University of Washington
Faculty Council on Faculty Affairs
January 12, 2021
11:00 a.m. – 12:30 p.m.
Zoom

Meeting Synopsis

1. Call to order
2. Announcements
3. Review of the minutes from December 8, 2020
4. Update on survey of part-time lecturers (Dan Jacoby, guest)
5. Revised code changes for faculty ADR & grievance (attachments to come; Zoe Barsness & Amanda Paye, guests)
6. Report from the task force on housekeeping changes
7. Good of the order
8. Adjourn

1. Call to order

The meeting was called to order 11:01 a.m.

2. Announcements

Chair Lee stated three FCFA Class A legislations are moving forward from the SEC to the Faculty Senate for review and one Class A has been approved.

3. Review of the minutes from December 8, 2020

The minutes from December 8, 2020 were approved as written.

4. Update on survey of part-time lecturers (Dan Jacoby, guest)

The survey for full-time temporary, part-time, and part-time temporary lecturers is ready to be distributed. It may be sent out tomorrow with approval by the faculty senate leadership. The survey will be anonymous but targeted by college and title. Anyone in those ranks who is on payroll currently and/or on the payroll on Dec 3, 2020 will receive the survey. Members are encouraged to ask eligible lecturers in their department to take part in the survey, and chair Lee will notify members when the survey is available.

The second survey for colleges is in progress. Chair Lee will invite members to join an additional meeting to review the draft survey.

5. Revised code changes for faculty ADR & grievance (attachments to come; Zoe Barsness & Amanda Paye, guests)

Zoe Barsness shared a presentation overview of the proposed Class A legislation (Exhibit 1) with new revisions from a university-wide review.
It was noted that Washington State requires UW to comply with the Administrative Procedures Act. While the APA does not apply to grievances, it is an additional boundary in the designing of new disciplinary proceedings.

The council examined the items of significant revision and provided feedback.

Remedy for Tenure/Promotion:
A member stated concern on the process of remedies sent back to decision makers. Another member mentioned that in most cases, Deans are decision makers. In tenure issues, this becomes a presidential decision. This could complicate the procedural changes attempting to limit the need of presidential input. A council member suggested language requiring a panel to provide explicit instructions on how to correct the process rather than it being discretionary.

Economic Relief:
It was noted reparations are usually state resources, but UW may have access to non-state resources which do not violate state rules. Public funds, research funds, or endowments cannot be used for damages in cases of grievances. Barsness asked the council for suggestions to clarify if the proposed language allows for restitutions within the authority of the institution. Private monies and State property rights may complicate those specifics.

Discretionary Review:
A member suggested requiring the UW president to consult with the faculty senate chair should the president desire to conduct a discretionary review. Mike Townsend highlighted the importance of having faculty senate chairs in a position to effectively work in that adjudication role.

President as Respondent:
Barsness stated UW Bothell and UW Tacoma would prefer the UW president delegate their powers to the campus chancellors in these instances. The drafting committee noted whoever is identified as the respondent must have decision making authority to address concerns. The legislation should narrow the discretionary review so presidential powers cannot be delegated to anyone other than a chancellor. There will be future discussion on instances in which the president is the respondent or where decisions become delegated to the provost.

A member asked Barsness and Paye to clarify the definition of “participate” within a hearing. It was noted that the legislation will provide a vague definition to allow the hearing panel coordinator to decide what “participate” means in that instance. Paye noted participants can attend but cannot speak to the panel, speak on behalf of the grievant, and cannot actively advocate on behalf of the grievant. They are there as a resource during panel breaks.

The council will evaluate final improvements to the legislation at the next FCFA meeting and decide their endorsement. Additional feedback from other stakeholders will also be reviewed.

6. Report from the task force on housekeeping changes

This item will be reviewed at a future meeting.

7. Good of the order
Nothing was stated.

8. Adjourn

The meeting was adjourned at 12:30 p.m.

Minutes by Alexandra Portillo, xanport@uw.edu, council analyst

Present: Faculty Code Section 21-61 A: Megan Callow, Gregory Lund, Aaron Katz, Jack Lee (chair), Jacob Vigdor, Teresa Ward, Mary Pat Wenderoth
Faculty Code Section 21-61 B: Xin Ying Hsu, Cass Hartnett, James Gregory, Mičeál Vaughan
Faculty Code Section 21-61 C: Cheryl Cameron
Guests: Zoe Barsness, Amanda Paye, Mike Townsend

Absent: Faculty Code Section 21-61 A: Karam Dana
Faculty Code Section 21-61 B: Jennette Kachmar

Exhibits

Exhibit 1 – 21-1-6 Cover memo for FCFA
The Drafting Committee of the Faculty Senate Task Force on Faculty Discipline and Dispute Resolution looks forward to reviewing the revisions to the proposed Class A Legislation to revise Chapter 27 of the Faculty Code. In addition to FCFA, the Drafting Committee received feedback from others, including members of the Task Force, BODC, and FCTCP, which has also been incorporated into the attached draft (Version 14.0). This overview describes the overall structure of the draft as compared to the current code. It also describes the points of significant feedback and how that feedback was addressed in the revised draft.

I. Overall Structure of Chapter 27

The overall structure of the revised Chapter 27 is consistent with the design of the current code but is restructured so that the entire dispute resolution process is contained in Chapter 27:

- The current Section 27-41, Conciliation, was moved up so that the Chapter starts with less formal dispute resolution, with an added reminder that faculty are encouraged to attempt informal resolution;
- The current Section 27-31, “Administrative Proceeding,” has been moved down to Section 27-71 and enhanced to provide a structure for the two-step unit-level review once a grievance has been initiated (although certain grievances advance directly to Institutional Review); and
- An institutional-level review process was borrowed from the Chapter 28 brief and comprehensive proceedings and designed to be more supportive of the resolution of faculty grievances.

II. Summary of Revisions to the Draft of Chapter 27

Following is a summary of the significant feedback on the draft of Chapter 27 shared with FCFA (Version 11.0) and a summary of the relevant substantive revisions to the attached revised draft (Version 14.0). Comments have also been included in the redlined draft document to identify and explain more minor revisions not summarized here.

A. Complexity and Organization

A common concern was the complexity of the process as described in the draft and the organization of the draft. To address these concerns, the following revisions have been made:

- The draft has been reorganized to move the information relating to when and how to file a petition for a grievance higher in the grievance sections (see Sections 27-53 and 27-54);
- Section 27-31 has been added to clarify that interpersonal conflict between faculty members is not addressed through the grievance process (in other words, grievances are reserved for faculty to dispute administrative decisions);
- The definition section for Faculty Grievances in Section 27-52 has been shortened and necessary information has been moved to other sections so that it is in context; and
• The descriptions of Steps 1 and 2 have been collapsed into one section entitled “Unit-level Review” and a description has been added to clarify the differences between the two steps.

B. Number of Roles

Another common concern was the number of different roles in the process and the clarity of the descriptions of each role’s responsibilities. To address these concerns, the following revisions have been made:

• The role of an Administrative Grievance Facilitator has been removed, although a dean may designate an individual under Section 27-61, Subsection C to receive petitions for a grievance;
• The Faculty Administrator Pool has been removed (see below); and
• The descriptions of the “respondent” roles have been consolidated into one definition under Section 27-52, Subsection D.

C. Faculty Grievance Panel and Faculty Administrator Pool

The Values & Principles Committee supported including a faculty member holding a current administrative appointment on the Faculty Grievance Panel to conduct the Institutional Review, while retaining a majority of non-administrative faculty. The composition of the three-person panel was designed to ensure representation by the constituencies with a stake in the outcome of the grievance – faculty and administration – with the majority remaining as faculty not holding administrative appointments. In order to identify faculty administrators for the panel, a Faculty Administrator Pool was to be created and maintained by the Provost.

Concerns were raised that including a current faculty administrator on the panel is a significant departure from the make-up of the faculty panel under current code and, also, may result in panel decisions being overly influenced in favor of administration. It also increased complexity by creating an additional role within the process and an additional pool of individuals that must be managed and trained.

As a result of these concerns, this role and pool have been removed and the panel is made up of three faculty drawn from the Faculty Rights and Responsibilities Pool. The number of panel members, however, remains as three members rather than permitting a party to request five members as in the current code Section 28-33, Subsection D, to avoid scheduling delays.

D. Remedy for Tenure and/or Promotion, Merit or Salary Increase, Non-Renewal, or Removal Due to Program Elimination

A concern was raised that the available remedies for promotion and/or tenure (and merit or salary increase, non-renewal, and removal due to program elimination) were limited to referring the decision back to the decisionmaker to conduct a corrected decision making process (See Section 27-82, Subsections A, B, C, and D); whereas the current code appears to give the panel unfettered decision making authority (See Section 28-54, Subsection B).

The Values & Principles Committee favored the drafted approach for several reasons. The first is that it is not clear that the current code gives the panel unfettered decision-making authority on tenure and promotion. The current code Section 28-32, Subsection B limits the panel’s authority to review tenure and/or promotion to when an administrator is alleged to have violated University regulations and/or an “injustice.” An injustice “can be reviewed only to the extent necessary to determine whether the decision being questioned was affected by
factors other than the relevant and permissible considerations in making the particular decision being challenged.”

Second, with respect to tenure and promotion, merit and non-renewal, limiting the remedy to a referral back to that department decision making process would avoid a faculty panel usurping the departmental faculty’s role. It is also worth noting that in past adjudications involving promotion and merit, panels have indicated that they did not feel they were in a position to make an independent decision on the promotion or merit increase and, instead, they referred the decision to the departmental decision making process.

As a result, this remedy has been retained in the current draft, except that rather than referring the decision to the dean, it will be referred to the final decision maker in the event it was the Provost who made the final decision. The panel may also provide instructions about how to correct the decision-making process, such as not considering criteria the panel determined to be impermissible.

E. Economic Relief and Attorney’s Fees

Another concern was that “economic relief” and reasonable attorney’s fees were not specifically included as a remedy for all other grievances under Section 27-82, Subsection E.2, although they are specified in the current code, Section 28-54, Subsection B.

A revision has been made to state that the panel may award “economic relief” (to use the same term as in the current code) but the clarification remains that such an award must be within the authority of the University and as provided by law. Although the current code appears to permit the relatively unrestricted award of economic relief, including attorney’s fees, there are legal restrictions on the types of monetary payments the University can make as a public entity. For example, by law, public funds can only be disbursed when it serves a public purpose and cannot be for an individual benefit. Depending on the circumstances, it is possible that payment of economic relief in the form of monetary “damages” to an individual or to reimburse an individual for attorney’s fees could be prohibited by law. On the other hand, payment of back wages, such as for a retroactive merit increase or promotion, could be awarded because the University is required by law to pay such wages.

As a result, Drafting Committee identified economic relief as an issue of concern that requires further research, legal interpretations, and subsequent institutional policy decisions. In the meantime, the proposed language is broad enough to permit the award of economic relief when permitted by law but avoids misleading faculty to believe certain monetary remedies could be awarded when they may not be permitted by law. As further clarification becomes available, it can be shared with faculty governance and decision-makers in the faculty grievance process.

F. Matters Not Subject to Grievance

The “matters not subject to grievance” section has been removed due to concerns about the optics of a list of matters not subject to grievance when the current code does not include this type of information. Some of the information from that section has been moved to other sections for the purpose of clarification (see the comments in the redlined draft).
In regard to allegations of violations of University conduct policies, it was urged that faculty be allowed to raise any complaints about administrative conduct through the grievance process. One of the primary reasons motivating the disentangling of grievances from allegations of misconduct is to focus the grievance process on solving a problem created by an administrative decision. Disciplinary proceedings, however, must be designed to ensure that the University satisfies its compliance responsibilities when on notice of allegations subject to state and federal regulations.

As a result, a more generalized clarification has been added to Section 27-54, Subsection A and Section 27-61, Subsection B that allegations that are governed by other University policies may be diverted to those processes. Faculty may choose to file a petition for a grievance, but they need to be aware that, depending on the nature of the allegations, it may need to be diverted to a disciplinary proceeding.

**G. Discretionary Review**

A concern was raised that the standard for discretionary review under Section 27-84, Subsection A is broader than the current standard under Section 28-61, Subsection C. An example was that “broad institutional impact” could be stretched to justify any decision; whereas the same concern was raised in Task Force discussions that the standard of “arbitrary and capricious” in the current code could be stretched to justify any decision (See Appendix A with a side-by-side chart of the current standard and discretionary review standard). When discussed within the Task Force, this standard was intended to be narrower and was also intended to provide the president with a framework for discretionary review that is more aligned with the nature of grievances.

In considering the feedback, Drafting Committee discussed two ways that some bounds could be placed around the president’s review: 1) substantive, meaning through the language of the authority to review or 2) procedural, meaning providing for procedural transparency if the president reaches in to conduct a review when it hasn’t been requested or if the president alters the panel’s decision. Drafting Committee concluded that the latter was the more effective way to do so for the very reason that those who have reviewed the draft differ on whether the current code’s standard is broader than the draft standard.

As a result, the draft has been revised to include several procedural requirements to enhance transparency in the decision-making process. First, the draft has been revised so that the president is required to consult with the Chair of the Faculty Senate if the president is considering “reaching in” to initiate a discretionary review when it has not been requested (See Section 27-84, Subsection C). Retained in the draft is that the president must describe in writing why the president is “reaching in” (See Section 27-84, Subsection C). It has also been revised to borrow the mandatory remand to the panel under the current code Section 28-61, Subsection C if the president does not affirm the panels’ decision (See Section 27-84, Subsection E). In any case where the president reaches a final decision that differs from the panel, the president must specifically describe in writing the reasons for that decision (See Section 27-84, Subsection E).

The Task Force has also recommended the creation of a committee to review grievance outcomes and identify process improvements, so if that committee identifies concerning decisions or patterns in discretionary review, it can raise that issue with faculty governance.
H. President as the Respondent

A concern was raised about an annotation that the president could not be a respondent in a grievance. The annotation was included to raise the issue of whether the faculty has the authority through the Faculty Code to bind the Board of Regents to take action, such as under the current code Section 28-61, Subsection D. This may be a moot (or rare) issue because there is no record or recollection that the Board of Regents has ever needed to act under the current code.

Upon careful consideration, the Drafting Committee has retained the annotation (see footnote 18) to identify this as an issue for faculty leadership who may wish to work toward clarifying this issue and considering whether a Board of Regents policy should be created to address this issue. It may be a moot (or rare) issue because the process was drafted so that administration decides who acts as the respondent at each step and in an Institutional Review.

I. Confidentiality of Conciliations

Concerns were raised about the revisions to the confidentiality provisions relating to Conciliation, which is contained in the draft Section 27-43, Subsection C. The relevant footnotes have been revised to better clarify why this revision was made. In its work, Drafting Committee attempted to identify where the current code may be misleading to faculty or in conflict with legal requirements, such as in this section. The current code (Section 27-42, Subsection C) appears to guarantee that statements and information divulged in conciliation cannot be subject to disclosure in external proceedings, including judicial proceedings. The code cannot guarantee this and, instead, that would be determined based on other legal standards.

J. Definition of Legal Counsel

A concern was raised that the definition of “legal counsel” did not include administrative employees who have legal training and who may be licensed to practice law, which would allow administrators to utilize University employees who are attorneys in the unit-level meetings or institutional review, which may give administration an unfair advantage.

Because “legal counsel” is not defined in the current code, the separate definition has been removed. Drafting Committee concluded that the faculty could not dictate how administration utilizes those employed in administrative positions who happen to also be licensed attorneys, particularly if it is within the scope of their employment to play an administrative role in the grievance process.

III. Conclusion

Drafting Committee very much appreciates your thorough and thoughtful feedback. Given Drafting Committee’s role and responsibility of attempting to give effect to the values and design developed through the Task Force, we hope that we can address FCFA’s feedback and concerns in your January meetings.
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<tr>
<th>Who decides whether a review will be conducted?</th>
<th>Current Code – Comprehensive</th>
<th>New Grievance Process</th>
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<tbody>
<tr>
<td>• if a “party”(^1) requests a review, then the president must conduct a review; or</td>
<td>• Even if a party requests review (grievant or respondent), the President need not review; or</td>
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<tr>
<td>• President can initiate</td>
<td>• President can initiate (but if the parties have not requested review and the panel has not recommended review, the President must consult with the Chair of the Faculty Senate and also describe the reasons for initiating discretionary review).</td>
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Who decides whether a review will be conducted?

Who decides whether a review will be conducted?

What is the standard for the President’s review

For remand:

• the decision of the panel was arbitrary or capricious;

• the procedures followed by the Adjudication Panel Chair or the hearing panel or any other person involved with the adjudication procedures in reaching their decisions, were materially and prejudicially unfair or not in accordance with the law or University rules or regulations; and/or

• the review in which he or she has engaged has revealed the importance of evidence which the panel did not adequately consider.

Following remand, the panel’s decision:

• was not supported by a preponderance of the evidence in the record, or

• Was arbitrary or capricious, or

• The procedures followed were materially and prejudicially unfair or in violation of law or University rules.

Discretionary review is reserved for grievances that:

• Have a broad institutional impact, such as if the grievance raises an issue that is not addressed in a University regulation, rule, or policy, and if the panel's decision was applied broadly, it would have an institutional impact;

• Have institutional policy implications, such as if the decision is inconsistent with the interpretation, intent, or application of a University regulation, rule, policy, or practice; and/or

• Where the decision and/or solution by the Faculty Grievance Panel may have exceeded its authority under Section 27-83.

The President must affirm the panel’s decision or refer the decision back to the panel with instructions.

The President’s final decision must include the reasoning for the decision, including a description of the institutional considerations that were applied if the President’s decision is not a reaffirmation of the panel's decision, and a solution, if any.

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\(^1\) Under Section 28-31, Subsection G, “Party is the person who has requested an adjudication and the person or persons whose actions or failure to act are identified in the petition as having given rise to the grievance.”