BEFORE A FACULTY HEARING PANEL
AT THE UNIVERSITY OF WASHINGTON

Professor Stephen M. Schwartz, Petitioner, vs. President Ana Mari Cauce, in her official capacity, *et al.*, Respondents.	PROFESSOR SCHWARTZ'S OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

> *"The UW concedes that Professor Allan would have standing as a contracting faculty member to challenge an improperly promulgated change to the Faculty Code."*

The Supreme Court of the State of Washington, in *Allan v. Univ. of Washington*, 140 Wn.2d 323, 331, 997 P.2d 360, 365 (2000).[1]

I. INTRODUCTION

The Administrative Respondents' Motion for Summary Disposition ("Motion") rests on a demonstrably false premise.[2] Professor Schwartz's Petition clearly *does* allege that the purported housekeeping amendment harmed him—and adversely affected the terms and conditions of his employment—in multiple ways. The fact that some of the injuries caused by the "housekeeping" were also inflicted on other faculty in no way diminishes Professor Schwartz's standing to bring this action. Under the Faculty Code, a hearing panel, and only a hearing panel, has the authority to make the first judicial ruling regarding the merits of Professor Schwartz's claims. Moreover, no prospective amendment of the Code will remedy the harms already done to Professor Schwartz by the Administrative Respondents' illegal actions. Accordingly, the Hearing Panel should deny the Administrative Respondents' Motion.

[1] For the convenience of the Hearing Panel, a copy of the *Allan* decision is attached as Exhibit 2 to the Declaration of David Corbett Regarding Respondents' Motion ("*Corbett Decl*.").
[2] Following his prior practice, Professor Schwartz will continue to refer to all of the Respondents, other than the Secretary of the Faculty, as the "Administrative Respondents."

II. PROFESSOR SCHWARTZ'S BRIEF REVIEW OF THE RECENT PURPORTED CHANGES TO FACULTY CODE SECTION 25-71

Professor Schwartz welcomes the Administrative Respondents' admission that the February 2016 housekeeping of Faculty Code Section 25-71 "altered notice requirements associated with UCIRO investigations."[3] However, the Administrative Respondents' description of the attempted change to this section of the Code is incomplete and misleading. The Administrative Respondents state only that "[t]he previous version of the Code required a dean or department chair to inform the faculty member before allegations were referred to UCIRO," and assert that the new version "does not provide for advance notice to the faculty member."[4] Although true at the most general level, these statements fall far short of accurately depicting the substance and effect of the purported change to the Code.

Before the housekeeping shenanigans, the parts of Section 25-71 dealing with investigations of complaints of discrimination and harassment read as follows:

> **B.** If a member of the faculty is alleged to have violated a rule or regulation of the University, its schools, colleges, or departments, the department chair or the dean in a non-departmentalized school or college *shall fully inform the faculty member of the nature and specific content of the alleged violation* and *shall offer to discuss the alleged violation with the faculty member and with the party raising the issue*. The faculty member and the party raising the issue may each be accompanied by one person. The matter may be concluded at this point by the mutual consent of all parties.

[3] Motion, at p. 1. Unfortunately, many of the factual assertions in Professor Schwartz's Petition remain unanswered. Do the Administrative Respondents contest the authenticity or accuracy of any of the emails and other documents referenced as exhibits to the Petition? *Cf.* Petition, at ¶¶ 1.2, 2.7 – 2.24, 2.27 - 2.28, and 5.4. Do they admit or deny that neither Killien nor Cameron ever informed any relevant faculty officer or council of their intent to use housekeeping to change 25-71's rules for handling discrimination matters? *Cf.* Petition, at ¶ 2.21? Do they admit or deny that they believe the Code gives them the power to impose "minor" punishments on non-consenting faculty members prior to any adjudication, and that they regularly use this power? *Cf.* Petition, at ¶ 4.3.1 and ¶ 4.4. Do they admit or deny that Dean Ramsey did not consult with the Chair of the Faculty Senate before removing Professor Schwartz from his PI position? *Cf.* Petition, at ¶ 4.3.2. Accordingly, Professor Schwartz renews his request that the Administrative Respondents be directed to promptly file a Response to the Petition that conforms with Section 28-36(B).

[4] Motion, at p. 1 (emphasis added).

C.	If he or she so wishes, the department chair, the dean, or the faculty member may initiate conciliatory proceedings at any time by contacting the University Ombud as provided in Chapter 27, Section 27-41.
D.	*If a mutually agreeable resolution is not achieved under Subsections B or C of this section*, and if *the dean* (*after consultation in the case of a departmentalized school or college with the department chair and the faculty member*) determines that the alleged violation is of sufficient seriousness to justify consideration of the filing of a formal statement of charges that might lead to dismissal, reduction of salary, or suspension for more than one quarter, he or she shall follow one of the following procedures:
1.	In cases concerning allegations of unlawful discrimination or sexual harassment, the dean shall request an investigation by the University Complaint Investigation and Resolution Office (UCIRO) as provided in Administrative Policy Statement 46.3.[5]

After the housekeeping changes, all the above language has been removed or rearranged so that it no longer applies to a chair's and dean's investigative responsibilities before they can take a complaint to UCIRO.[6] The provisions in the alleged new Section 25-71 dealing with the investigation of complaints of discrimination or harassment have been reduced to the following:

C: In cases concerning allegations of unlawful discrimination, harassment or sexual harassment, or retaliation against a member of the faculty, where the dean has determined under Executive Order No. 31 that the allegations require an institutional investigation, the matter shall be referred to the University Complaint Investigation and Resolution Office (UCIRO).[7]

III. ARGUMENT

1. Much of Administrative Respondents' Motion rests on its mischaracterization of the purported changes made to 25-71.

When the Administrative Respondents summarize the facts that supposedly entitle them to a partial dismissal, they emphasize that Professor Schwartz "does not claim harm from having received notice about the UCIRO investigation shortly *after*, instead of shortly *before*, it was

[5] *See* Exhibit 8 to Petition (emphasis added). *See also* Petition at ¶ 2.7 and Exhibit 9.
[6] *See* Exhibit 8 to Petition.
[7] *See* Exhibit 8 to Petition. The full text of the post-housekeeping version of 25-71 is available on line at http://www.washington.edu/admin/rules/policies/FCG/FCCH25.html#2571.

initiated."[8] This is a complete red herring, only made barely and superficially plausible by the Respondents' mischaracterization of the scope of changes to 25-71. Professor Schwartz had no reason to claim harm supposedly *flowing from a delay in telling him that a UCIRO investigation was underway*. But he had every reason to claim, and does clearly allege, *injury caused by his Chair's failure to "fully inform" him of the "specific content of the alleged violation" and to "offer to discuss the alleged violation with . . . the party raising the issue," before going to UCIRO*.[9] Had they not overlooked the patent difference between being fully informed of the specific content of charges, and being informed that UCIRO is investigating *something*, the Administrative Respondents could not have filed their Motion in its current form.[10]

2. The Administrative Respondents challenge only the sufficiency of Professor Schwartz's allegations, and this challenge has already been rejected by the Chair of the Adjudication Panel.

The Administrative Respondents' Motion attacks Professor Schwartz's pleadings and allegations, rather than his evidence. The Motion begins by stating that Professor Schwartz "does not *claim* the housekeeping amendments caused him any actual harm."[11] It goes on to assert that Professor Schwartz "does not *allege* these forms of notice caused him any actual harm."[12] In the conclusion, the Motion again asserts that Professor Schwartz's *allegations* are defective.[13]

Administrative Respondents' exclusive focus on supposed deficiencies in Professor Schwartz's allegations, rather than with his evidence, has two important consequences. First, *even if* Professor Schwartz's Petition had failed to plead injury with sufficient specificity, the

[8] Motion, at p. 2 (emphasis in original). *See also* Motion, at p. 1 (last paragraph) (emphasizing that Dr. Alpers informed Professor Schwartz of the UCIRO investigation within one day of the UCIRO investigation starting), and p. 3 (first paragraph of argument section) (mentioning failure to allege harm from "insufficient notice of the UCIRO investigation").
[9] *See* Petition, at ¶¶ 1.1, 3.10, and 4.3.3.
[10] Of course, Professor Schwartz also alleges that Dr. Alpers never offered to meet with him and the complainant to discuss the allegations against him. *See* Petition, at ¶ 1.1 and ¶ 4.3.3.
[11] Motion, at p. 1 (emphasis added).
[12] *Id.* at p 2.
[13] *Id*. at p. 5.

proper remedy would be to dismiss the relevant part of his Petition *with leave to amend it*.[14] Or, at least, that would be the proper remedy in the court system.[15] Having insisted that Chapter 28 proceedings are distinguished by their collegiality, the Administrative Respondents should have the burden of explaining how this position is consistent with denying Professor Schwartz the opportunity to amend his pleadings if necessary, an opportunity which he would be afforded as a matter of justice in a court.[16]

Second, because Respondents only challenge the sufficiency of Professor Schwartz's allegations and not his evidence, their motion has already been implicitly ruled on—and rejected—by the Acting Chair of the Adjudication Panel. In his "Schwartz Adjudication Decision" dated March 2, 2018, Professor Richard Christie correctly noted that it was his duty under Section 28-36C to "[d]etermine whether the notice and petition have been properly and timely filed."[17] In his ruling, Professor Christie held in part as follows:

> In determining whether a claim is proper, I look to Faculty Code Section 28-32B, which lists the categories of disputes that may be resolved by adjudication. These include

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[14] If the Hearing Panel believes it necessary, Professor Schwartz offers to amend his Petition to add the following allegation as a new Paragraph **1.4(a)**: "By failing to inform me of the 'specific content' of the alleged violation, and by not 'offer[ing] to discuss the alleged violation' with me and the party raising the issue before turning the matter over to UCIRO, Respondents deprived me of procedural rights that probably would have averted a UCIRO investigation entirely, and also prevented the improper decision to strip me of my position as PI on the CVP grant." *See Corbett Decl.* at ¶ 2 and **Exhibit 1**. *Compare* Petition, ¶¶ 1.1, 1.3, 2.7 and Exhibit 9, and 3.10.

[15] *See, e.g., Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (stating, in a case involving an "as pleaded" challenge to the plaintiff's standing, that "[i]t is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile"). *See also San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831, 842 (2007) (noting that a motion to dismiss based on inadequate pleading "should be granted sparingly and with care, and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief") (internal quotation marks omitted). When the only bar to relief claimed is a failure to plead or allege injury with sufficient precision, that is not an "insuperable bar."

[16] *See* Respondents' Response to Dr. Schwartz's Motion to Strike, at p 1.

[17] The quotation is from Faculty Code Section 28-36C (emphasis added). Professor Christie's ruling refers to Section 28-36C at page 2. A copy of Professor Christie's ruling is attached to the *Corbett Decl.* as **Exhibit 3**.

> "Cases in which it is alleged that an authorized University official, through action or inaction, has violated University regulations thereby affecting the terms, conditions, or course of employment of the petitioning faculty member." (28-32 B.1 in part) . . . .
> . . . .
> Petitioner . . . alleges that Respondents Cameron, and Cauce, together with then-Secretary of the Faculty Professor Marcia Killien, improperly employed a housekeeping process intended for minor changes to make a substantive change to the disciplinary process in Faculty Code 25-71 for dealing with issues involving UCIRO investigations. *This alleged improper change, which removed the requirement for providing the specific content of an alleged violation and offering to discuss the alleged violation prior to taking disciplinary action against a faculty member, was in place on January 8* [sic]*, 2017 and* *contributed to the alleged impropriety of Petitioner's removal as PI of the CVP grant, affecting the terms, conditions, or course of his employment*.
> . . . .
> I find that Petitioner has alleged that administrators took various actions that were unfair and/or illegal, and affected the terms, conditions, and course of Petitioner's employment. I find that the question of which version of the Faculty Code was legally in effect at the time of these alleged actions is an important, but not the only, component of Petitioner's allegations, and that *the legality of the change is a proper subject of this adjudication*.[18]

Professor Christie's reading of the Petition is a reasonable one, unaffected by the Administrative Respondents' mischaracterization of the housekeeping changes to 25-71.[19] It also directly rejects the Administrative Respondents' main argument in their Motion.

Although the Faculty Code is silent as to whether this Hearing Panel must defer to the decision of the Chair of the Adjudication Panel, clearly it can so defer, or simply adopt his reasoning as its own. However, the remainder of this Opposition explains, without further reference to Professor Christie's ruling, why the Administrative Respondents' Motion is completely unpersuasive.

3. Professor Schwartz's Petition plainly alleges both that the housekeeping amendments injured him, and that those injuries affected the terms and conditions of his employment.

Contrary to the Administrative Respondents' key assertion, Professor Schwartz's Petition "does . . . claim the housekeeping amendments caused him . . . actual harm."[20] Each of the

[18] *Corbett Decl*., Exhibit 2, at pp. 3-4 (emphasis added).
[19] *See supra*, at pp. 1-2.

following alleged harms flowing from the housekeeping amendments is sufficient to defeat Respondent's principal argument for dismissal.

a. Deprivation of the right to vote on a substantive amendment to the Code.

The University is "first and foremost a community of scholars," and the faculty are a vital part of that community.[21] The Washington legislature has recognized this fact by delegating its authority over the "immediate government of the institution" to the faculty, under the supervision of the Board of Regents.[22] The Faculty Code, in turn, is an essential part of the legal framework regulating faculty participation in the shared governance of the University.[23]

Although the faculty have delegated much of their legislative authority to the Faculty Senate, they have specifically retained their authority to approve or reject changes to the Faculty Code.[24] Section 29-36(C) of the Faculty Code states that "[t]o become effective, a proposed amendment to the Faculty Code shall require either an affirmative majority vote of the eligible members of the faculty, or a two-thirds majority vote of those casting ballots."[25] Professor Schwartz is an eligible voting member of the faculty.[26] Accordingly, he has a right to vote on any substantive amendment to Section 25-71.[27]

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[20] *See* Motion for Summary Disposition, at p. 1 (emphasis added).
[21] Executive Order 32. *See also* Faculty Code Section 13-20.
[22] *See* RCW 28B.20.200.
[23] It is also part of state law, by virtue of having been enacted under a delegation of authority from the State Legislature. *See, e.g.*, *Mills v. W. Washington Univ.*, 170 Wn.2d 903, 913, 246 P.3d 1254, 1259 (2011).
[24] Faculty Code Section 21-41. *See also* Faculty Code Section 13-31 (noting that the "the University faculty . . . [e]nacts each Chapter of the Faculty Code")
[25] Faculty Code Section 29-36(C).
[26] *See* Faculty Code Section 21-32(A), and Petition, at p. 1. Professor Schwartz's status as a faculty member is one more thing the Respondents have so far neither admitted nor denied.
[27] Indeed, given his status as a member of the voting faculty, and given the plain terms of Chapter 29, Professor Schwartz—like all other voting faculty—arguably has a right to vote on all amendments to the Code. The Introduction to Faculty Code and Governance, the only document to reference housekeeping *of the Code* in the entire UW Policy Directory, bears no sign of having been issued by anyone with authority. *See* http://www.washington.edu/admin/rules/policies/FCG/FCGIntro.html. Presidential Executive Order 3 authorizes "housekeeping" of "executive orders and administrative orders," but not of the Faculty Code. *See* http://www.washington.edu/admin/rules/policies/PO/EO3.html. Nonetheless, in this adjudication, Professor Schwartz is focusing on the housekeeping performed on Section 25-71 in February 2016.

By purporting to make a substantive amendment to 25-71 by means of housekeeping, respondents Cheryl Cameron, the former Secretary of the Faculty, and the Office of the President directly deprived Professor Schwartz of an important right (his right to vote on Code amendments), thereby detrimentally affecting the terms and conditions of his employment.[28] Professor Schwartz's Petition clearly alleges this injury, and this injury by itself is sufficient to defeat the Administrative Respondents' Motion.[29]

This conclusion follows directly from Faculty Code Section 28-32(B)(1). That section gives a faculty member a right to seek adjudicative relief if he or she alleges that a University official "has violated University regulations [*here, Chapter 29 of the Faculty Code*] thereby affecting the terms [*here, the right to vote on changes to the constitution of shared governance*] . . . of employment of the petitioning faculty member."[30]

The conclusion that the Administrative Respondents' Motion fails as a matter of law is also decisively supported by Washington Supreme Court precedent dealing with the concept of a plaintiff's "standing" under the Administrative Procedures Act ("APA"). Under the APA, "[a] person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action."[31] Although they do not say so, the Administrative Respondents' Motion is effectively a challenge to Professor Schwartz's standing to obtain judicial review of the alleged housekeeping amendment to Section 25-71.[32]

Unfortunately for the Administrative Respondents, the University has previously conceded to the Supreme Court that a *"Professor . . . would have standing as a contracting faculty member to challenge an improperly promulgated change to the Faculty Code*."[33] This is of course a key part of what Professor Schwartz is alleging: that the changes to Section 25-71

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[28] *See* Black's Law Dictionary (6th ed. 1990) at p. 1472 (defining "terms" as "[c]onditions, obligations, rights, price, etc., as specified in contract or instrument") (emphasis added).
[29] *See* Petition, at ¶ 3.8 and 3.10.
[30] Faculty Code Section 28-32(B)(1).
[31] RCW 34.05.530.
[32] That the UW is a state "agency" subject to the APA's adjudicative provisions is established by RCW 34.05.010(2) and (16).
[33] *Allan v. Univ. of Washington*, 140 Wn.2d 323, 331, 997 P.2d 360, 365 (2000).

were "improperly promulgated" under the guise of "housekeeping." [34] Even if the Administrative Respondents can offer some plausible reason why they should not be bound by the University's prior concession, the Supreme Court went on to hold that a UW professor "*has [a] contractual interest in the rules that govern his working conditions.*"[35] Professor Schwartz has a concrete, contractual right to vote on amendments to the Faculty Code, and has alleged that this right was infringed when Respondents purported to substantively amend the Code without a faculty vote. Accordingly, the Administrative Respondents' argument that Professor Schwartz has failed to allege a cognizable injury caused by the housekeeping is patently incorrect.

b. Deprivation of important procedural protections.

In addition to alleging that the attempt to make substantive amendments to 25-71 under the guise of housekeeping deprived him of his contractual right to vote, Professor Schwartz also alleges that this improper amendment facilitated Drs. Alpers and Ramsey's violation of important contractual procedural protections that apply when a chair *timely* learns of a complaint against the faculty member.[36]

The qualification that the rights at issue apply when a chair *timely* learns of a complaint against the faculty member is necessary because the pre-housekeeping version of 25-71 was designed to be consistent with APS [Administrative Policy Statement] 46.3.[37] APS 46.3 foresees two different possible types of investigation into claims of discrimination or harassment: (1) "local investigation and resolution" and (2) "UCIRO[] investigation and resolution."[38] Although "all individuals are encouraged to discuss complaints against University employees with the appropriate supervisor," APS 46.3 also allows the person making the complaint, at his or her option, to bypass the supervisor and go directly to UCIRO.[39]

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[34] *See* Petition, at ¶¶ 2.1-3.11.
[35] *Id*. at 332.
[36] *See* Petition, at ¶ 3.10 and ¶ 4.3.3 (clearly alleging the deprivation of the relevant procedural rights).
[37] APS 46.3 is available on line at http://www.washington.edu/admin/rules/policies/APS/46.03.html. Strikingly, APS 46.3 was not changed at the same time as Section 25-71, even though it is promulgated by the Provost.
[38] APS 46.3 (2).
[39] *See* APS 46.3(2)(A) and (B).

According to Respondents' own account, the person raising allegations against Professor Schwartz did not go directly to UCIRO, but instead went to Dr. Alpers and his assistants.[40] Therefore, Professor Schwartz not only shares with all faculty the abstract chance that he might face a situation where he has the rights conferred by the valid Section 25-71, but he actually was confronted with such a situation. Even in the absence of any other harm, Professor Schwartz has standing to vindicate the procedural rights that the Administrative Respondents collectively failed to provide him.[41]

c. Deprivation of the opportunity to head off the UCIRO investigation and prevent Dean Ramsey's improper punishment prior to adjudication

The one part of the Administrative Respondents' Motion which might sound like a challenge to Professor Schwartz's evidence, rather than simply to his pleading, is the statement that "[u]nder all the circumstances, no discussion with Dr. Schwartz could have relieved Drs. Ramsey and Alpers of their obligation to commence an investigation."[42] The Administrative Respondents try to bolster this assertion by noting that "Dr. Schwartz, through his attorney, conceded that the 'University should investigate allegations of behavior that . . . may qualify as unacceptable or inappropriate under E.O. 31.'"[43]

However, the Administrative Respondents' argument here is disingenuous. Even if Dr. Alpers had to investigate, he did not have to commence a UCIRO investigation. As previously

[40] Response to the Petition, at pp. 1-2.
[41] *See* Section 25-71D(3) (pre-housekeeping version) (stating that "a faculty member aggrieved as a result of these [investigative] activities has recourse to . . . the adjudicative proceedings described in Chapter 28"). The faux, "housekept" version of 25-71 has moved this passage to obscure its bearing on investigations of discrimination, and substantively changed the wording to refer to "potential recourse" rather than just "recourse." *See* Exhibit 8 to the Petition. However, both versions reinforce the point that a professor has standing to seek relief for procedural wrongs. *See also Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 794, 920 P.2d 581, 584 (1996) (noting that "[w]here an agency refuses to provide a procedure required by statute or the Constitution, the United States Supreme Court routinely grants standing to a party despite the fact that any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative") (internal quotations omitted). *See also* Section 25-71(E)
[42] Motion, at p. 3 (emphasis added).
[43] *Id.* at pp. 3-4.

noted, APS 46.3 provides for both "local investigation and resolution" and "UCIRO[] investigation and resolution" of discrimination and harassment complaints.[44] The pre-housekeeping (and still valid) version of 25-71 regulates the sort of "local" investigation that is to occur when a complainant first goes to a Chair, rather than UCIRO. The Chair's talking with the accused professor, fully informing him or her of the specific content of the charges, and offering to discuss the matter together with the accuser, are all part of the local investigation required to be done before a chair or dean can turn a matter over to UCIRO.[45]

In short, although it is true that Dr. Schwartz does not "claim he was entitled to have an opportunity to head off the investigation," he has more than adequately pleaded deprivation of an opportunity to head off the UCIRO investigation and the related precipitate decision to strip him of his PI position.[46] Indeed, given "all the [undisputed] circumstances," it's very difficult to see how timely informing Professor Schwartz of the specific content of the allegations against him could not have averted the substantial subsequent harms to Professor Schwartz. It is undisputed that the allegations against Professor Schwartz were found to be unsupported.[47] This means that no student or faculty member corroborated the assistant's claims, nor did anyone confirm the

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[44] APS 46.3

[45] *See* Exhibit 9 to Petition, at p. 2. If necessary, Professor Schwartz will demonstrate in future briefing that nothing in any past or current U.S. Department of Education interpretation of Title IX prohibits a local investigation as allowed by both APS 46.3 and the pre-housekeeping version of 25-71. *Compare* *https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf* (April 2011 document cited by Administrative Respondents at Motion, p. 3) *with* *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf* (September 2017 document withdrawing prior analysis of Title IX, and noting that the prior analysis led educational institutions to adopt procedures that "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation"). For now, however, the Hearing Panel need not and should not take a position on whether some part of Title IX or the associated federal regulations supersedes both the pre-housekeeping version of 25-71 and APS 46.3. The Administrative Respondents did not even raise the specific issue of the permissibility of a "local" investigation in their Motion, and hence should not be allowed to elaborate on this in their reply (to which Professor Schwartz would not be allowed to respond). If the Administrative Respondents wish to raise some sort of "higher law" defense, they can do so in their response to Professor Schwartz's upcoming motion, in a new motion if they choose to file one, or at the hearing itself.

[46] Motion, at p. 3. *See also* Petition, at ¶ 1.1, 1.3-1.4, 3.10, and 4.3.3. If the Hearing Panel concludes that these allegations are not sufficiently specific, Professor Schwartz is entitled to amend his Petition as indicated in footnote 13 above.

[47] Response to Petition, at p. 4.

existence of a retaliatory voice mail. [48] Surely Professor Schwartz is entitled to the inference that if he had been informed in detail about the charges, he would have asked Dr. Alpers if the allegations had been corroborated by anyone other than the single complainant. Dr. Alpers and Dr. Ramsey have so far not been willing to maintain, under penalty of perjury, that they would have forged ahead with a UCIRO investigation and stripped Professor Schwartz of his PI position even though they knew or should have known of the lack of corroboration for the assistant's claims. They are thus in no position to deny that informing Professor Schwartz about the specific content of the charges, and offering to meet with him and the assistant, would have dramatically changed the course of further investigation.

For all of the above reasons, Professor Schwartz has clearly overcome the Administrative Respondents' challenge to the adequacy with which he alleged injury flowing from the attempted housekeeping amendment to 25-71.

4. The Hearing Panel, and only the Hearing Panel, has the authority under the Code to redress the injuries inflicted on Professor Schwartz.

The Administrative Respondents assert that "[f]aculty adjudication panels exist to follow and enforce the Code as written."[49] To perform that task, hearing panels must be vested with the authority to interpret the Code, and to distinguish between what is Code and what isn't.[50] The Administrative Respondents have now admitted that the housekeeping "amendments" to Chapter 25-71 have not been ratified.[51] If this Hearing Panel determines that these unratified alterations made substantive changes to 25-71 and therefore exceeded the proper scope of any

[48] *Id.*

[49] Motion, at p. 4 (emphasis added). Professor Schwartz might propose a different description of the role of hearing panels, but he agrees that a touchstone of their duties is respect for the Code, as opposed to respect for something merely masquerading as Code.

[50] *See, e.g., Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule"). *See also United States v. Nixon*, 418 U.S. 683, 703, 94 S. Ct. 3090, 3105, 41 L. Ed. 2d 1039 (1974) (applying the same principle in a case involving the President of the United States).

[51] Motion, at p. 4, note 5 (asserting that "[e]ven if the provisions at issue here are not ultimately *revised*, they will at least be *ratified* by the processes underway") (emphasis in original). This is a peculiar statement, which would only be true at the time it was written if the Administrative Respondents already knew both the content of the proposals to be put to a faculty vote and the outcome of that vote. Professor Schwartz hopes this is not the case.

housekeeping, it has the authority to say so. By declaring the amendments to be invalid, and by stating that the responsible persons exceeded their authority, this hearing panel would take a substantial first step toward vindicating Professor Schwartz's rights and redressing the various injuries inflicted on him.

Numerous provisions in the Code support the conclusion that a hearing panel has the authority to make the sorts of determination Professor Schwartz asks of it.[52] The preface to Chapter 28 states in part that "[t]his chapter sets forth the adjudicative procedures to be used in resolving disputes involving faculty members that cannot be resolved by informal means," that its provisions comply with the Administrative Procedures Act, and that "parties shall avail themselves of these proceedings prior to seeking review beyond the University."[53] Section 28-32(B) states that "[a] faculty member may initiate an adjudication . . . for resolution of a dispute . . . in which it is alleged that an authorized University official, through action or inaction, has violated University regulations thereby affecting the terms, conditions, or course of employment of the petitioning faculty member."[54] Section 28-54(B) lists "restoration . . . of privileges, benefits or status" as proper types of remedy a hearing panel may award.[55] Section 25-71D(3) of the pre-housekept Code states that "a faculty member aggrieved as a result of these [investigative] activities has recourse to . . . the adjudicative proceedings described in Chapter

[52] So, too, do other provisions of state law concerning an agency's power to grant declaratory relief. *See* RCW § 34.05.240 and WAC 478-108-070. These provisions were analyzed in detail at pp. 10-11 of Professor Schwartz's Combined (1) Motion to Strike Administrative Respondents' Answer to Petition as Non-Responsive, dated March 1, 2018.

[53] Chapter 28 (preface). The fact that the court system would be willing to hear and rule on this controversy is established by *Allan*, *Mills*, and other cases where issues relating to faculty codes have been ultimately adjudicated by the courts. *See also Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 44, 202 P.3d 334, 340 (2009) (noting that "[i]t is well-settled law in Washington that public agencies must follow their own rules and regulations"). This Hearing Panel's deliberations, and any attendant internal appeals or informal dispute resolution, are the University's one chance to keep this matter from the court system.

[54] As demonstrated above at pp. 1-12, this is precisely what Professor Schwartz alleges in his Petition.

[55] Professor Schwartz submits that declaring the housekeeping amendments to Chapter 25-71 to be null and void is an effective, and necessary, step toward restoring to him the "privileges, benefits, [and] status" of being a voting member of the faculty of the University of Washington, possessed of the procedural rights conferred by the valid, pre-housekeeping version of 25-71.

28."[56] Finally, Section 22-60(B)(9) implicitly acknowledges the power of a hearing panel to interpret any section of the Code that is at issue before it.[57]

The fact that the University has now convened a "Task Force on the Faculty Disciplinary Code and Process" in no way impairs this panel's right and duty to rule on the merits of Professor Schwartz's claims about housekeeping.[58] According to the Administrative Respondents, the Task Force was created to "review and revise the faculty disciplinary process in the Faculty Code."[59] By the Administrative Respondents' own admission, the Task Force was not convened to recommend or award possible redress to Professor Schwartz. Indeed, no possible prospective amendment of the Code could remedy the harms already inflicted on Professor Schwartz. The Administrative Respondents argue here precisely like lawbreakers who, caught in the act, try to avoid a judicial reckoning by pleading with the court to look the other way until "better" laws are made in the future.[60] The Hearing Panel should not fall for this self-serving sophistry.

5. The Hearing Panel should deny the renewed motion to dismiss the Secretary of the Faculty in his official capacity, unless agreement is achieved, and an order issued, to the effect that the Secretary of the Faculty will be a "permissive nonparty participant."

Professor Schwartz has repeatedly emphasized that the current Secretary of the Faculty is a party solely in his official capacity. However, this is not a reason to dismiss Professor Townsend from this matter. His predecessor in office is credibly alleged to have exceeded her

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[56] *See* Exhibit 8 to Petition.
[57] Section 22-60(B)(9) states that the SEC "[s]hall interpret . . . the provisions of the *Faculty Code* on matters other than those within the jurisdiction of the Adjudication Panel (Chapter 28),[*]" and an appended comment states that "[*][t]he scope of this authority extends to any provision of the *Faculty Code* not currently the subject of an adjudication under Chapter 28."
[58] Motion, at pp. 2-3, and Appendix A.
[59] Motion, at p. 2. The Administrative Respondents' carelessness with the Code is tellingly exemplified by their statement that the Task Force will "revise" the Code. Not unless it violates Chapter 29, it won't.
[60] As Professor Schwartz has previously pointed out, the Faculty Code is part of state law. *See, e.g., Mills v. W. Washington Univ.*, 170 Wn.2d 903, 913, 246 P.3d 1254, 1259 (2011) (holding that "[b]ecause [a section] of the University's [WWU's] Faculty Handbook [dealing with faculty discipline] was promulgated pursuant to legislative delegation . . . it is a '*provision of law*'") (emphasis added).

authority and violated the Faculty Code because of her participation in the housekeeping alteration of Section 25-71.[61] The only proper person to defend the actions taken by the former Secretary of the Faculty in her official capacity (if he so chooses) is the current Secretary of the Faculty.

The participation of the Secretary of the Faculty in this matter as a party may be particularly important once the Hearing Panel begins to consider a precise remedy. The Hearing Panel can only direct parties "to take such steps as may be appropriate to carry out its decisions," and the President can only direct parties to "do whatever is necessary to implement the decision."[62] Professor Schwartz has expressly requested that the Hearing Panel declare the supposed housekeeping amendments to Chapter 25-71 to be null and void.[63] It would also be just and reasonable for the Hearing Panel to direct the University to once again publish the correct, pre-housekeeping version of 25-71.[64] Technically, that relief cannot be afforded unless the Secretary of the Faculty is a party. The Secretary of the Faculty does not serve at the pleasure of the President, and only the Secretary of the Faculty is authorized to give the final go-ahead to publication of the Code.[65]

One possible accommodation that might satisfy the concerns of all parties would be as follows: (1) The Secretary of the Faculty would formally waive his right to defend his predecessor's actions; (2) Professor Schwartz would stipulate that this waiver is not a concession of liability; (3) the Secretary of the Faculty would seek, and the Hearing Officer grant, status as a "permissive nonparty participant" pursuant to Section 28-51(B); and (4) the Secretary of the Faculty would stipulate to be bound by the ultimate decision in this matter,

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[61] *See* Petition, at ¶¶ 2.1-3.11.
[62] *See* Section 28-54(B) and Section 28-91. "Party" is defined by Section 28-31(G) as "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." Section 28-91.
[63] Petition, at p. 15 (first bullet point).
[64] *See* Petition, at p. 15 (final bullet point, asking the Hearing Panel to grant "[s]uch other relief as the Hearing Panel determines to be just, fair, and reasonable."
[65] *See* Sections 22-56 and 22-57, *and* Executive Order 47.

whether that final decision is rendered by the Hearing Panel or on appeal. In the absence of a stipulation and order of this form, the Hearing Panel should not dismiss the Secretary of the Faculty from this adjudication.

6. The Hearing Panel should not dismiss President Cauce and Vice Provost Cameron, even if it were to decide that Professor Schwartz lacks standing to challenge the housekeeping to 25-71.

The Administrative Respondents also argue in passing for the dismissal of Vice Provost Cameron and President Cauce.[66] This argument is based on the assertion that "*only* Dr. Schwartz's housekeeping amendment claims implicate" those Respondents.[67] This assertion is incorrect. Professor Schwartz's Petition alleges that "[t]he University[] persist[s] in ignoring the plain language and intent of the Code by punishing faculty prior to adjudications."[68] This allegation provides sufficient notice to all Administrative Respondents that Professor Schwartz intends to prove that Drs. Alpers and Ramsey were acting according to illegitimate policies formulated at the highest level when they punished Professor Schwartz prior to any adjudication. The Hearing Panel should not dismiss Vice Provost Cameron and President Cauce, even if it concludes that Professor Schwartz does not have standing to pursue his claims related to housekeeping.

IV. CONCLUSION

The Administrative Respondents' Motion for Summary Disposition fails for multiple reasons. The Motion's arguments rest on a clear mischaracterization of the scope of the purported housekeeping changes to Section 25-71. Because it challenges only Professor Schwartz's pleadings, rather than his evidence, the Motion has already been effectively rejected by the prior ruling of the Acting Chair of the Adjudication Panel.[69] The Motion flies in the face of established law regarding standing, and the University's prior concession that a professor "would have standing as a contracting faculty member to challenge an improperly promulgated

[66] Motion, at p. 4.
[67] *Id.* (emphasis added).
[68] Petition, at ¶ 5.4 (emphasis added). *See also* Petition, at ¶ 4.3.1 and ¶ 4.4.
[69] *See Corbett Decl.*, **Exhibit 2**.

change to the Faculty Code."[70] Furthermore, Professor Schwartz has plainly alleged at least three different ways in which the purported housekeeping amendment adversely affected the terms and conditions of his employment.[71] Because Professor Schwartz clearly has standing to pursue his claims related to housekeeping, because the Hearing Panel clearly has the authority to grant him relief, and because there is no legislative remedy for the injuries to Professor Schwartz, the Hearing Panel should deny the Administrative Respondents' Motion.

Dated May 18, 2018.

By: David J. Corbett
David J. Corbett
Attorney for Petitioner Professor Stephen Schwartz.

[70] *Allan*, 140 Wn.2d at 331.
[71] Even if the Hearing Panel disagrees about the sufficiency of Professor Schwartz's pleadings, it should at most dismiss the Petition with leave to amend. *See supra,* at pp. 4-5 and note 13.