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THE UNIVERSITY OF MICHIGAN
Senate Advisory Committee on University Affairs (SACUA)
Monday, November 4, 2019 3:15 pm
4006 Fleming Administration Building
Ann Arbor, Michigan 48109-1340

Present: Ahbel-Rappe, Beatty (chair), Conway, Dinov, Malek, Manera, Marsh, Potter, Spencer, Banasik, Snyder

Absent: Gallo

Guests: C. Gerdes, Associate General Counsel and Special Counsel to the Provost; J. Burkel, Assistant Vice Provost for Academic and Faculty Affairs; S. Matish Associate Vice Provost for Academic and Faculty Affairs, P. Petrowski Associate Vice President and Deputy General Counsel; Professor M. Atzmon; Professor J. Cheney-Lippold, Professor W. Schultz; Members of the Press

3:18: Call to Order and Approval of Minutes

The agenda was approved; the minutes for October 7 were approved.

3:17: Announcements

Chair Beatty announced Professor Reichman's delivery of the annual Davis, Markert, Nickerson lecture, the topic being the status of adjunct faculty in higher education, and that a video of the lecture will be posted soon on YouTube. The four speakers for next year's Davis, Markert, Nickerson panel discussion have accepted their invitations. The panel discussion on October 22, 2020 will commemorate the series' 30th anniversary, centering on freedom of speech and state power.

Chair Beatty said that she has been in communication with Professor Schirmer, Chair of the U-M Flint Faculty Council, and Keith Riles, AEC. Professor Schirmer asked about a staged rollout of the AEC survey out for U-M Flint that would include sections of general questions for the faculty, and reviews of the Flint President and Flint Chancellor (excluding Deans and department chairs). Chair Beatty requested that the Flint Deans also be included, and that later versions could then include department chairs. He indicated that his initial conversations with Flint stakeholders indicate support to include the Deans, and that he can share additional feedback when the Chairs meet in Ann Arbor on November 22.

Chair Beatty said she met with UM-Dearborn Faculty Senate leaders on November 1 to learn about Dearborn concerns and issues. Members of the UM-Dearborn Faculty Senate expressed concern about the fact that degrees issued through the University of Michigan's Detroit Center for Innovation will be conferred by UM-Ann Arbor. Members of the UM-Dearborn faculty senate also discussed the One University Movement, and drew attention to the fact that while graduate programs at UM-Dearborn are subject to the rules and fees of the Horace H. Rackham Graduate School, they are not eligible for the same benefits as programs on the Ann

Arbor campus (including fellowships). Professor Malek said that the research budgets for UM-Flint and UM-Dearborn, as shared at a meeting of the Research Policies Committee, are small. He suggested these budgets could be reviewed with SACUA. Professor Manera and Chair Beatty reported their attendance at an RPC meeting where a Post-Doctoral fellow had discussed compensation and other difficulties faced by Post-Docs at Michigan. Professor Malek pointed out that Post-Doctoral Fellowships at the Medical School are paid on the pay scale set by the National Institutes of Health.

Chair Beatty mentioned that the Faculty Senate Leaders of Flint and Dearborn will have an informal lunch meeting with Professors Marsh, Conway, and Beatty on November 22.

Ms. Synder and Dr. Banasik reported that the audio recording of the October 21, 2019 Senate Assembly meeting was successful.

Chair Beatty reminded SACUA of the reception she is hosting on November 17, 2019 for SACUA members and their families from 5:00-7:00pm..

3:33: Umbrella Policy on Sexual Misconduct (guests: C. Gerdes, Associate General Counsel and Special Counsel to the Provost; J. Burkel, Assistant Vice Provost for Academic and Faculty Affairs; S. Matish Associate Vice Provost for Academic and Faculty Affairs, P. Petrowski Associate Vice President and Deputy General Counsel)

Associate Vice Provost Matish said that an outside review of the University's Sexual Misconduct policies by Hogan Marren Babbo & Rose, Ltd recommend that the university adopt a single sexual misconduct policy for students and employees. The review is available at: <https://president.umich.edu/wp-content/uploads/sites/3/2019/04/HMBRUM-report.pdf>. A task team was convened to implement these recommendations, consisting of representatives from Office of General Counsel, the Provost's Office, the Office for Institutional Equity (OIE), the Office for Student Conflict Resolution (OSCR), the Sexual Assault Prevention and Awareness Center (SAPAC), University Human Resources, Michigan Medicine, UM-Dearborn, and UM-Flint. On October 15, 2019, the University released a draft Umbrella Policy containing a draft SPG, Employee Procedures, and Student Procedures (<https://record.umich.edu/articles/u-m-drafts-sexual-gender-based-misconduct-policy-for-all-campus/>) for community feedback, which will be solicited until November 22, 2019. She said the new policy largely codifies existing practice and clarifies things that require clarification.

Assistant Vice Provost Burkel said the draft umbrella policy is 27 pages long. The SPG is 3.5 pages includes references to other sources of authority, and is modelled on SPG 601.29, Alcohol and Drug Policy (<https://spg.umich.edu/policy/601.29>). There are 9 forms of prohibited conduct: Sexual Assault; Sexual Exploitation; Sexual Harassment; Gender-Based Harassment; Sexual and/or Gender-Based Stalking; Intimate Partner Violence; Sex and Gender-Based Discrimination; Retaliation; and Violation of Protective Measures. In a case where there appear to be in cases where alleged conduct may fall under both the draft umbrella and other policies (e.g., single incident involving allegations of race discrimination and sexual harassment), the university will look at them on a case by case basis and determine whether the case should proceed under multiple procedures, or whether one type of alleged conduct predominates such that the entire matter is better handled under one set of procedures. He said that Responsible Employees are employees who are required to promptly share all details of alleged Prohibited Conduct which they receive in the scope of their employment with OIE. These Responsible Employees are (1) university administrators and supervisors; and (2) employees in certain designated positions and units or departments. The draft policy also lists confidential resources.

Special Counsel Gerdes said the recommended employment procedures, which are now presented in a single set of procedures, will be largely consistent with current policies and procedures. The process continues current investigative practices whereby OIE conducts the

investigation, the results of the investigation are provided in a report that summarizes all of the relevant evidence and includes a determination of responsibility; there will be no pre-determination hearing for employees and OIE finding may not be appealed. Faculty and staff may continue to use any grievance/appeal process applicable to their position to challenge sanctions imposed as a result of the OIE report. There is a change from a current practice in that the report will identify by name all witnesses, even though it is recognized that this may have a chilling effect. This change aligns the new policy with current law. During the investigation, parties and witnesses may request “Interim Measures” such as separation of parties involved; OIE, in consultation with other University offices, may approve the “Interim Measures,” and, if approved, Human Resources will implement those measures. The scope of possible sanctions is clearly set forth in the in the policy, and any sanctions imposed are shared with both parties, and the time frame for completion is 115 days from commencement of investigation to sanctions.

Deputy General Counsel Petrowski said that, hitherto, UM-Ann Arbor, UM-Dearborn and UM-Flint had substantively the same process for student cases, but have set them out in 3 separate documents to account for differences in campus structures. All three campuses rolled out new interim student policies in light of the 6th Circuit Court finding in *Doe v. Baum* (<http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0200p-06.pdf>), holding that where credibility is at issue in student sexual misconduct cases, and where suspension or expulsion is a likely sanction, a university must provide the parties a live hearing with the opportunity for cross-examination. The cross-examination must be conducted by the parties themselves or by their agents (it cannot be done by a third-party intermediary such as the hearing officer).

Deputy General Counsel Petrowski said the Student Procedures will continue to offer students two options for resolving matters: Investigative Resolution and Adaptable Resolution. In the case of an Investigative Resolution, OIE will conduct the investigation and issue a preliminary report summarizing evidence. There will then be a live hearing before a hearing officer—external to the University— who will manage the process, may ask the parties questions, and make a determination of responsibility. In this hearing each party will be afforded an opportunity to cross-examine the other, and to cross-examine witnesses; students have the opportunity to appeal the finding and sanctions; and the timeframe for completion is 120 days. Adaptable Resolution includes a voluntary, non-disciplinary, remedies-based process between or amongst the affected parties; it is generally designed to allow a Respondent to acknowledge harm and accept responsibility for repairing the harm (to the extent possible) experienced by the Complainant. Use of Adaptable Resolution must be agreed on by both students and approved by the Title IX Coordinator.

Chair Beatty said that SACUA understands the importance of the process, and shares the goal of establishing a good policy. She asked about the rationale for not giving an employee the right to challenge a suspension without pay prior to a finding of fact, adding that if safety should be an issue, it could be possible to suspend someone and then follow up that a suspension of pay if warranted?

Special Counsel Gerdes replied that suspension of pay in these cases does not apply to faculty, it applies only to staff members, it is present state of policy 201.12 (<https://spg.umich.edu/sites/default/files/201x12.pdf>). She said that faculty will currently continue to be paid under ByLaw 5.09 and that suspension of salary is not currently possible, even if dismissal proceedings are underway under ByLaw 5.09.

Professor Malek asked if this protection applied to all faculty. Special Counsel Gerdes said it applied to clinical and tenure-track faculty covered by ByLaw 5.09, that research faculty fall under the staff definition. Dr. Banasik said that the language currently in the draft policy is unclear on this point. Special Counsel Gerdes said she will take back concerns about research faculty to the committee. Assistant Vice Provost Burkel said this policy does not expand the

group that can be sanctioned. Professor Malek said that SACUA is concerned about the rights of all faculty members, including research faculty.

Professor Conway asked how the term “The University” is defined when the policy states that “relevant university offices” will approve OIE Interim Measures. Special Counsel Gerdes said that, in the case of faculty members these would be the Provost’s Office and the relevant Dean’s office. The situation is more complicated for a staff member, for whom the relevant authority could be the direct supervisor, an area manager or even the Chief Financial Officer. Since organizational structures are so different, it might be necessary to go up three levels to identify the relevant decision maker for a staff member. Special Counsel Gerdes will recommend that examples be added to the draft policy. Associate Vice Provost Matish added that when concerns are raised about who to consult, OIE frequently receives guidance from Academic Human Resources.

Professor Dinov asked if statistics were available about the number of OIE cases. Special Counsel Gerdes said this will be available in *The University Record* by the end of the week.

Professor Dinov asked if the policy allows the same person to investigate and decide a case in an OIE investigation. Special Counsel Gerdes said yes, but that sanctions are imposed by the dean’s office, that OIE’s role is to decide if the policy was violated or not violated. Professor Malek indicated that it is the case that some cases are handled by single investigators, some are consultative. Professor Manera and Chair Beatty expressed concern about the fact that faculty and staff cannot appeal an OIE finding and inquired after protections in case OIE has made a mistake. Special Counsel Gerdes said that a faculty member who files a grievance typically raise concerns about the sanction and often argues that OIE has failed to consider the evidence correctly. She added the executive committee typically reads the report and whatever response the faculty member choose to make in most schools and colleges.

Professor Marsh says that the fact that a dean’s office will say it cannot refute an OIE report is a significant problem. It means there is no appeal of an OIE report. SACUA has seen cases in which OIE has been in error, and found it deeply problematic when people do not feel that OIE’s conclusions can be reviewed. He said an appeals policy leads to a better process because it increases accountability. Chair Beatty added that for a faculty member to file a grievance, the faculty member has to show that there is an error in process, a difficult point if the problem is with an erroneous finding with an unappealable OIE report. In her view, there should be opportunity to clear up factual errors in OIE reports.

Professor Conway asked why there should be hearings for students, but not for faculty and staff if the point of the umbrella is about consistency. Special Counsel Gerdes asked if that meant a complainant should be allowed to appeal an OIE finding. Professor Malek said that would be reasonable. He noted that while some people might contest everything, they are not in the majority; the majority of people will only appeal when they feel wronged. Special Counsel Gerdes and Associate Vice Provost Matish said there are not many cases in which sanctions are issued. They asked if faculty and staff could appeal the OIE finding as students may do, should a faculty or staff member also be allowed to file a grievance that includes the OIE finding? Professor Marsh said he is open to an appeal process that lives outside the grievance process, or with a more effective grievance process in which OIE findings can be appealed. The current grievance policy does not work well for an unbiased airing of issues with erroneous findings because one can only grieve the dean, and the dean can say he/she is not OIE.

Professor Conway asked why the decision in *Doe v. Baum* is not relevant to faculty and staff. Deputy General Counsel Petrowski said that the case law is rapidly evolving, that in 2011 the Federal Government sanctioned a single investigator model, and that it was a student who challenged this in the court system. The 6th Circuit issued a ruling doing away with the single investigator model in a case where there can be suspension or expulsion and credibility is at issue. Under such circumstances the university must provide a live hearing in which the student or

representative can cross examine the accuser. There is no case law saying the same thing for faculty and staff. The court found that students have a “property interest” in their education. She asked what the “property interest” would be for a staff or faculty member?

Professor Manera asked about the lack of protections under ByLaw 5.09, which establishes a property right for tenured and clinical faculty, for research faculty. Special Counsel Gerdes said legal definitions can be problematic, as most staff do not have property interests in their jobs, and that the law looks at classifications of employment very differently than we think about them on a day-to-day basis.

Chair Beatty asked why are timelines shorter for employees than for students? Employees have 5 days to review a preliminary investigative report and students have 10 days. Deputy General Counsel Petrowski said these are all calendar days, and that the committee would like to look at this issue.

Professor Malek said he feels there are genuine strengths with the policy, the addition of links and definitions of offenses is very helpful. He added that a well-intentioned person will not violate the policy, what we have to avoid is such a person becoming enmeshed in it.

4:29 Professors Cheney-Lippold, Atzmon and Schmidt

Professor Cheney-Lippold thanked SACUA for its meeting with him and read aloud a letter describing his experiences grieving the sanctions imposed on him last year (see appendix). Professor Malek asked if Professor Cheney-Lippold had engaged in faculty governance before he had a problem with the administration. Professor Cheney-Lippold said he had not. Professor Malek asked if he was instrumentalizing faculty governance, and if merit was the major determinant of his decision not to provide the letter of reference. Professor Cheney-Lippold said he recognized the thinness of his case. Professor Ahbel-Rappe said her department had a discussion of issues surrounding the provision of letters of reference, and arrived at the idea that one response was for a faculty member simply to tell a student that he/she is too busy to write a letter. Professor Cheney-Lippold said that merit could be the leading consideration, but that ethical issues should trump other factors. Professor Ahbel-Rappe pointed out that when people of Michigan passed proposal 2, taking away health benefits from faculty partners, she went to Lansing to protest before the legislature and was told “this was a Christian nation that worshipped Jesus Christ.” In her view that response shows that people who are concerned with justice must confront injustice and prejudice at home and asked whether Professor Cheney-Lippold would write for someone wanting to work in the United States. Professor Cheney-Lippold said that the Boycott, Divestment and Sanctions Movement (BDS) is a solidarity campaign within Palestine, and has recommended that its supporters not provide letters of reference for students wishing to study abroad in Israel

Professor Malek stated that it takes effort on the part of all faculty members to strengthen faculty governance, and asked if Professor Cheney-Lippold had to pay a lawyer in pursuing his grievance. Professor Cheney-Lippold said that, because of the controversy surrounding the case, he was able to have pro bono representation from a lawyer based in Ann Arbor, and he had no out of pocket expenses. Professor Malek asked what his costs might have been. Professor Cheney-Lippold indicated that his meetings with counsel amounted to at least two dozen hours.

Chair Beatty said that SACUA wanted to acknowledge Professor Cheney-Lippold’s presence and recognized that it might take outside pressure to make a person realize how faculty governance could help. Professor Schultz said the University’s relationship with Israel requires a hearty moral discussion which should be reaching a wider audience. Professor Ahbel-Rappe proposed a thought experiment, asking if she could refuse to write a letter for a Republican or a white male. Schultz said it would be possible to discuss the point.

Professor Marsh asked Professor Cheney-Lippold about his statement, widely reported in the press, that he had written a letter to a student saying that because he had received tenure he could do as he wished. He categorically denied that he acted as he did because he had tenure, and stated that he had previously written for students for programs in Israel. Professor Cheney-Lippold said he met with the journalist and did not make such a statement to the journalist. However, he subsequently met with a student to discuss the situation and mentioned to the student that there is a qualitative change when a person has tenure which enables a person to act in different ways. He later saw the reporter outside his office door and wondered if the reporter had taken these comments with the student out of context.

Professor Malek said that he considered the two SACUA statements regarding the letter writing incident to be amongst its proudest achievements, which is why it is concerning that SACUA's statements were used by the Administration to justify Cheney-Lippold's sanctions in ways that SACUA did not approve. Chair Beatty said that SACUA has been working to make sure it remains relevant. Professor Conway noted that the grievance process worked because most of Cheney-Lippold's sanctions were reversed.

Professor Atzmon said he feels that the situation is dire, that Professor Cheney-Lippold was punished for his opinions. Professor Beatty noted that Professor Riles mentioned to her that his department chair had sent around a note asking if his department has opinions about writing letters, which suggests that this issue is still pending for possible rules from administration.

Librarian Spencer said she learned in the CAC meeting that the Office of VP for Communications offers media training, and Chair Beatty said she has taken it on the Dearborn campus. The training was helpful.

5:02 Approval of the Faculty Senate Proposal.

SACUA approved the draft resolution for the Faculty Senate with one abstention.

5:03 Adjournment

Respectfully submitted,
David S. Potter
Senate Secretary

Appendix: Statement by Professor Cheney-Lippold

Hello.

First, I want to say how much I appreciate you all for giving me the time to speak today; I also want to thank SACUA for its support of academic freedom around my case and its defense of academic freedom within the university community at large. And second, I want to give you all a report from my experience this past year after declining to write a letter of recommendation for a student.

To quickly recap: in August of 2018, I declined to write a letter of recommendation for a study abroad program in Israel. I did this for several reasons. One, as an act of solidarity, I followed the 2005 call by Palestinians for academics to boycott Israeli institutions until full democratic rights are given to Palestinians. Two, a 2017 decision by Palestinian and Israeli activists to include study abroad programs in this academic boycott—especially given how those study abroad programs are often used to whitewash Israel's apartheid policies. And third, the Israeli legislature passing the Nation State law in July, 2018 that formally defined Israel as an ethno-state.

After I declined to write that letter of recommendation, an email I wrote explaining my actions circulated widely first in online Facebook groups and later through the media. I was called an anti-semitic by a Regent of the University of Michigan. And I received thousands of emails: many in support, but also many of hate and several death threats.

Ultimately, I received a letter from the LSA Dean's office on October 3rd sanctioning me, freezing any salary merit raise for one year, freezing a sabbatical I had planned in Winter 2019 for two years (and thus effectively cancelling a fellowship I had at Humboldt University in Berlin), and threatening dismissal procedures if I did what I did again. Importantly, there was no explicit reference to any violation of policy in this initial letter. In fact, the only rules that I was accused of violating were institutional standards set by the AAUP and SACUA itself.

After this letter was made public by a Freedom of Information Act request in mid-October, both the AAUP and SACUA sent clarifying emails to the Dean's office that criticized how their language was used to justify my sanctions. In the case of SACUA, as you likely know, members drafted a second letter to state that the ultimate decision "to write any letter must remain the prerogative of the author...[without] fear of reprisal for declining." Accordingly, and in terms of due process, it appeared to me that I was being sanctioned without guiding policy, as these two institutions publicly condemned how their own standards were being applied in my case.

After attempting to informally resolve things with the Dean's office in December, 2018, I filed a formal grievance and began the months-long process outlined in SPG 201.08. A hearing was conducted in May, 2019, and I received a judgement in July of this year that was able to provide me some relief:

The Grievance Hearing Board suggested that the University return my lost sabbatical credits and annulled any sabbatical freeze. In doing so, they wrote in their report that the board "finds that Dr. Cheney-Lippold did not violate identifiable policy or norms in refusing to write a recommendation letter... and that sanctions should be modified accordingly." This is vital to emphasize, as such language demonstrates that faculty members are, and should be, the ultimate person deciding whether to write a letter a recommendation. As a result of this decision, I feel confident saying that no policy currently exists that requires professors to write letters of recommendation that may compromise their ethical beliefs.

Yet I was not given full relief. In arguments during my hearing in May, the Dean's office retroactively charged me with violating a policy not previously mentioned in my case—that of SPG 201.96—and accused me of failing to "engage each other in a professional manner, with civility and respect," and that "faculty members in particular are 'under the obligation not to bring the University into disrepute and to conduct themselves consistent with these obligations and responsibilities.'"

As this new violation did not appear in my October 3rd, 2018 sanctioning letter, and the first time I heard about SPG 201.96 in regards to my case was during my May, 2019 hearing date, such a retroactive application of policy is thoroughly inimical to any norm of due process.

Nonetheless, citing comments I made to the media about my decision not to write a letter of recommendation, the Grievance Hearing Board referred to SPG 201.96 in order to justify keeping my salary freeze in place. And in the case of the remaining sanction that permitted the beginning of dismissal proceedings if I refused to write another letter of recommendation, the board

considered themselves “unable to regulate the future actions of LSA,” a point that highlights the clear limits of faculty governance and redress within the university’s grievance framework.

While I fully respect the Grievance Hearing Board, I do take issue with their decision in terms of how it limits free speech. And I wonder how “bringing the University into disrepute” when talking to the media might be incredibly violative of academic freedom, especially the AAUP’s own defense of professors’ “civic duty” and ability to publicly speak out on matters important to them.

Most striking, though, was how the Dean’s office cynically used faculty governance letters and structures throughout my case. In the October letter that sanctioned me, the former Dean cited SACUA’s first letter as one of the two justifications for my sanctions. Then, after SACUA supplied a second, clarifying letter that repudiated its use in my sanctioning, the Dean’s office seemed to stop caring about faculty governance at all. In my hearing in May, both SACUA’s clarifying letter and the positions of SACUA itself were explicitly rejected by the Dean’s office, a rejection I found structurally problematic—and thus allows us to extend conversations about faculty governance beyond my own case... which is I why I am here before you today.

I want us as faculty to begin thinking about how we might collectively strengthen our own faculty governance structures so they cannot be used and abandoned according to the whims of the Dean’s office or the administration at large. While I believe that my case raises specific concerns around faculty’s academic and political freedoms, I think that there is a larger, and much more important, structural problem of faculty governance that I’ve now encountered head-on. This problem represents more than a lack of policy guiding writing letters of recommendation. Indeed, this problem also highlights how due process, faculty petitions, and SACUA itself were treated as disposable as the Dean’s office attended to the needs of the Dean’s office—and not the needs of the faculty or the university community.

University of Michigan Bylaws of the Board of Regents, Sec. 5.02:

Governing Bodies in Schools and Colleges

Sec. 4.01 The University Senate

"...[t]he Senate is authorized to consider any subject pertaining to the interests of the university, and to make recommendations to the Board of Regents in regard thereto. Decisions of the University Senate with respect to matters within its jurisdiction shall constitute the binding action of the university faculties. Jurisdiction over academic policies shall reside in the faculties of the various schools and colleges, but insofar as actions by the several faculties affect university policy as a whole, or schools and colleges other than the one in which they originate, they shall be brought before the University Senate."

Rules of the University Senate, the Senate Assembly and the Senate Advisory Committee on University Affairs:

Senate: “In all cases not covered by rules adopted by the Senate, the procedure in Robert's Rules of Order shall be followed.”

Assembly: “The Assembly may adopt rules for the transaction of its business. In appropriate cases not covered by rules of the Assembly, the rules of the University Senate shall apply.”

SACUA: “The committee may adopt rules for the transaction of its business.”