

TriCampus Committee Resolution on Due Process

Rationale: In light of recent and continuing challenges to faculty rights and academic freedom, the Senate Assembly endorses the following summary and compendium of what we see as long-established norms of university governance.

Summary: Principles of due process are an essential component of a transparent and democratic system of shared governance in higher education. It is the expectation of the University of Michigan Senate Assembly that the principles outlined in sections A-E of this document should be applied in all circumstances involving the evaluation of a faculty member's conduct, regardless of the specific procedures, offices, or persons involved. These principles apply to all faculty members on all University of Michigan campuses and to any type of investigation of faculty conduct where sanctions are being considered. Supervisors and others overseeing members of the governing faculty are advised to maintain open dialog with those faculty regarding their professional responsibilities, allowing for low-risk feedback, mentorship, and opportunities to alter conduct before sanctions become possible or complaints arise. Where principles in sections A-E are not currently being met, faculty bodies, committees, groups, and their supervisors, as well as relevant staff offices, should work toward meeting these principles and establishing appropriate procedures before they are needed (normally such procedures should be approved by the relevant faculty legislative bodies where they will be applied).¹ All investigations of faculty conduct should adhere to "due process and procedural fairness, including but not limited to, fair and adequate notice, fair investigation processes, and the ability to obtain an independent, meaningful and timely appeal of findings."² In response to (and in part derived from) the 2015 Report on the Office of Institutional Equity Procedures and Conduct written by SACUA, sections A-E of this document are endorsed as rights of due process for investigation of a faculty member's conduct.

A) Principles of fair investigation:

1. Investigation of faculty conduct, including by supervisors, administrators, and staff offices, should occur through pre-articulated procedures that have been endorsed by the relevant governing faculty body and distributed to the faculty for whom they apply (i.e. faculty in a department for a departmental process, those in a college/school for a school/college process, etc.).
2. Procedures should conform to these and other principles, such as the Standard Practice Guide (see the SPG Hierarchy of Legal and Policy Requirements),³ Regents Bylaws,⁴ University of Michigan Faculty Handbook,⁵ and Senate Assembly Rules.⁶ Another important source regarding standards of due process endorsed in these principles, including for sanctioning of faculty, is the AAUP Recommended Institutional Regulations on Academic Freedom and Tenure.⁷
3. Procedures should address expectations of confidentiality, discretion, and timeliness of proceedings, for the respondent, complainant, and investigatory body, as well as where/how

¹ See the SPG 'Procedures for Development of University Policy,' <http://www.spg.umich.edu/policies/policy-development-procedures>, and appropriate bylaws, codes, and standing rules with jurisdiction

² SACUA, Report on Office of Institutional Equity Procedures and Conduct (2015), ii. See <https://facultysenate.umich.edu/wp-content/uploads/sites/22/2015/04/SACUA-OIE-Report-public-version-final-3-9-15.pdf>.

³ SPG, 'Hierarchy of Legal and Policy Requirements,' <http://spg.umich.edu/about/policy-hierarchy>.

⁴ Bylaws of the Board of Regents: <http://regents.umich.edu/bylaws/>.

⁵ University of Michigan Faculty Handbook: <https://www.provost.umich.edu/faculty/handbook/>.

⁶ Rules of the Senate Assembly: <https://facultysenate.umich.edu/wp-content/uploads/sites/22/2015/02/rules-april1997.pdf>.

⁷ For AAUP's Recommended Institutional Regulations on Academic Freedom and Tenure see https://www.aaup.org/sites/default/files/JA18_RIR.pdf.

documentation associated with the investigation will be kept and which parties will have access to it.

4. Investigation activities that might compromise a faculty member's professional standing should not occur before the faculty member has been apprised of the investigation.
5. Investigations should proceed only after a complainant submits a written complaint. Complaints should clearly identify actions in question and the policies that the complainant believes have been violated by those actions. If an administrative or staff office that might have a role in an investigation or determining sanctions alleges wrongdoing without an independent complaint then it should treat itself as a complainant and follow the procedures to act only in that role. In such instances, an appropriate third party approved by both the complainant and administrative/staff office will be selected to investigate the complaint.
6. Standards of due process include fair and adequate notice: "[D]ue process demands that college and university officials offer employees notice of alleged rule violations and, where possible, opportunities to correct their behavior."⁸
7. Faculty members are entitled to have an opportunity to be heard at a point in the process when there is still an opportunity to influence the outcome.⁹
8. A fair and competent investigation process includes:
 - Access to all opposing evidence and that which is reasonably necessary to support or defend oneself as well as the opportunity to respond to and challenge opposing facts. This includes the right to present evidence and witnesses in one's defense, as well as to question opposing witnesses directly.¹⁰
 - A right to representation by counsel and to have a support person present at any meetings.
9. A fair hearing conducted by knowledgeable and impartial arbiters: "Because of the nature of academic inquiry and its often specialized subject matter, fair treatment in cases involving the professional activities of faculty, in addition to conforming to other generally applicable principles, requires that assessments and conclusions be informed by or subject to review by 'the judgment of competent peers.'"¹¹ Investigatory procedures should avoid conflict of interest.
10. Time limits for resolutions of complaints should be indicated in all procedures relevant to assessing faculty conduct, as well as for appeals. Options for requesting extensions should also be outlined.
11. All involved in conducting an investigation should have appropriate training that is standard to the industry, which might include training in bias and discrimination.
12. Investigators should be identified prior to the investigation. Any changes to those conducting the investigation should thereafter be approved by the complainant and respondent.

B) Principles regarding sanctions:

1. Per SACUA's recommendations in the 2015 OIE Report, "institutional discipline of faculty members [must be] in proportion to the severity and persistence of misconduct...."¹² If findings of an investigation were inconclusive or did not find fault or recommend sanctions, no sanction

⁸ Patrick D. Pauken, *Due Process Rights in Faculty and Staff Dismissal*, pp. 135-141, Charles J. Russo (ed.), *Encyclopedia of Law and Higher Education*, 2010 as cited in SACUA, Report, 4

⁹ *Ibid*, 3

¹⁰ H.J. Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975). Cited in SACUA, Report on Office of Institutional Equity Procedures and Conduct (2015), 4. Being able to directly question opposing witnesses is in keeping with SACUA's best practices for grievance procedures.

¹¹ University of Michigan Faculty Handbook, Section 1.C. as cited in the SACUA, Report.

¹² *Ibid*, 3.

should be applied by any party except through a formal appeal process or separate investigation that results in a different finding.

2. Sanctions should not be imposed against a faculty member who was not the subject of the investigation, or who made the investigated complaint (including witnesses), unless a separate complaint and investigation took place regarding his/her own conduct. Findings and sanctions against complainants or witnesses in the absence of separate complaints and investigations (afforded the complainant or witness in the role of a respondent) shall be considered retaliatory.
3. The variety of possible sanctions for a given level of investigation should be articulated by the relevant level of governing faculty before investigations take place. Sanctions should not infringe upon a faculty member's rights to academic freedom and freedom of speech.
4. Sanctions and findings should be accompanied by a written explanation that specifically and fully identifies the actions found to be in violation of policy, the specific policies that those actions were found to have violated, and the factual basis for the decision. The explanation should also provide a complete record of evidence (including witness statements) under consideration.
5. Sanctions and findings should be based exclusively on the evidence presented. For example, committees and other investigators should not procure/consider evidence or consult witnesses that the faculty member does not have an opportunity to question.
6. All investigatory procedures, including those for investigations by OIE, Human Resources, boards, committees, and administrative offices or supervisors, etc. should include a right to timely and meaningful appeal heard by independent representatives who were not involved in the original investigation. Appeal procedures should be carefully articulated.
7. A written warning or finding against a faculty member is a form of sanction for LEO faculty per the LEO Contract. This should be considered the case for governing faculty as well.¹³
8. To be considered for sanction, including a written finding, a faculty member should have enjoyed all rights of a respondent in an investigatory process.
9. Investigators, grievance boards, etc. should confine findings and sanctions to those individuals and actions that constitute the original subject of the complaint. To avoid creating findings that extend beyond the evidence considered, it is not the purview of investigators to find fault with others, including the complainant, respondent, or witnesses, for actions that were not under review.
10. Per the AAUP's Statement on Government of Colleges and Universities, faculty status decisions should be by faculty action in both favorable and adverse reactions. An elected faculty body (not an executive committee due to possible conflicts of interest) should offer primary input on proposed sanctions.

C) Interpretation or modification of governance policy

In complaints requiring the interpretation or modification of governance policy (and for all governance disputes that affect faculty), faculty governance bodies should be among those consulted (if not the primary source consulted). Hence, Human Resources, OIE, the Office of General Counsel, administrators and their agents should consult faculty governance bodies that are responsible for the setting, maintaining, or enforcement of the policy in question, to settle interpretation questions between faculty, administrators, or staff, including those that could result in sanctioning of a faculty member.

¹³ For LEO, 'Discipline is a written warning, suspension with or without pay, reduction in duties, or reduction in pay for misconduct or unsatisfactory performance.' U of M LEO Contract (2013-18), 111, <https://leounion.org/contract>.

D) In cases of dismissal or threat of dismissal

Members of the governing faculty should consult Section 5.09 of the Regents Bylaws,¹⁴ the Tenure Committee Hearing Procedures, and the Overview of the process in a Regents' Bylaws 5.09 hearing conducted under Section 5, which also establish due- process standards that may be suitable for other situations.¹⁵

Electronic Voting

- Absentee votes may be called by the Chair of the Assembly if an important and urgent matter arises that cannot wait until the next scheduled Senate Assembly meeting, including over the summer recess.
- Senate Assembly members may transmit their votes by e-mail to the Secretary of the Assembly or his/her designate (e.g. the Director of the Faculty Senate Office) or through a secure web-based platform such as may be set up for the purpose.
- The Secretary of the Assembly, or designate, shall be responsible for tallying electronic absentee votes.
- The Assembly will be notified by e-mail that an absentee vote be held. Voting will be open for a period of 5 business days from the date of notification. After voting closes, the Assembly will be promptly notified of the results of the vote.
- The quorum for an absentee ballot shall be the same as that for conducting a Senate Assembly meeting; currently 50% of Senate Assembly members.
- Electronic votes shall not be considered secret, unless a secret ballot has been called for – e.g. election of SACUA members
- Senate Assembly members voting in person at an Assembly meeting shall not be permitted to vote electronically.
- The resolutions to be voted on electronically should normally have been discussed by the Senate Assembly prior to voting. A summary of any discussion should accompany the resolution

¹⁴ Regents' Bylaws Section 5.09: Procedures in Cases of Dismissal, Demotion, or Terminal Appointment (revised April 2011), <http://regents.umich.edu/bylaws/bylaws05a.html#9>.

¹⁵ Overview of the process in a Regents' Bylaws 5.09 hearing conducted under Section 5 (approved by SACUA, September 21, 2009). Tenure Committee Hearing Procedures (from Debasish Dutta to Christine Gerdes and David Nacht, Nov. 21, 2008).