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DOC 2014-12 Amendment to the Competencies Sections of the Bylaws of the Faculty Hearing Committee on Grievances, and the Faculty Hearing Committee on Academic Freedom and Tenure

University of Dayton. Faculty Affairs Committee

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PROPOSAL TO THE ACADEMIC SENATE

TITLE: Amendment to the Competencies Sections of the Bylaws of the Faculty Hearing Committee on Grievances, and the Faculty Hearing Committee on Academic Freedom and Tenure

SUBMITTED BY: The Faculty Affairs Committee of the Academic Senate

DATE: December 12, 2014

ACTION: Legislative Authority

REFERENCES: Constitution of the Academic Senate, Art. II B. 1. c.

BACKGROUND AND RATIONALE FOR THE PROPOSAL

While the bylaws and operating procedures of the Faculty Hearing Committees on Grievances and on Academic Freedom and Tenure are promulgated by those committees, the “Areas of Competence” of the committees (perhaps better understood as the jurisdiction of the committees) are established by the Academic Senate pursuant to its legislative authority.

At present the areas of competence of both committees exclude from their domain matters involving “sexual harassment.” The presumed reference of the exclusion was the University’s former Policy on Sexual Harassment. The apparent rationale for the exclusion was that the Policy on Sexual Harassment had its own investigatory and fact finding procedures designed to comply with the mandates of federal statutes prohibiting colleges and universities from discriminating on the basis of gender.

In 2013 the University withdrew its separate Policy on Sexual Harassment and subsumed the matters covered in that policy into a new comprehensive Nondiscrimination and Anti-Harassment Policy which prohibits discrimination or harassment on a wide variety of bases such as gender, religion, ethnicity, disability and status as a veteran of the United States armed forces. The Nondiscrimination and Anti-Harassment Policy of the University contain investigatory and fact finding procedures which largely parallel those contained in the former Policy on Sexual Harassment.

The withdrawal of the University Sexual Harassment Policy and its replacement with the Nondiscrimination and Anti-Harassment Policy required an amendment to the Areas of Competence of the Faculty Hearing Committees because those areas, as currently drafted, implicitly referred to a no longer existing policy of the University.

The Executive Committee of the Academic Senate referred the matter to the Faculty Affairs Committee of the Academic Senate (“FAC”) for action.

The FAC has determined that the best course of action is to expand the current exclusion from matters involving “sexual harassment” to matters covered by the University’s Nondiscrimination and Anti-Harassment Policy.

The FAC opted for this approach for two reasons. First, the mandate of federal statutes prohibiting colleges and universities from discriminating on the basis of gender that colleges and universities have expeditious and effective procedures for investigating and addressing claims of gender bias remains in effect. Thus, the necessity which prompted the existing exclusion probably still exists. Claims of discrimination and harassment often involve multiple bases. Separating out the gender discrimination claims is sometimes impossible, and even if feasible, can lead to wasteful duplicate investigations. The FAC believes that extending the current exclusion for sexual harassment claims to all claims cognizable under the Nondiscrimination and Anti-Harassment Policy is the most administrable and efficient solution.

Second, the investigatory and fact finding procedures set forth in the Nondiscrimination and Anti-Harassment Policy are carried out by investigators who have received training in federal anti-discrimination matters. The elected members of the faculty hearing committees do not necessarily have such training or experience in looking into these issues.

The FAC also chose to preserve the ability of the Faculty Hearing Committee on Academic Freedom and Tenure to review whether a faculty member's actions were protected by principles of academic freedom. The FAC was concerned that cases may arise in which actions investigated under the Nondiscrimination and Anti-Harassment Policy may involve issues of academic freedom. That Policy provides that:

4. Academic Freedom

The proper exercise of academic freedom by a member of the faculty is not restricted by the University's prohibition of harassment against a protected class. When members of the faculty lecture, lead discussions, show exhibits and the like on sexually-related, race-related, etc. topics relevant to course material, they are not subject to censure arising from claims of harassment, provided such classes are conducted in accord with the norms of the discipline.

If a faculty member who is subject to a claim of harassment against a protected class defends on the grounds that his or her actions were within the bounds of academic freedom, the equity compliance investigators will have to explore not only what happened, but whether the actions constituted "the proper exercise of academic freedom." Given the centrality of the principles of academic freedom to the functioning and governance of the University, the FAC believed that it was vital for faculty members who are the main beneficiaries of those principles, and who have day to day experience with those principles, to have a voice on questions of academic freedom. The Faculty Hearing Committee on Academic Freedom and Tenure supplies that voice.

The FAC does not believe that allowing the Faculty Hearing Committee on Academic Freedom and Tenure to review claims that a faculty member's actions were protected by principles of academic freedom will interfere with the University's obligation to provide an expeditious and effective investigation and remediation of claims of gender bias, or any other claims of class based bias. First, reviews by the Faculty Hearing Committee on Academic Freedom and Tenure are far from common occurrences. That Committee has not been called upon for at least two years. Second, even if that Committee reviews a matter, its findings and conclusions are only advisory to the relevant decision maker, such as the President of the University or the Provost of the University.

DESCRIPTION OF THE PROPOSAL:

The Faculty Affairs Committee of the Academic Senate proposes that the competencies of the Faculty Hearing Committees on Grievances and on Academic Freedom and Tenure be amended to remove the current exclusion for matters involving “sexual harassment” and to put in its place an exclusion for matters covered by the University Nondiscrimination and Anti-Harassment Policy. Notwithstanding the proposed new exclusion, the Faculty Hearing Committee on Academic Freedom and Tenure will be able to independently review and make findings on claims that a faculty member’s actions were protected by principles of academic freedom.

The proposal of the Faculty Affairs Committee of the Academic Senate would amend the Competencies sections of the bylaws of the Faculty Hearing Committee on Grievances and the Faculty Hearing Committee on Academic Freedom and Tenure to read as follows:

FHC on Grievances

I. Area of Competence

- A. The Faculty Hearing Committee on Grievances (hereinafter designated as FHCG) handles all grievances initiated by a University faculty member or instructional staff except those involving tenure, dismissal or academic freedom.
- B. The FHCG does not hear grievances concerning academic freedom or the termination, dismissal and/or failure to reappoint tenured or non-tenured (including part-time) faculty.
- C. Grievances concerning academic freedom or the termination, dismissal and/or failure to reappoint tenured or non-tenured faculty are heard by the Faculty Hearing Committee on Academic Freedom and Tenure.
- D. The FHCG hears grievances arising (i) from improprieties of conduct other than matters covered by the University Nondiscrimination and Anti-Harassment Policy and (ii) from matters such as promotions, salaries, assignment of space or other facilities, and assignment of teaching duties. If the issues in a case are such that it could be brought before both the Faculty Hearing Committee on Academic freedom and the Faculty Hearing Committee on Grievances, a case involving tenure must first be submitted to the FHC-AFT. At no time would the FHC-AFT and the FHCG handle any complaints in the same case simultaneously.
- E. Grievances that relate to the matters referenced in D. (ii) above, and that are also based on, or related to, matters covered by the University Nondiscrimination and Anti-Harassment Policy, will be addressed in a sequential process. The Office of Equity Compliance and the Title IX Coordinator will first address the element(s) of the grievance that are related to matters covered by the University Nondiscrimination and Anti-Harassment Policy. The FHCG will receive the findings of the Office of Equity Compliance investigation, which are binding with respect to the elements of the grievance involving matters covered by the University Nondiscrimination and Anti-Harassment Policy. The FHCG will then commence its review of any elements of the grievance that do not involve such

matters. The FHCG's deliberations and final recommendation will take into account the results of the OEC investigation as warranted.

FHC on Academic Freedom and Tenure

I. Area of competence

A. The Faculty Hearing Committee on Academic Freedom and Tenure (hereinafter designated as FHC-AFT) handles all appeals involving the granting of tenure, dismissal, or academic freedom.

B. The FHC-AFT handles appeals arising from improprieties of conduct other than matters which are covered by the University Nondiscrimination and Anti-Harassment Policy.

C. Appeals arising from matters such as promotions, salaries, assignment of space or other facilities, and assignment of teaching duties are heard by the Faculty Hearing Committee on Grievances.

D. If the issues in a case are such that it could be brought before both the Faculty Hearing Committee on Academic Freedom and the Faculty Hearing Committee on Grievances, a case involving tenure must first be submitted to the FHC-AFT. At no time would the FHC-AFT and the FHCG handle any complaints in the same case simultaneously.

E. Appeals that relate to the granting of tenure, dismissal, or academic freedom, and that are also based on, or related to, matters covered by the University Nondiscrimination and Anti-Harassment Policy, will be addressed in a sequential process. The Office of Equity Compliance and the Title IX Coordinator will first address the element(s) of the appeal that are related to matters covered by the University Nondiscrimination and Anti-Harassment Policy. The FHC-AFT will receive the findings of the Office of Equity Compliance investigation, which are binding with respect to the elements of the appeal involving matters covered by the University Nondiscrimination and Anti-Harassment Policy. However, the FHC-AFT may make its own determination regarding whether any actions in the appeal are protected by principles of academic freedom. The FHC-AFT will then commence its review of any elements of the appeal that do not involve matters covered by the University Nondiscrimination and Anti-Harassment Policy. The FHC-AFT's deliberations and final recommendation will take into account the results of the OEC investigation as warranted.¹

¹ The current language of the Areas of Competence sections of the bylaws of the two Faculty Hearing Committees is attached to this document as Appendix A.

Appendix A--Existing Language

Faculty Hearing Committee on Grievances--Bylaws and Operating Procedures (2012)

I. Area of competence

- A. The Faculty Hearing Committee on Grievances [hereinafter designated as “FHCG”] handles all grievances initiated by a University faculty member or instructional staff except those involving tenure, dismissal or academic freedom.
- B. The FHCG does not hear grievances concerning the termination, dismissal and/or failure to reappoint tenured or non-tenured (including part-time) faculty.
- C. Grievances concerning the termination, dismissal and/or failure to reappoint tenured or non-tenured faculty are heard by the Faculty Hearing Committee on Academic Freedom and Tenure.
- D. The FHCG hears grievances arising (a) from improprieties of conduct other than sexual harassment and (b) from matters such as salaries, assignment of space or other facilities, and, assignment of teaching duties.
- E. If the issues in a case are such that it could be brought before both the Faculty Hearing Committee on Academic Freedom and Tenure and the Faculty Hearing Committee on Grievances, a case involving tenure must first be submitted to the FHC-AFT. At no time would the FHC-AFT and the FHC-G handle any complaints in the same case simultaneously.

Faculty Hearing Committee on Academic Freedom and Tenure--Bylaws and Operating Procedures (2012)

I. Area of competence

- A. The Faculty Hearing Committee on Academic Freedom and Tenure (hereinafter designated as “FHC-AFT”) handles all appeals involving the granting of tenure, dismissal, or academic freedom.
- B. Appeals arising (i) from improprieties of conduct other than sexual harassment and (ii) from matters such as promotions, salaries, assignment of space or other facilities, and assignment of teaching duties are heard by the Faculty Hearing Committee on Grievances.
- C. Appeals concerning sexual harassment are addressed by the policy document on sexual harassment.
- D. If the issues in a case are such that it could be brought before both the Faculty Hearing Committee on Academic Freedom and Tenure and the Faculty Hearing Committee on Grievances, a case involving tenure must first be submitted to the FHC-AFT. At no time would the FHC-AFT and the FHC-G handle any complaints in the same case simultaneously.