

MEMORANDUM

TO: Petitioner: Professor Stephen M. Schwartz
 David Corbett, Counsel for Professor Schwartz

Respondents:
 Mary Peterson and Jake Ewart, Special Assistant Attorneys
 General for the Respondents
 Dr. Charles Alpers
 Dean Paul Ramsey
 Vice Provost Cheryl Cameron
 President Ana Mari Cauce

FROM: Jillian Barron, Hearing Officer

DATE: August 21, 2018

RE: Order Regarding Professor Schwartz’s Motion for Partial Summary
 Disposition and Discovery Schedule

Professor Schwartz has moved for partial summary disposition of the claims raised in his petition. Specifically, Professor Schwartz challenges revisions made to Section 25-71 of the Faculty Code (“Code”) in February 2016 and asks that those revisions be declared null and void. This Order sets forth the Panel’s decision on his motion, reached after consideration of the parties’ briefs, exhibits, and oral argument, deliberation among Panel members, and consultation with the Hearing Officer. The Panel grants Professor Schwartz’s motion to the extent described below.

I. Factual Background

The parties’ briefing showed the following facts to be undisputed.

Section 25-71, entitled “Standard of Conduct,” outlines procedures to be followed when a faculty member is alleged to have violated University rules or regulations. Prior to the February 2016 revisions, Section 25-71 provided in relevant part that in the case of such an allegation:

- B. [T]he 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.

- C. If she or he 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.
 - 2. In cases concerning allegations of scientific and scholarly misconduct as defined in Section 25-51, the dean shall proceed as provided in Executive Order No. 61 [(“EO 61”)], “Policy for Addressing Allegations of Scientific and Scholarly Misconduct.”
 - 3. In all other kinds of cases the dean shall appoint a special investigating committee [and certain other steps will be taken].

The February 2016 revisions to Section 25-71 changed these procedures in cases involving alleged research misconduct or alleged discrimination, harassment, or retaliation. In such cases, under the revisions, there was no longer a requirement to engage in the initial two steps of notifying the faculty member of the allegations and attempting to informally resolve the matter (“conciliation proceedings”). Instead, under the revised Section 25-71, allegations of research misconduct were to be addressed following the procedures in EO 61.¹ Allegations of discrimination, harassment, or retaliation, if determined by the dean under EO 31 to require an institutional investigation, were to be referred to UCIRO.² Where violations of other rules or

¹ EO 61 was also revised in February 2016, so the procedures to be followed were those in the updated version of EO 61, which do not require notification and conciliation prior to a formal investigation.

² EO 31, entitled “Nondiscrimination and Affirmative Action,” sets forth the University’s policies prohibiting discrimination, harassment, and retaliation, and states that complaints against employees alleging such conduct should be brought in accordance with the process described in Administrative Policy Statement 46.3.

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regulations were alleged, the conciliation proceedings previously applicable to all alleged violations were still to be followed.

The individuals who drafted the February 2016 revisions to Section 25-71 initially focused only on alleged research misconduct. They had determined that EO 61 needed to be revised to meet the requirements of federal law regarding research misconduct. In a series of communications among themselves in the fall of 2015, then Secretary of the Faculty Marcia Killien, Vice Provost Cheryl Cameron, and Director of the Office of Scholarly Integrity (“OSI”) Anne Ackenhusen voiced concern that the requirement of conciliation proceedings in Section 25-71 could conflict with the EO 61 process, and they began drafting revisions to Section 25-71 to try to reconcile the two processes.³ Their proposed revisions to Section 25-71 eventually removed the requirement of conciliation proceedings not only for alleged violations of EO 61, but also for allegations of unlawful discrimination, harassment, sexual harassment, or retaliation, which were now to be referred directly to UCIRO.

On February 12, 2016, the revisions to Section 25-71 were published along with the revised version of EO 61. Pursuant to an assertion that the revisions to Section 25-71 were necessary to make the section consistent with EO 61, the revisions—including the revision regarding allegations of discrimination, harassment, and retaliation, which had nothing to do with EO 61—were characterized as “housekeeping amendments.” On that basis, the revisions to Section 25-71 were made part of the Code with the approval of the Secretary of the Faculty—Ms. Killien—and the Chair of the Faculty Senate—Norm Beauchamp. The revisions were not reviewed and approved through the formal Code amendment process established in Code Chapter 29.

In January 2017, Dr. Charles Alpers, Interim Chair of the Department of Pathology, informed Professor Schwartz there had been complaints about his behavior during the last several months, which had already been referred to UCIRO for investigation. Pending the outcome of UCIRO’s investigation, Dr. Alpers also removed Professor Schwartz as the director/principal investigator (“PI”) on a grant for which he had been the PI for a number of years. In May 2017, UCIRO found that a preponderance of evidence did not support the allegations of discrimination, harassment, or retaliation against Professor Schwartz. By early June 2017, Professor Schwartz was informed that he would be allowed to return to his PI role on the grant.

II. The Parties’ Arguments and the Panel’s Conclusions

Professor Schwartz argues that the February 2016 revisions to Section 25-71 were not simply housekeeping amendments and could only be lawfully adopted in compliance

³ As part of the revisions in EO 61, OSI was renamed the Office of Research Misconduct Proceedings or ORMP.

with the requirements of Code Chapter 29. Among other things, Chapter 29 requires that proposed amendments be presented to and approved by a vote of the faculty, then presented to the President for approval. Sections 29-35, 29-36, and 29-37. It is uncontested that the amendment process established by Chapter 29 was not followed in the case of the February 2016 revisions to Section 25-71. Professor Schwartz cites a number of cases in support of his argument that the February 2016 revisions were therefore not properly adopted and are null and void. He alleges that he was harmed by the improper adoption of the revisions in at least two ways: (1) he was not fully informed of the nature and content of the allegations against him or allowed to try to resolve them before they were submitted to UCIRO, as would have been required under the pre-amendment provisions of Section 25-71; and (2) as a member of the faculty, he was deprived of his contractual right to vote on the 2016 revisions, which impacted the terms and conditions of his employment.

In response to Professor Schwartz's motion, Respondents do not contend the February 2016 revisions to Section 25-71 fell within the definition of housekeeping amendments. They acknowledge the revisions were not adopted through the "typical process used for making changes to the Code." Nevertheless, Respondents oppose Professor Schwartz's request that the revisions be declared null and void. In particular, Respondents assert that: the revisions were drafted and approved by faculty leadership; Professor Schwartz was not charged with research misconduct, so consideration of that aspect of the revisions is unnecessary; declaring the revisions null and void in their entirety would undo federally required changes to the research misconduct policies; invalidating only some of the revisions would create the potential for unintended consequences; and declaring the revisions null and void would only change them prospectively, which would not provide a remedy for Professor Schwartz. While Respondents cite no legal authority for this proposition, they also suggest the Panel is not empowered to review the validity of the 2016 revisions. They argue that a University task force and committee are currently reviewing the Code and are expected to issue proposed revisions in 2019. According to Respondents, that process obviates the need for the Panel to consider whether the 2016 revisions challenged by Professor Schwartz were properly adopted and, in any event, provides a better forum for determining the appropriate contents of the Code.

As stated in the June 18, 2018 Order on Respondents' Motion to Dismiss, the Panel finds that Professor Schwartz has sufficiently alleged harm resulting from the application to his situation of the February 2016 revisions to Section 25-71 rather than the prior provisions of that section. To decide whether he is entitled to a remedy for that action, the Panel must first determine whether the February 2016 revisions were invalid, as he argues. The Panel concludes that it has the authority to review the validity of the February 2016 revisions to Section 25-71, that it is the proper body to review the issue in the first instance, and that the determination of validity can be made based on the undisputed evidence in the record.

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The only basis offered for adopting the 2016 revisions outside the Chapter 29 amendment process was that they were “housekeeping amendments.” Chapter 29 does not establish an exception from the usual amendment process for “housekeeping” matters. Rather, the term “housekeeping amendments” derives from the Introduction section of the Code. In listing abbreviations for the authority or means by which policies have been adopted, the Introduction to the Code refers to Rules Coordination (abbreviated as “RC”) as follows:

The Rules Coordination Office publishes simple housekeeping amendments to the Faculty Code and Governance that correct typographical errors; make address, name, or contact information changes; or clarify language without changing its effect. All housekeeping amendments to the *Faculty Code and Governance* are first reviewed and approved by the Secretary of the Faculty.

Introduction, paragraph 3, RC—Rules Coordination.

The Panel finds that the February 2016 revisions to Section 25-71 do not fall within the defined parameters of housekeeping amendments. The revisions removed substantive procedural protections to which faculty were entitled under the existing version of Section 25-71. Whereas before the revisions faculty had to be informed of allegations of research misconduct, discrimination, harassment, or retaliation and given an opportunity to attempt to resolve or conciliate them informally, now there was no such requirement, and allegations could be immediately forwarded to ORMP or UCIRO without notice to the accused faculty member. **Thus, the 2016 revisions deprived faculty of the possibility of avoiding a formal investigation that could negatively impact their reputation and even their ability to perform their work. That federal law and EO 61 might require research misconduct allegations to be handled in the manner described in the February 2016 revisions does not change the conclusion that the revisions were not simply housekeeping amendments.**

Given that the revisions were not accurately characterized as housekeeping amendments, they could only be properly adopted through the amendment process set forth in Chapter 29. It is undisputed that the revisions were not adopted through that process. As a result, the revisions never achieved the status of effective amendments to

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the Code and they are not valid.⁴ See Section 29-26.C (to become effective, proposed amendment requires affirmative majority vote of eligible voting faculty or two-thirds majority of those casting ballots); Sections 29-37 and 29-38 (amendment approved by faculty must be delivered to President for approval or disapproval before it can become effective).⁵

This decision does not determine whether Professor Schwartz in fact suffered injury as a result of the improper adoption or application of the February 2016 revisions to Section 25-71. The parties should direct their presentation of evidence at the adjudication hearing to that issue, as well as to the other claims Professor Schwartz has asserted.

III. Discovery and Hearing Schedule

The parties have previously indicated a desire to engage in discovery. They should attempt to agree on parameters and timing for any written discovery requests and depositions by the end of the day on August 27. If the parties are unable to resolve any differences regarding discovery by that date, they shall notify the Hearing Officer by August 28 regarding the discovery they believe is needed, or why specified discovery should not be taken, and the Hearing Officer will rule on any disputes. The Panel advises the parties that discovery should be limited to no more than is truly necessary.

All discovery must be completed soon enough for the parties to proceed with the scheduled hearing dates, which begin on Monday, October 8 and are set out below, along with the hearing rooms. MGH is Mary Gates Hall. Regardless of the number of hearing dates scheduled, the parties are currently expected to keep their presentations to approximately 16 hours each. Some flexibility may be available, taking into account cross-examination and argument.

Monday, October 8:	12:00 to 5:00 pm	– MGH 258
Wednesday, Oct 10:	1:00 to 6:00 pm	– MGH 258
Thursday, Oct 11:	9:00 to 11:30 am	– MGH 224

⁴ Although Professor Schwartz was not charged with research misconduct, he has asserted that improper adoption of the portion of the February 2016 revisions that relates to research misconduct has negatively impacted the terms and conditions of his contract as a faculty member. The Panel finds that at least in this context, where the process of adopting the 2016 revisions addressed procedures for responding to allegations of research misconduct *and* discrimination, harassment, and retaliation, the harm alleged by Professor Schwartz is sufficient to support the Panel's review of the validity of the research misconduct portion of the 2016 revisions. As with the revisions relating to allegations of discrimination, harassment, and retaliation, the revisions relating to alleged research misconduct did not qualify as housekeeping amendments and were never effectively adopted by the faculty.

⁵ While this finding of invalidity is made within the specific context of Professor Schwartz's claims, its reasoning applies more generally. To the extent the Order on Respondents' Motion to Dismiss could be interpreted as ruling out such a general finding, it is superseded by this Order.

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Friday, Oct 12:	12:00 to 5:00 pm	– Gerberding 142
Monday, Oct 29:	12:00 to 5:00 pm	– MGH 258
Wednesday, Oct 31:	1:00 to 6:00 pm	– MGH 258
Thursday, Nov 1:	9:00 to 11:30 am	– Gerberding 142
Friday, November 2:	12:00 to 5:00 pm	– Gerberding 142
Monday, Nov 5:	12:00 to 5:00 pm	– MGH 258
Thursday, Nov 8:	9:00 to 11:30 am	– MGH 224
Friday, Nov 9:	12:00 to 5:00 pm	– Gerberding 142

The parties shall exchange and provide to the Hearing Officer the following disclosures no later than Monday, October 1, 2016:

- A list of witnesses they intend to call at the hearing;
- A list and copies of all documents they intend to produce or rely upon at the hearing;
- A list of the Faculty Code sections or other authority they will be relying on in support of their arguments.

In addition, the parties shall bring to the hearing sufficient hard copies of all exhibits they wish to submit into evidence to provide copies to the Panel and the Hearing Officer.

cc: Hearing Panel:
Russell McDuff
Thomas Hazlet
Clare Ryan