

Opinion of General Counsel 2018-01

To: Jennifer Bird-Pollan
Chair, Senate Council

From: William E. Thro 
General Counsel

Date: December 7, 2018

Subject: Request for Opinion of General Counsel

Recently, you asked me to opine on whether a proposed interpretation by the Senate Rules and Elections Committee (SREC) is consistent with the Governing Regulations (GR), Administrative Regulations (AR), and University Senate Rules (USR). This Opinion of General Counsel responds to your request.

As I understand the question, the Senate Rules and Elections Committee has made the following proposal:

“The SREC acted on a request for an interpretation relating to the charge to the Senate Advisory Committee for Privilege and Tenure. Please insert the following “asterisk” interpretation as the last interpretation of Senate Rules section 1.4.4.2.

* Regardless of one’s tenure status or rank, adding unsolicited materials to one’s Standard Personnel File without timely notice (AR 2:1-1.VII.F) is a matter that relates to the individual’s academic privilege and professional function as a scholar (SR 1.4.4.2.B.1) and therefore falls under the purview of the SACPT.

With this phrasing, the Senate Rules and Elections Committee is taking the position that *any* addition of unsolicited materials to one’s Standard Personnel File is a matter for review by the Senate Advisory Committee on Privilege and Tenure.

For the reasons stated below, I conclude the proposed interpretation is too broad. While there are limited circumstances where the addition of unsolicited materials to one’s personnel file without timely notice would fall within the

see blue.

jurisdiction of the Senate Advisory Committee on Privilege and Tenure, not every addition of unsolicited materials falls within the Committee's jurisdiction.

The analysis starts with first principles. Because ours is a government of laws and not of humans, we are governed by what was actually enacted and not what the legislature, the Board of the Trustees, the University President, or the University Senate intended. The sole object of the interpretative enterprise is to determine what the constitutional provision, statute, regulation, or rule says. Moreover, any interpretation of the text must recognize that federal law is superior to Kentucky law; the Kentucky Constitution is superior to Kentucky statutes; Kentucky statutes are superior to the Board's Governing Regulations; Governing Regulations are superior to the President's Administrative Regulations; and Administrative Regulations are superior to the Senate Rules.¹ If an inferior text contradicts a superior text, the inferior text is invalid.² Similarly, an inferior text cannot limit or expand the authority of the superior text.

With these principles in mind, the analysis turns to the relevant texts. AR 2:1-1, Sections VII.F.3 & F.5, provide the policies and procedures for "unsolicited materials" being added to a faculty employee's Standard Personnel File. The relevant provisions state:

Section F.3, "Unsolicited materials relevant to *professional function* may be included in the Standard Personnel File by the educational unit

¹ As the chief administrative officer of the University, the President is authorized by the Board of Trustees to promulgate the Administrative Regulations including the Human Resources Policies and Procedures and the Business Procedures Manual, to provide interpretation and implementation of these Governing Regulations, and of the Minutes of the Board of Trustees, and to delineate policies within the sphere of delegated responsibility. (GR II.A.2.)

² The President must, of necessity, in the day-to-day direction of University affairs, interpret existing policies and, when necessary, establish new policy with respect to academic, administrative and financial matters. While responsible for the enforcement of the Governing Regulations of the Board of Trustees and the University Senate Rules, the President also shall provide for the application of these rules and regulations to individual cases. Under extraordinary circumstances, and with written justification to the University Senate through the University Senate Council, the President may suspend a rule of the University Senate in a particular case; however, under no circumstance may the President suspend rules concerning admission and the number of credits and quality points required for graduation. (GR III.A.6.)

administrator provided the faculty employee sees them and is offered the opportunity to document his or her response to them. The faculty employee's written responses shall be placed by the educational unit administrator in the individual's Standard Personnel File." (AR 2:1-1.VII.F.3.)

Section F.5, "The Standard Personnel File may contain communications to or from the faculty employee, solicited or unsolicited letters or memos relating to *professional function, which are not relevant to consideration for promotion or the granting of tenure.*" (AR 2:1-1.VII.F.5.)

(emphasis added). Sections F.3 and F.5 collectively stand for three propositions. First, if unsolicited materials are included in the Standard Personnel File, the materials must be "relevant to professional function." Unsolicited materials that are not "relevant to professional function" may not be included. Second, there can be unsolicited materials which are relevant to the professional function, but "are not relevant to consideration for the promotion or granting of tenure." In other words, the mere fact that unsolicited materials are relevant to professional function does not mean the unsolicited materials are relevant to promotion or granting of tenure. Third, if unsolicited materials relevant to professional function are included, then the faculty member must be given an opportunity to document his or her response to the materials. This is true regardless of whether the unsolicited materials are relevant to the consideration for promotion and granting of tenure.

Having discussed the Regulations concerning unsolicited materials, the analysis now turns to the authority of the SACPT to decide disputes regarding unsolicited materials in the Standard Personnel File.

The SACPT is not created by the Governing Regulations; it is a creation of the Senate Rules. However, GR X assumes the existence of the SACPT and explicitly grants it authority in five narrow circumstances related to faculty appointments. Those narrow circumstances are:

1) Notification of Non-Renewal (Non-Tenured Appointment).

A faculty member may appeal the non-renewal decision to the SACPT for reasons of "procedural matters, privilege, or allegations of violation of academic freedom."³

³ Any related appeal(s) to the Provost concerning procedural matters or privilege and/or to the University Senate Advisory Committee on Privilege and Tenure concerning procedural matters, privilege, or allegations of violation of academic freedom must be initiated in writing by the concerned faculty member within sixty

2) Academic Freedom (Non-Tenured Faculty or Post-Retirement Appointments).

A faculty member on a non-tenured appointment or on a post retirement appointment who alleges that a decision not to reappoint them was caused by a violation of their academic freedom, or that they were given less advance notice than required, may appeal to the SACPT.⁴

3) Termination - Financial Emergency.

If a faculty member is terminated for reasons of “financial emergency,” they may “have the issues reviewed” by the SACPT with a right to appeal to the President and the Board.⁵

4) Dismissal (Tenured Faculty or Non-Tenured Faculty before the End of Appointment).

If no settlement is agreed upon between the unit administrator and the faculty member, the Provost prepares a reasonable statement of charges which is provided to the faculty member and the SACPT. The SACPT conducts an informal investigation for the purpose of attempting to affect a resolution and, in the case of failure, recommends to the President whether, in its opinion, dismissal proceedings should be undertaken.⁶

(60) days after being notified in writing by the dean about non-renewal of appointment. (GR X.B.1.e.)

⁴ If faculty members on non-tenured appointments or faculty members on post-retirement appointments allege that decisions not to reappoint them were caused by considerations violating academic freedom, or that they were given less advance notice than required in these Governing Regulations, they must present their allegations in writing to the University Senate Advisory Committee on Privilege and Tenure within sixty (60) days after being notified in writing by their respective deans of the decisions not to reappoint. Allegations so presented shall be given preliminary consideration by the University Senate Advisory Committee on Privilege and Tenure, which shall attempt to settle the matter by informal methods. (GR X.B.1.g.)

⁵ In a case of termination because of a financial emergency, the faculty member may have the issues reviewed by the University Senate Advisory Committee on Privilege and Tenure with the right of appeal to the President and the Board of Trustees for the University faculty member. (GR X.B.1.f(1))

⁶ Dismissal of a faculty member with tenure or of a non-tenured faculty member before the end of a specified term of appointment shall be preceded by discussions between the faculty member and the appropriate administrative officer or officers

5) Suspension of Faculty - Pending Termination.

When a decision to terminate a faculty appointment has been reached, the faculty member may be suspended, or assigned to other duties in lieu of suspension, only if immediate harm to the faculty member or others is threatened by the faculty member's continuance. Before suspending the faculty member the President must "consult" with the University Senate Advisory Committee on Privilege and Tenure.⁷

Although the Regulations give substantial power to the SACPT, nothing in the Regulations empowers the SACPT to review the placement of unsolicited materials in the Standard Personnel File. Nor is there any authorization to review a decision related to the promotion or grant of tenure

Of course, the Senate Rules have granted SACPT authority beyond the authority specified in the Regulations. University Senate Rule 1.4.4.2 expands the role of the SACPT to include review of alleged "violations" that might "have affected the outcome of decisions made in the processes of faculty reappointment, terminal reappointment, non-renewal of appointment, promotion and/or tenure."⁸ Specifically, the Rule describes the SACPT's jurisdiction as:

1. Except for cases of dismissal for cause (subsection 2a, below), the SACPT is to consider whether

looking toward a mutual settlement. In the event of failure to agree upon settlement, the Provost shall be responsible for the preparation of a reasonably detailed statement of charges which shall be furnished to the faculty member and the University Senate Advisory Committee on Privilege and Tenure. The committee shall make an informal investigation for the purpose of attempting to affect a resolution and, in the case of failure, shall recommend to the President whether, in its opinion, dismissal proceedings should be undertaken. Its opinion shall not be binding upon the President. (GR X.B.1.f(2))

⁷ Before suspending a faculty member, pending an ultimate determination of the individual's status through the hearing procedure, the President shall consult with the University Senate Advisory Committee on Privilege and Tenure. (GR X.B.1.f(3))

⁸ While the Senate Rules may delineate the powers of the SACPT, the Senate Rules may not do so in a manner that contradicts the Constitutions, statutes, governing regulations, or administrative regulations. This Opinion assumes—but does not decide—that the Senate Rules concerning the SACPT's powers are consistent with all superior texts.

(a) violation of procedures (as established by University-level regulations/policies, or by the college, or by the department faculty;),

(b) violation of privilege and/or

(c) violation of academic freedom,

have affected the outcome of decisions made in the processes of faculty reappointment, terminal reappointment, non-renewal of appointment, promotion and/or tenure. Cases of complaint on the substantive merit of administrative decisions in these faculty personnel processes are instead to be submitted through established administrative channels as prescribed by GR I.F.

Similarly, the SACPT does not consider complaints relating to the substantive merit of administrative decisions on salary, faculty performance review, distribution of effort, allocation of resources, etc. (for which the administrative appeal procedure of GR I.F is applicable). However, if an issue instead involves violation of established procedure, violation of privilege or violation of academic freedom, and if the petitioner both (i) exhausts the process of GR I.F through the level of the Provost and the issue remains unresolved and (ii) satisfies the burden of making a prima facie case to the SACPT that the particular violation of procedure, privilege or academic freedom is of such a nature as to potentially significantly impinge on the petitioner's reappointment, terminal reappointment, non-renewal of appointment, promotion and/or tenure, then the SACPT may elect to consider the case.

(emphasis added). In other words, the SACPT has jurisdiction to review an action which is alleged to: (1) be a violation of procedure or privilege or academic freedom; *and* (2) have negatively affected outcome of decisions in the processes of faculty reappointment, terminal reappointment, non-renewal of appointment, promotion, and/or tenure. Both conditions must be met. There must be an allegation of both a violation and a negative decision in one of the processes. An allegation of a violation without a negative decision in one of the processes is insufficient.

Given the explicit language of the Regulations concerning unsolicited materials and the Senate Rules empowering the SACPT, there are limited circumstances where the SACPT could review the addition of unsolicited materials to the Standard Personnel File. Those circumstances require the faculty member to allege three things:

- (1) there are unsolicited materials relevant to the professional function in the Standard Personnel File; and
- (2) the faculty member was not given the opportunity to review the materials and submit a response; and
- (3) the presence of the unsolicited materials affected a negative decision about faculty reappointment, terminal reappointment, non-renewal of appointment, promotion, and/or tenure.

Although the faculty member must allege all three requirements, the final requirement—the allegation that the presence of unsolicited materials affected a negative decision—is the key requirement. If the decision was in the faculty member's favor, there is no harm to the faculty member and the SACPT has no jurisdiction. Similarly, if the unsolicited material was added after the decision was made, there is no harm and the SACPT has no jurisdiction unless and until there is some future negative decision.

The SERC's proposal assumes that the SACPT will *always* have jurisdiction to consider the addition of unsolicited materials. It fails to include the requirement of an actual negative decision against the faculty member. Accordingly, the SERC's proposal is too broad and, thus, inconsistent with the Regulations and the Rules.