On the Legal Aspects of University Disciplinary Proceedings in Wisconsin

Chris Henige

Disclaimer

I am not an attorney. I am an architectural historian. Because of my circumstances, I have been forced to research the law regarding my case. As a historian, I am quite familiar with doing research – gathering evidence and crafting an argument based on that evidence. My experience in reading the case law has demonstrated that the law is not really all that different. Evidence is presented, arguments are made based on the language of the statutes and precedents in case law.

There are a couple of assumptions I have made in all of this. First, it seems reasonable to conclude that the statutes mean exactly what they say, and that they are not secret knowledge understood only by lawyers. How can the public be expected to comply with the laws if those laws don't actually mean what they say? Second, it seems reasonable to conclude that the statutes are in fact enforceable, that law enforcement officials are required to do so, and that when it is proven that individuals have failed to conform their conduct to the plain language of the law, then there should be consequences.

Finally, because I am not an attorney, it is entirely possible that my line of reasoning may be flawed in some way. I welcome any commentary on my interpretations – such debate is the very essence of academia. I have no interest in pursuing remedies that are not in fact supported by the law.

Are Faculty Personnel Rules on campuses of the University of Wisconsin System enforceable as law?

Wisconsin Statute 227.01(13) includes the following definition:

> 'Rule' means a regulation, standard, statement of policy, or general order of general application **which has the effect of law** and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or **procedure of the agency**. (emphases added)

Wisconsin Statute 36.09(1)(a) confers upon the Board of Regents to "enact polices and promulgate **rules** for governing the system". (emphasis added)

Wisconsin Statute UWS 2.01 addresses "Faculty Rules", including all rules created as required by UWS 2 through UWS 8.

Wisconsin Statute UWS 2.02 states:

> "Rules and procedures developed pursuant to chs. 3, 4, 5, **6**, 7, and 8 by the faculty of each institution shall be forwarded by the chancellor to the president and by the president to the board for its approval prior to their taking effect. **Such policies and procedures, unless disapproved or altered by the regents, shall be in force and effect as rules of the regents.**"

Wisconsin Statutes Chapter UWS 6 relative to complaints and grievances against faculty, confers rulemaking authority upon individual institutions. At the University of Wisconsin-Whitewater, those rules were created as UWW Chapter VI and approved by the Faculty Senate, approved by the Chancellor and approved by the Board of Regents.

Note: The Faculty Personnel Rules referred to on this website are the rules that were in place when all of the events which are described on this website occurred. Relative to the University of Wisconsin-Whitewater, UWW Chapter VI was approved by the Board of Regents on February 5, 1982 and August 18, 2006. UWW Chapter VI has since been changed, (the new rules were approved by the Board of Regents on October 7, 2016, after all proceedings relative to Henige had been initiated subject to the preceding rules).

In 1997, in the case of *Weyenberg v. UW-Oshkosh*, [Wis. App. 96-1605], the Wisconsin Court of Appeals ruled that:

> "Pursuant to WIS. ADM. CODE § UWS 3.06(1)(c), the rules governing the tenure process at the UWO were established by the faculty and chancellor of that institution and are set forth in the UWO *Handbook* ch. 5, § 5.04, titled Faculty Personnel Policies and Procedures (Faculty Policy). **The policies and procedures set forth in the faculty policy section were approved by the faculty senate, the chancellor and the UW board of regents, and therefore have the status of rules of the regents and may be enforced in the same manner as state statutes***."* (emphasis added)

This ruling makes clear that Faculty Personnel Rules implemented by UW campuses, as long as they are "approved by the faculty senate, the chancellor and the UW board of regents", have the force of law. This would include all chapters of those rules, especially relative in this case to those in Chapter VI relating to complaints and grievances against faculty.

In 2018, the Walworth County Circuit Court ruled in *Henige v. UW Board of Regents* [18CV167] that "uniformity, consistency and compliance with procedural rules are important aspects of the administration of justice; if the statutory proscriptions are to be meaningful, they must be unbending." (Citing *Useni v. Boudron*, 2003 WI App 98, ¶13, 264 Wis 2d 783, 662 N.W.2d, 672).

Weyenberg established that the Faculty Personnel Rules "may be enforced in the same manner as state statutes", and therefore according to *Useni* those rules must be "unbending" in order to be "meaningful". Failure to enforce the Faculty Personnel Rules as statutes, "unbendingly", would be to render them "meaningless".

How flexible are the statutes found in UWS 4 regarding dismissal of tenured faculty members?

As noted just above, *Useni* established that the statutes are not flexible, especially when their plain language does not provide room for interpretation.

For example, UWS 4.03 requires a "standing committee charged with hearing dismissal cases", and UWS 4.04 requires that "The request for a hearing shall be addressed in writing to the chairperson of the standing faculty committee created under s. UWS 4.03." It stands to reason that in order for the accused faculty member to comply with UWS 4.04 there must be a designated "chairperson" of the "standing

committee". What if there is none? What if the "standing committee" is nothing more than a pool of names which has no "chairperson"? Is the University in violation of the law because they have not complied with the requirements of UWS 4.04?

Another example. UWS 4.05 addresses "adequate due process", and subparagraph (1)(h) establishes that "the admissibility of evidence governed by s. 227.45 (1) to (4) stats." Wis. Stat. 227.45(1) states that "the agency or hearing examiner shall admit **all** testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony,…". (emphasis added).

This seems pretty clear – both parties must have the opportunity to present **all** evidence they wish to present as long as it is not "immaterial, irrelevant or unduly repetitious." However long that takes.

But what if the University sets time limits on the ability of both parties to do so? The law says "all", not "all that can fit into three hours". And what if these time limits were established **before** any witness lists or exhibits were submitted to the hearing panel? Not only are such time limits therefore arbitrary and capricious, the law doesn't allow for them in the first place.

What about Open Meetings Law and Open Records Law?

I think we all know that both sets of statutes apply to the University context, and Wisconsin Law is particularly sensitive to open government:

> "Wis. Stat. 19.81: In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business…This subchapter shall be liberally construed to achieve the purposes set forth in this section…"

Again, as in the other instances above, such statutes must be "unbending" if they are to be "meaningful".

Do perjury statutes apply to disciplinary hearings under Wisconsin statutes?

Wis. Stat. 946.31 states:

> "Perjury – (1) Whoever **under oath or affirmation** orally makes a false material statement which the person does not believe to be true, in any matter, cause, action or proceeding, before any of the following, whether legally constituted or exercising powers as if legally constituted, is guilty of a Class H felony: …(d) **An administrative agency** or arbitrator **authorized by statute to determine issues of fact;**" and "(2) It is not a defense to a prosecution under this section that the perjured testimony was corrected or retracted."

Dismissal hearings are authorized by Wis. Stat. UWS 4.04. Does the Hearing Panel have an obligation to have the witnesses swear to the veracity of their testimony? Apparently not. In my case, witnesses were asked to affirm whether their statements would be truthful, but on another campus this did not occur.

I would argue that because in my case witnesses did actually affirm that their testimony would be truthful, and they did so at a hearing authorized by statute, their testimony is subject to the perjury statute. The Office of General Counsel and the Board of Regents have argued that "there is no

requirement in UWS Chapter 4 that witnesses be sworn, nor does such a requirement usually attach to an internal personnel proceeding." What an astounding claim! So, as far as they are concerned, witnesses are free to perjure themselves with impunity at hearings that may result in deprivation of property including tenure. I am sure they would love for that to be the case, but common sense and fundamental principles of fairness and due process argue otherwise.

This raises a larger question of whether all disciplinary hearings are similarly protected, because these other types of hearings are also authorized by statute, UWS 6.01(2):

> "Provision for a hearing before a standing faculty committee selected by the faculty of each institution in such manner as they shall determine. Such hearing shall be held at the request of the chancellor or, if the chancellor invokes a disciplinary action, at the request of the faculty member concerned."

So, it seems sound advice that accused faculty members should make an explicit demand that witnesses take an oath or make an affirmation of truthfulness. If the hearing panel then requires it, the accused is protected from rampant perjury. If the hearing panel declines, then the legitimacy of the entire process might reasonably be called into question.

How might the statutes regarding extortion come into play?

During the course of my adventures as an academic, there came a time when the University seemed to be employing pretty devious tactics in order to compel me to do or not do one thing or another. At one point, it felt extortionate, so I researched the statutes on extortion:

> "Wis. Stat. 943.30(1): Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime or offense, or threatens or commits any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act, is guilty of a Class H felony."

This seems long and convoluted, as it is intended to apply to a wide range of circumstances. Let's reduce it to the basics:

> "Wis. Stat. 943.30(1): Whoever, either verbally or by any written or printed communication, maliciously … threatens or commits any injury to the … profession, calling or trade, or the profits and income of any … profession, calling or trade of another, … with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act, is guilty of a Class H felony."

My paraphrase has not changed the meaning any, and that's right, if someone threatens your income or your job in order to force you to do something illegal, or in order to compel you not to exercise your right to do something legal, they have committed felony extortion. So where do we draw the line between "strongarm tactics" and extortion?

Let's take the example of open meetings law. Wisconsin citizens are guaranteed the right not to be "systematically excluded" from any open and public meetings of governmental bodies as observers. (*Badke v. Greendale Village Board*). It is also the case that if you are a member of the governmental body that is meeting, you cannot be excluded as a member of that body, nor can you be excluded from any meetings of any subunits of that governmental body. (Wis. Stat. 19.89).

Now let's say the University administration has mandated that you "not attend department meetings" of your own department – not as a member and not as an observer – you cannot "attend". That's obviously a violation of open meetings law. But what if they also state, in writing, that if you fail to comply with their directive, you will be subject to disciplinary action up to and including dismissal? Isn't that a threat to the income and profession of someone in order to compel them not to exercise their legal right to attend those meetings? Isn't that extortion?

Another example. What if, during the course of negotiations, the Dean and Chancellor offer to suspend certain penalties imposed against you by the chancellor, say, a semester-long suspension, but only if you do a number of things, including naming an individual who has been privately but lawfully recording open and public meetings of your department under Wis. Stat. 19.90, so that they can take disciplinary action against that individual, and that if you don't name that person, your suspension will not be suspended? Is that extortion? What if the Dean and Chancellor also accuse you of "colluding" with that individual, and that it "must stop"? Isn't it reasonable for you to assume that you will also be facing disciplinary action if you don't "stop" acting lawfully? Is that extortion?

Finally, what if certain faculty members in your department object to your lawful conduct, and file a complaint in which they allege misconduct on your part because you continue to act lawfully even though they had expressed that they don't like your lawful conduct, and so they ask for a suspension to be leveled against you? Is that not a threat against your income in order to compel you to cease acting lawfully? Is that not extortion nonetheless?

Do misconduct in public office statutes apply to the conduct of University employees?

Wis. Stats. 946.12(1) to (5), state:

> "Any public officer or **public employee** who does any of the following is guilty of a Class I felony:
>
> > (1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or"
> >
> > "(2) In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or"
> >
> > "(3) Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of

> others and with intent to obtain a dishonest advantage for the officer or employee or another; or”
>
> “(4) In the officer's or employee's capacity as such officer or employee, makes an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies; or”
>
> “(5) Under color of the officer's or employee's office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law.”

These statutes obviously do apply to University employees because they are “public employees”. So too are the attorneys who represent them.

As you can see, these statutes are like a Swiss Army knife – they can be applied to all kinds of misconduct on the part of University employees. It might seem harsh to seek felony indictments against public employees for doing a lousy job. But these statutes are limited to actions that are either required by law or forbidden by law. They are not intended to cover simple incompetence. These statutes provide remedy for individuals like me who prefer to put a stop to ongoing misconduct rather than allowing the University to sweep it under the rug.

And what about the attorneys?

One would certainly think that lawyers involved in disciplinary proceedings had some obligation to safeguard the integrity of the process. In the case of UW-Whitewater, at the time of the proceedings against me the Faculty Personnel Rules stated that the role of counsel for the hearing panel was to “help the panel conduct impartial, complete, and comprehensive proceedings.” If these rules do in fact have the force of law, then any failures of counsel to meet their obligations would seem to constitute felony misconduct in public office, because in this case the attorneys for the hearing panels were in fact public employees.

There are also remedies to be found in the Supreme Court Rules, Chapter 20, governing attorney ethics: “While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.” I strongly recommend anyone who has dealt with attorneys in any capacity in this process read through these rules in order to avoid being steamrolled by less-than-scrupulous individuals.

Based on my own personal experience, the majority of bad actors in my case did so with the knowledge and counsel of attorneys paid for by the UW System. I made sure of that because I copied them on every objection. These bad actors will probably blame the lawyers when they find themselves faced with criminal charges. With any luck they’ll all sue the lawyers for advising them to break the law, if that’s in fact what happened. But aren’t these same bad actors just as much to blame themselves? They knew the rules, and when they were caught breaking them, they could have admitted their misconduct or incompetence, and made the necessary corrections. Instead, they sought the advice of people whose sole purpose it seems is to sanctify their every action, rather than to instruct them on the realities of the law. So be it.

A Note in Closing

I stated at the top of this document that I am not an attorney, so what if I'm wrong about all of this? Fine, then at least we all know where the lines are drawn. My complaints have been made in good faith based on my interpretations of the plain language of the statutes. Frankly, in order for the University to prevail in complaints based on my reading of the law they will have to make arguments that must be unpalatable to the rank and file of University employees across the state. So far, they've made the following arguments in my case:

- "It is UW-Whitewater's position that once Dr. Henige was removed from his service duties, he was no longer a 'duly appointed member' of the Department for purposes of attending department meetings." (Board of Regents) In other words, if we tell a faculty member not to attend meetings of their own department, then they are no longer "duly appointed" members of that department for the purposes of meetings, and therefore we can tell them not to attend meetings of their own department.
- "There is no requirement in UWS Chapter 4 that witnesses be sworn, nor does such a requirement usually attach to an internal personnel proceeding." (Board of Regents) In other words, witnesses are free to perjure themselves with impunity.
- "Dr. Henige argues that he is not 'on contract' during the summer and thus should not have to participate in a hearing he has requested concerning his dismissal. In the first instance, faculty members are not 'on contract' in the traditional sense. While it is true that their teaching duties may be confined to the academic year, absent any other arrangement, faculty members—particularly tenured faculty members—have continuing appointments and remain on the University payroll and receive health care benefits over the summer month." (Counsel for the chancellor) In other words, faculty on nine-month contracts can be forced to participate in University business when they are not under contract.
- "Therefore, even though the policy does not allow for a continuation without both parties' agreement, the Hearing Panel will grant the request for an extension and select dates that are available for all parties, their key witnesses and the Hearing Panel members as soon as possible so as not to unduly delay this process." (Chair of the Hearing Panel) In other words, the faculty personnel rules are optional, and depending on our own level of incompetence, we can simply ignore these rules in order to cover for our incompetence.
- "As a matter of policy, UW-Whitewater should follow its own rules, but it is also free to reasonably interpret its rules. UW -Whitewater has not prohibited itself from making an exception to its hearing procedures where doing so is reasonable or necessary." (Board of Regents) In other words, the faculty personnel rules are optional, and depending on our own level of incompetence, we can simply ignore these rules in order to cover for our incompetence.
- "To be sensitive of the time commitments of Dr. Henige, the committee members, and witnesses, we believe it is appropriate to set forward some expectations with regard to the time allotted for each party. Particularly, the law recognizes the need to avoid irrelevant and duplicative testimony and to better focus the issues for the committee…The University believes that one day is more than sufficient for it to present its case and for Dr. Henige to present his." (Counsel for the Chancellor) In other words, faculty do not have a right to present a "comprehensive" defense, or in fact to present "all" evidence they believe is relevant, especially

in a hearing in which someone's livelihood is at stake because frankly, we don't have the time for such nonsense.

- "The Board finds that the faculty hearing panel's imposed time limits were reasonable and appropriate." (Board of Regents) Of course they do.
- "…you end up when you do these sorts of things deciding to cast your lot in with one side or another, when in fact … the side you should cast your lot in with is the person who is paying you." (UW-Platteville Administrator). Enough said.
- "University officials receive the benefit of the doubt that they are acting with integrity unless the facts create an impermissibly high probability of actual bias." (Board of Regents) Hmm…
- Et cetera, et cetera…

And what if I'm right? How many University employees across the UW System have already been cheated? How many more will stand up and file complaints? In my own case, I have identified hundreds of offenses against dozens of individuals. What makes these people believe that it's acceptable to violate either the rules or the law?

I am pursuing all of these courses of action because I don't believe public employees should be able to cheat each other or the public with impunity. I am taking criminal action rather than civil action because in my experience, civil actions usually end up in settlements, and settlements with the University typically require nondisclosure and non-disparagement agreements. No thanks. That just allows the University to continue to do what they have always done.

It is my sincere belief that hanging felony convictions on these people is the only way to force compliance with the law, what the rest of us would view as basic human decency and integrity.

Chris Henige