II. iv. f, regarding mediation.
3. 336 E.2. definition of good cause as "material or unforeseen circumstances related to the complaint and sufficient to justify the extension sought" is too narrow ("related to the complaint") and does not offer much guidance.

I hope this is helpful to the DIVCO discussions. If you have questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Constable". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Marianne Constable
Chair, Committee on Privilege and Tenure
Professor of Rhetoric



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February 20, 2019

BARBARA SPACKMAN
Chair, Berkeley Division

Re: Proposed revisions to Senate Bylaw 336
(Privilege and Tenure Divisional Committees – Disciplinary Cases)

Dear Chair Spackman,

The Committee on Rules and Elections considered the proposed revisions to SB 336, which would shorten the timelines for disciplinary hearings. Our comments follow, but first we must state that the Senate has not been given enough time to fully consider such an important change. This is a matter on which faculty Senate input, including comment by a wide swath of the faculty as a whole, is called for under the principle of shared governance. The short turn-around time for comments on this proposal seems to call that principle into question.

Overall, we had strong reservations about whether the proposed deadlines would be feasible and fair, given the complexity of managing legal processes. The shorter deadlines, when combined with the strict standard for granting extensions, could affect the due process rights of the accused faculty member. According to our committee's legal expert, the requirement of a speedy trial, once thought to be a benefit to the defendant, is now seen as a benefit to the prosecution, so courts are usually generous in granting extensions (continuances) to the defense. This proposal allows an extension only for "good cause," which is defined as "material or unforeseen circumstances related to the complaint and sufficient to justify the extension sought." Material and unforeseen circumstances are not defined, but it appears to be a higher standard than the one used in California courts. See, for example, the California rule here:

https://www.courts.ca.gov/cms/rules/index.cfm?title=three&linkid=rule3_1332. It is customary for judges to grant continuances merely when both parties agree, and lawyers usually consent to them for reasons that include the convenience of lawyers and the parties, rather than a "material or unforeseen circumstance." A refusal to grant an extension could lead to a due process violation if the defendant does not have enough time to assemble his or her defense, such as retaining counsel, securing witnesses, analyzing the facts and law, etc. The proposed deadline here, combined with a standard that could be seen to restrict the granting of extensions, could cause such a due process problem.

This is our chief concern, but we note several other questions and ambiguities found within the policy, to which we call attention and urge careful consideration.


1. The *recommendation* of the CSA has been transmuted into a *requirement*. Is there room for

modification?

2. Resolution of SVSH cases can take years. Is it wise to eliminate the pre-hearing conference and one-third of the time for filing of an initial response, in order to save a relatively meager measure of time at this crucial stage? Has expert advice concerning the value of a pre-hearing conference been obtained?
3. Has the principle of balancing rights of all parties (accuser, accused, university, public) been given due consideration? Is the benefit to some parties of the relatively small seven-day speedup in C2 commensurate with potential harm to the interests of the accused?
4. What role does the initial answer of the accused play? Is it merely an acknowledgement of notification, a formal plea, or a more substantive response? Is it admissible as evidence during the hearing itself? Is 14 days an adequate period for preparation of an answer?
5. Point B states that there is no limit on the time elapsed between an incident and the filing of a complaint. Is this philosophically consistent with the 14-day timeframe of C2?
6. The language in point C1 is garbled. Does “termination of employment” refer to commencement of proceedings whose completion *could* result in such termination? Here one reads “the appropriate Chancellor”, elsewhere simply “the Chancellor”.
7. The sentence “In case of charges filed by the administration . . . , charges shall be filed by the Chancellor . . . ” in C1 is difficult to understand.
8. Perhaps there could be an indication of what is meant by “the administration” in C1. More substantively, is some review by the Chancellor intended here, or is the Chancellor simply to act on the administration’s decision?
9. The phrase “once probable cause has been established” suggests a presumption that probable cause will necessarily be established, and moreover, that it will be established *after* the filing of charges by the administration. Better might be something along the lines of “The chancellor [or the administration] will follow APM-015/016 and divisional policies in determining whether probable cause exists for disciplinary action. If . . . then . . . “
10. Is there a timeframe for the finding of probable cause?
11. Are the delivery requirements of part C1a adequate? Faculty are not required to read University email daily. An in-person meeting would not be available if the accused were traveling (and consequently more likely not to read email regularly and not to receive correspondence sent to the last known place of residence).
12. In point (b) in B3, “personally” should be “in person”. In “electronic mail or overnight delivery”, “or” should be “and”.
13. Also in B3, is the hazy notion of “giving priority” enforceable?
14. The policy that a hearing will not be postponed if the accused fails to appear does not contemplate legitimate hardship.
15. Point D1 is concerned with potential negotiations between Chancellor and accused and states that no deadline is to be extended to facilitate such negotiations. Does this place the CSA report’s *recommended* timeframe before the goals of justice and efficacy? Ongoing (in the assessment of the Chancellor) progress towards negotiated settlement should be grounds for some extension, in the best interest of all parties.
16. Is the Chancellor required to engage in good faith negotiations if the accused requests it? One can imagine circumstances in which the Chancellor might decline to do so, provoking a challenge to the integrity of the proceedings. It might be wise to address this question explicitly.

17. In D1a, “third parties” should be “other parties”. Should “impartial” be dropped, since partial parties might be welcome and useful in some cases? It could be indicated whose consent is required for such participation.
18. In D2, “early” should be “negotiated”.
19. In D2, it makes no sense to require that the chair formally request something of the Chancellor in every case. It should simply be blanket policy that the Chancellor should consult with the Committee or its chair prior to finalization of negotiated resolution.
20. F2a does not indicate *how* the parties will determine those facts not disputed. (This is an agenda item for a pre-hearing conference under the current bylaws.) Have experts on legal hearings and/or mediation been consulted on these procedures?
21. After F2e one reads “. . . shall not result in an extension of the hearing date”, but is it not stated elsewhere in the document that any deadline is open to extension?
22. Point F4 states that certain legal rules of procedure need not be followed. Something of an affirmative nature should be included—perhaps assigning authority and responsibility to the chair of the Hearing Committee. Perhaps “the technical legal rules” should be “formal legal rules” or “formal legal procedures” or something of the sort.
23. Point F10 in the tracked copy is not quite consistent with F10 in the clean copy. The first sentence of F10 could be cleaned up.
24. F8 assigns a prosecutorial role to the Chancellor (or designee). The role of the Hearing Committee could be likewise clarified, here or elsewhere. This role seems to be to examine, to uncover, and to weigh evidence, but not to prosecute.

Sincerely,



David Milnes
Chair, Committee on Rules and Elections

DM/scq