In re Dr. Stephen M. Schwartz Petition for Adjudication

Respondents' Reply in Support of Their Motion for Summary Disposition of Dr. Schwartz's Claims Regarding the February 12, 2016 Housekeeping Amendments to Faculty Code Section 25-71

INTRODUCTION

In response to multiple, serious allegations that Dr. Schwartz had harassed staff and students, Dr. Paul Ramsey, Dean of the School of Medicine, asked UCIRO to commence an investigation. Dr. Schwartz was notified of the investigation's commencement the next day, had detailed information about the allegations within the week, and participated in the investigation. UCIRO ultimately did not find facts showing violations of Executive Order 31. Dr. Schwartz then resumed his role as principal investigator on a training grant, a role temporarily occupied by Dr. Mark Majesky during the investigation. The allegations, and the investigation, were handled professionally and appropriately.

Dr. Schwartz claims to have been injured personally by some of these events, but he also claims that he—along with every other faculty member—was injured by housekeeping amendments made to Section 25-71 of the Faculty Code in February 2016. He asks the Panel to change the Code back to what it was in 2015. But any such change in the Code would affect all faculty members equally, and is therefore a decision best left to other bodies in the University; it should not be made by a three-person adjudication panel convened only for the purpose of assessing—and, if appropriate, redressing—claims of actual, personal injuries alleged by an individual faculty member.

Right now, a task force is at work reviewing and revising the provisions of Section 25-71. The work of that task force is expected to culminate in a full faculty vote within the next academic year. If a Code change affecting all faculty members is to be made, it should be made pursuant to that process—not as part of an adjudication that features no actual injury allegedly suffered by Dr. Schwartz. This Panel should dismiss Dr. Schwartz's housekeeping amendment claims because he has suffered no actual injury, and in deference to the work being done elsewhere in the University to revise Section 25-71. At the very least, the Panel should stay consideration of Dr. Schwartz's housekeeping claims until the task force has completed its work. Dr. Schwartz's claims may soon be moot, and the Panel can consider and resolve Dr. Schwartz's other claims in the meantime.

ARGUMENT

1. Dr. Schwartz Claims No Injury Relating to the Code Amendments that Can Be Remedied by this Panel

a. Dr. Schwartz Claims Only Generalized Injury

Dr. Schwartz claims this Panel should not wait for the task force to complete its work because "no prospective amendment of the Code will remedy the harms already done to Professor Schwartz by the Administrative Respondents' illegal actions." Professor Schwartz's

Opposition to Respondents' Motion for Summary Disposition ("Opp'n") at 1. But, of course, nothing he asks *this Panel* to do would remedy any alleged "harms already done to Professor Schwartz," either. With respect to the housekeeping amendments, Dr. Schwartz asks the Panel only to declare them "null and void;" he does not ask the Panel to remedy any injuries he claims flowed uniquely to *him* from lack of notice (no such injuries exist). Because he asks only for a change in the Code that would affect all faculty members equally, that issue should be left to the task force. This is not a proper subject for adjudication.

Dr. Schwartz claims it does not matter that any "injuries" stemming from the housekeeping amendments "were also inflicted on other faculty," Opp'n at 1, but individualized injury is necessary for any adjudication. Faculty Code Section 28-32.B.1. authorizes a faculty member to file a petition only if an action has affected the terms, conditions, or course of employment "*of the petitioning faculty member.*" (Emphasis added.) Section 28-32.B.3. similarly focuses on the terms, conditions, or course of employment "of the faculty member" filing the petition. A faculty member filing a petition must claim a personal, specific injury that can be redressed by an adjudication.

This is also true in court. In order to bring a claim in court, the U.S. Supreme Court has explained that a plaintiff must have suffered an "'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotations omitted). It must also be "likely" that the "injury will be redressed by a favorable decision." *Id.* at 561 (citations and quotations omitted). Without those elements, a plaintiff does not have "standing" to sue.

Because injuries must be particularized, people cannot file lawsuits in court to remedy *generalized* injuries. For example, the U.S. Supreme Court has rejected challenges to the propriety of the process by which the Nineteenth Amendment was ratified, *Fairchild v. Hughes*, 258 U.S. 16 (1922), a taxpayer suit challenging the propriety of certain federal expenditures, *Massachusetts v. Mellon*, 262 U.S. 447 (1923), a claim that Justice Hugo Black's appointment to the Supreme Court violated the U.S. Constitution, *Ex parte Levitt*, 302 U.S. 633 (1937), and a challenge to the federal government's failure to disclose CIA expenditures, *United States v. Richardson*, 418 U.S. 166 (1974). In these types of cases, a plaintiff cannot seek relief for a "generalized grievance" because "the impact on [plaintiff] is plainly undifferentiated and common to all members of the public." *Richardson*, 418 U.S. at 171, 176-77.

According to the U.S. Supreme Court, the role of the courts "is, solely, to decide on the rights of individuals." *Lujan*, 504 U.S. at 576 (citation and quotation omitted). "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Id.* (emphasis in original). These well-established principles are also embedded in the Code. *See* Section 28-32.B.

Here, Dr. Schwartz claims he was denied the right to vote on changes to Section 25-71 and was denied procedural protections he believes were changed by the housekeeping amendments. Opp'n at 7-10. These are generalized grievances that would apply equally to all faculty members. They are therefore inappropriate subjects for an adjudication, and proper

subjects for the political bodies at the University.[1] The Panel should not insert itself into work that the task force (incorporating members from both the legislative and executive components of the University) is doing now to carefully review and revise Section 25-71.[2]

b. Dr. Schwartz Could Not Have "Headed Off" an Investigation

Dr. Schwartz for the first time suggests he has suffered a particularized injury because he was denied an opportunity to head off the investigation into his alleged misconduct. Opp'n at 11-12. The University of Washington has an obligation under state and federal law to investigate allegations of harassment such as these. *E.g.*, *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 793-94, 98 P.3d 1264 (2004). Nothing Dr. Schwartz could have said or done would have relieved Drs. Ramsey and Alpers, or the University, of that obligation.

Seemingly recognizing that obligation, Dr. Schwartz claims that, without the housekeeping changes, an investigation could have been handled either "locally" *or* by UCIRO, and that he was harmed because he should have had "an opportunity to head off *the UCIRO investigation.*" Opp'n at 11 (emphasis in original). This is wrong. He offers no logical reason why it would have made any difference to have had the investigation conducted "locally" rather than by UCIRO. The University's obligations to investigate thoroughly would have been unchanged.

Moreover, Dr. Schwartz is simply wrong when he claims "it's very difficult to see how timely informing Professor Schwartz of the specific allegations against him could *not* have averted the substantial subsequent harms to Professor Schwartz." *See* Opp'n at 11 (emphasis in original). Dr. Schwartz was informed about the investigation the day after it was requested, and within a week he had detailed information about the allegations against him. *See* Response to Petition at 3-4; Appx. 5. He did not even attempt to use that information to cut the investigation short. The allegations against him were serious and credible. *See id.* at 1-3; Appx. 1-4. The complaints were made by more than one person, related to different alleged victims, and arose from different occasions. *See id.* In a March 24, 2017 letter to Drs. Ramsey and Alpers (two months into the investigation), Dr. Schwartz's attorney complained about the location of

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[1] Dr. Schwartz's claims are unusually political because they pit a faculty member against a former Secretary of the Faculty.

[2] Dr. Schwartz claims that the University conceded, in *Allan v. University of Washington*, 140 Wn.2d 323 (2000), that any faculty member would have standing to challenge the propriety of a change to the Faculty Code. If Dr. Schwartz is right—and a faculty member need not wait to file a petition until that faculty member has suffered actual, particularized injury—then Dr. Schwartz could have brought his claims on February 13, 2016, as soon as the housekeeping amendments were published publicly. He did not do that, and would be outside the 90 days he is allowed to bring a petition. *See* Section 28-35.B. In other words, even if the Panel agrees with Dr. Schwartz that generalized grievances are appropriate subjects for adjudication, his housekeeping amendment claims should be dismissed as untimely. Moreover, the *Allan* decision is not instructive. The Court determined only that a professor's spouse does not have standing to assert a claim under the Administrative Procedures Act based on an allegation that the University failed to follow procedural requirements. 140 Wn.2d at 332-33. The Court expressly declined to find that *anyone* (including a professor) would have standing to challenge changes to the Faculty Code in court under the Administrative Procedures Act, *id.* at 333, and questioned whether the injury-in-fact element would be satisfied where Code changes related to disciplinary proceedings, and there was no pending disciplinary proceeding pending against the faculty member, *id.* at 332. This case is different from *Allan.*

Dr. Schwartz's office, but did not suggest the UCIRO investigation was an unjustified fishing expedition that could have been entirely averted by a simple meeting with Dr. Schwartz. *See* Petition Ex. 2.

Dr. Schwartz's particularized requests for relief all relate to the decision to temporarily make Dr. Mark Majesky principal investigator on a training grant while the investigation took place. *See* Petition at 15. That decision had nothing to do with the housekeeping amendments. While the Respondents do not agree that Dr. Schwartz's claims related to the training grant have merit, or that he has been harmed, Respondents at this time ask the Panel only to dismiss Dr. Schwartz's claims relating to the housekeeping amendments, which caused him no particularized injury whatsoever.

2. Given Dr. Schwartz's Lack of Injury, the Panel Should Leave It to the Task Force to Reevaluate Section 25-71

Because Dr. Schwartz claims the housekeeping amendments caused him only an "injury" shared by all other faculty members, this Panel should leave it to the task force to review and revise the Code that applies to everyone. Dr. Schwartz makes almost no comment on the task force, other than to point out that "the Task Force was *not* convened to recommend or award possible redress to Professor Schwartz." Opp'n at 14 (emphasis in original). This is true, but the relief Dr. Schwartz seeks with respect to the housekeeping amendments—a return to the 2015 version of Section 25-71's UCIRO provisions—is squarely within the task force's charge. There is complete overlap between the task force's undertaking and Dr. Schwartz's request for relief from this Panel with respect to the housekeeping amendments. This Panel should therefore defer to the task force, which is better suited to this task.

3. Professor Christie's Ruling Was a Preliminary Gatekeeping Assessment that Does Not Bind this Panel

Under Section 28-36.C., the Chair of the Adjudication Panel must, among other things, determine whether a petition has been "properly and timely filed." These are preliminary gatekeeping determinations. The Chair is *not* charged with making any substantive determinations. *See* Section 28-36.C. Indeed, motions for summary disposition are to be decided only by "the hearing panel." Section 28-52.A. Dr. Schwartz is therefore wrong when he suggests the Panel should simply adopt the observations of Professor Christie (temporary Chair of the Adjudication Panel for purposes of this adjudication) in determining whether Dr. Schwartz's Petition had been "properly and timely filed." Professor Christie did not have a motion from Respondents, did not have the benefit of briefing on the issues, and did not have these issues squarely before him. Only this Panel may determine this motion for summary disposition. Section 28-52.A.

4. Dr. Schwartz Should Not be Permitted to Amend his Petition

If the Panel decides to dismiss Dr. Schwartz's housekeeping amendment claims (as it should), Dr. Schwartz asks that he be permitted to amend his Petition to add the speculative allegation that, had the 2015 Code been in place at the time of his investigation, he "probably would have averted a UCIRO investigation entirely, and also prevented the improper decision to

strip [him] of his position as PI on the CVP grant." Opp'n at 5 n.14. The Code does not permit an amended Petition under these circumstances. If a motion for summary disposition is granted, Section 28-52.A. requires the Panel to dismiss the claims and issue a decision. The Panel should not permit any amendment.

Even if we were in court, courts do not permit amendments that would be futile. *E.g.*, *Rodriguez v. Loudeye Corp.*, 114 Wn. App. 709, 729, 189 P.3d 168 (2008). Here, as explained above, Dr. Schwartz cannot reasonably contend that he would have averted an investigation; an investigation is required by law and University policy in response to allegations like the ones present here (a proposition Dr. Schwartz does not dispute in his Petition). Nor would it have mattered whether UCIRO or another body conducted the investigation, and Dr. Schwartz does not allege any specific harm to him caused by UCIRO's involvement (instead of a different investigating body). The decision to make Dr. Mark Majesky principal investigator had nothing to do with whether UCIRO or another body investigated Dr. Schwartz, and Respondents do not at this time ask the Panel to dismiss claims related to the training grant decision. Dr. Schwartz's proposed amendment—even if it were allowed under the Code—would not change the Panel's ultimate analysis.

5. The Panel Should Dismiss Professor Townsend, Vice Provost Cameron, and President Cauce

Dr. Schwartz claims Professor Townsend is a necessary party because only the Secretary of the Faculty can authorize Code changes and because the Panel can only direct "parties" to award any relief. Opp'n at 15. This is a misreading of the Code. Where Section 28-54.B. authorizes the Panel to give "direction to the Provost or other appropriate party to take such steps as may be necessary to carry out the decision," the Code does not mean "party to the adjudication." The Provost is not a necessary party to every adjudication, so Section 28-54.B. plainly authorizes the Panel to direct any appropriate person at the University to carry out a Panel decision.

Similarly, under Section 28-91, "the President shall instruct the parties to do whatever is necessary to implement the decision and shall take all action necessary to insure that relief awarded is realized in fact." There, the "parties" refers to the parties to the adjudication, but the President herself (who may or may not be a party) is required independently to "take all action necessary to insure that relief awarded is realized in fact." Section 28-91. Relief awarded in an adjudication can be carried-out by non-parties. Dr. Schwartz misreads the Code in suggesting otherwise.[3]

Dr. Schwartz is especially misguided in suggesting that Respondents Cauce and Cameron should not be dismissed even if the housekeeping claims are dismissed. Opp'n at 16. Dr. Schwartz claims he is entitled to attempt to prove that the University has on other occasions "punish[ed] faculty prior to adjudications." *Id.* This is wrong. As explained above, Dr. Schwartz cannot bring claims that relate to harms allegedly done to *other* faculty members on *other* occasions. His claims must relate to his own, particularized harms. Nor has he alleged

[3] As with the Motion, Professor Townsend takes no position on the claims raised in Dr. Schwartz's Petition other than that Professor Townsend should be dismissed.

any claims about other faculty members with any specificity in his Petition. *See* Petition. Even if he had, he has not shown that his Petition was filed within 90 days of those other events, as required under the Code. Section 28-35.B. Dr. Schwartz is not entitled to sidetrack this adjudication by attempting to prove other alleged violations against other faculty members. Even courts do not allow parties to delay proceedings to conduct time consuming "mini-trials" on ancillary matters. *See, e.g., State v. Kilgore*, 147 Wn.2d 288, 293, 53 P.3d 974 (2002) (describing with approval an evidentiary rule that prevents time consuming mini-trials on ancillary evidentiary matters). Respondents Cauce and Cameron are only relevant Respondents if the housekeeping changes are part of this adjudication. If the Panel dismisses claims relating to the housekeeping changes, it should dismiss Respondents Cauce and Cameron as well.

CONCLUSION

Dr. Schwartz asks this Panel to order a change in the Faculty Code that would affect all faculty members. This is not an appropriate subject for an adjudication. Dr. Schwartz has not suffered particularized injury stemming from a change in the notice requirements under the Code, and it would therefore be improper and imprudent for the Panel to decide the question. A task force composed of well-respected members of the University community has already begun a review of Section 25-71. The task force should complete that work without involvement from this Panel. The Panel should dismiss Dr. Schwartz's housekeeping amendment claims or, at a minimum, stay consideration of them until the task force has finished its work.

Dated this 25th day of May, 2018.

HILLIS CLARK MARTIN & PETERSON P.S.

By: _____

Mary Crego Peterson, WSBA #31593
Jake Ewart, WSBA #38655
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789
Email: mary.peterson@hcmp.com;
jake.ewart@hcmp.com

Attorneys for Respondents