Office of General Counsel

1852 Van Hise Hall
1220 Linden Drive
Madison, WI 53706
(608) 262-2995
(608) 263-3487 Fax
email: counsel@uwsa.edu
website: http://www.wisconsin.edu/general-counsel/

Tomas L. Stafford
Anne E. Bilder
Noah Brisbin
Wade Harrison
Erin E. Kastberg
Jennifer Sloan Lattis
Matthew J. Lind

Writer's Direct Line:
(608) 262-0747
Writer's E-mail:
jlattis@uwsa.edu

May 19, 2017

Barbara Barnet
Susan Hansen
Abulkhair Masoom
Sheryl Wills

UW Platteville Appeals Commission By email only

Re: Burton charge for dismissal: Administration's response to materials filed by Burton on May 15, 2017

Dear Appeals Commission:

This letter serves as the administration's response to the "briefs" filed by Sabina Burton on May 15, 2017. The former chair, Brian Peckham, had given me until today to file a response.

It is entirely unclear what Burton is seeking to accomplish from these briefs. She appears to be asking the Commission to either dismiss the charges or exclude evidence. Neither of these are within the Commission's authority set forth in UWS 4.07(1), as former chair, Brian Peckham, so properly pointed out in his email communication to the parties of May 15, 2017.

The Board of Regents is the only decision maker in this matter. Even if the Commission were to agree that Burton did not receive the pre-hearing process she was entitled to under UWS chapter 4, or that her termination would violate her first amendment rights, or that the investigation was inadequate, the most the Commission could do is to recommend to the Board of Regents against dismissal citing those reasons.

With that in mind, I will briefly address some of the items raised by Attorney Amouyal (who subsequently withdrew) with the understanding that the full briefing on these issues will necessarily take place when the matter is placed before the Board for its decision.

Alleged Violations of UWS chapter 4

A. The Roter Investigation.

Burton takes a number of issues with Petra Roter's investigation which seem to arise from her lack of understanding regarding the role of the investigation. The point of the investigation is to provide the chancellor with information to aid him in determining whether to bring charges.

UWS 4.02 provides that when a chancellor receives a complaint that might lead to dismissal, he shall "within a reasonable time initiate an investigation." There are no other rules that address the content or scope of the investigation nor do the rules specify who is qualified to investigate. The investigator is not prohibited from offering opinions. Burton has no grounds to exclude the investigation report or to seek dismissal of the charges based upon its alleged inadequacies. The report will be provided to the Board and the Board will give the report the weight it deems appropriate.

B. The Informal Meeting.

Burton argues that she never received her UWS 4.02(1) informal meeting with the chancellor because a meeting where the chancellor was represented by his legal counsel [me], could not be considered "informal."

The allegation is bizarre. Burton has filed a baseless complaint against me with the Office of Lawyer Regulation (OLR). That office is woefully behind in resolving complaints, but I have been informed that the investigator will, when he is able, send the complaint back to the OLR with a recommended finding that no rules of professional conduct have been violated. I was also informed that Attorney Amouyal had spoken with the investigator, and he firmly told her that Burton could not use the fact of the complaint to gain any advantage in her disputes with UW-Platteville. That is precisely what she is attempting to do here.

Burton may continue to make this specious argument to the Board of Regents, but there is no action that the Commission can take. It cannot, as already noted, exclude me nor dismiss the complaint based on the alleged inadequacy of the informal meeting offering.

C. The Statement of Charges

I have already addressed Burton's hyper-technical argument that she did not receive proper notice of her appeal rights in a letter directed to Laura Anderson dated April 21, 2017. I repeat those comments here.

Wis. Admin. Code UWS § 4.02(2) provides that "[a]ny formal statement of specific charges for dismissal sent to a faculty member shall be accompanied by a statement of the appeal procedures available to the faculty member." The only "appeal" from a statement of charges that is provided for in chapter UWS 4 is the right to a hearing on the charges set forth in § UWS 4.04. The charging statement issued to Dr. Burton (administration's Exhibit A) provided her with notice of her right to request a hearing on page 5. In addition, Dr. Burton has, several times throughout this process, been provided with a copy of UWS chapter 4.

Traditionally, the term "appeal" refers to the right to seek review from a higher court of a final decision by a lower court. In the administrative law context, though, "appeal" has taken on a looser meaning and often refers simply to the next step in the process. This is the only reasonable reading of the term as it is it used in § UWS 4.02(2) because the Board of Regents is the only body with authority to dismiss a tenured faculty member, see § UWS 4.01(1), and theirs is the only "decision" from which any actual appeal could be taken. However, the placement of the term in § 4.02 which deals with the issuing of charges rather than in § 4.08 which deals with the Board's decision, suggests that the requirement does not refer to notice of rights regarding appeal from the Board's decision, but rather refers to the right to "appeal" the issuance of charges.

Additionally, the notice requirement in § 4.02(2) cannot be read to create rights of appeal that do not otherwise exist in the administrative code.

The Board of Regents has the authority to interpret UWS chapter 4, thus this argument should be addressed to the Board when the matter is before it.

<u>First Amendment</u>

Burton asks the committee to "consider" whether she had a right protected by the First Amendment to the United States Constitution to do the things she is charged with, namely: publish confidential personnel information about colleagues, engage in disrespectful, harassing and intimidating behavior towards colleagues, and involve students in her personnel disputes and grievances. Certainly the Commission may take the First Amendment into account when it makes its recommendations. But the First Amendment is not remotely as protective as Burton argues. In the end the Board of Regents will decide this question following briefing by the parties.

When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). All of the "speech" set forth in the charges was made by Burton pursuant to her official duties. Moreover, the courts have long employed a balancing test wherein the "employee's interest in expressing herself . . . must not be outweighed by any injury the speech could cause to the 'interest of the State, as an employer, in promoting the efficiency of the public services its

performs through its employees." *Waters v. Churchill*, 511 U.S. 661, 668 (1994) *citing Connick v. Myers*, 461 U.S. 138 (1983).

Burton attended the personnel meetings at which she secretly taped conversations as part of her official duties. She had the duty to keep that information confidential, and she violated that duty. The First Amendment does not protect the making of secret tapes or the publishing of confidential information.

Burton was engaging in her duties when she demeaned, insulted, and intimidated her colleagues, but even if she was not, the First Amendment has never protected disruptive speech towards colleagues in the public work place. *Waters*, at 672 ("[The Court has] never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work.").

Burton was engaging in her duties as a faculty member when she involved students in her personnel (or personal) grievances, but even if she was not, the First Amendment has never prohibited a public employer from restraining speech, even on matters of public concern, that disrupts the workplace. *See e.g. Piggee v. Carl Sandburg College*, 464 F.3d 667, (7th Cir. 2006) (College had right to insist that instructor refrain from engaging in speech to students related to her religious beliefs regarding homosexuality).

Burton seems to be under the impression that because she has made public statements that occasionally touch on matters of public concern, she is free to disrupt the work of the Criminal Justice Department, insult colleagues, and violate trust without repercussion. She is, quite simply, wrong.

Request to Exclude Letter of Direction

Burton requests that the Commission exclude as evidence the letter of direction issued by Dean Throop on October 28, 2014 and testimony thereto because she believes she was denied due process in its issuance.

We must set aside the legal question of whether Burton was denied any due process related to the letter of direction (or indeed whether any process is ever due to the target of a letter of direction) because Burton is pursuing a federal lawsuit on this point and the question must be adjudicated by that court (See Burton Exhibits I and K.)

Regardless, the Appeals Commission lacks the authority to exclude relevant evidence from the record. Wis. Admin. Code § UWS 4.05 specifies that the admissibility of evidence is governed by Wis. Stat. §§ 227.45 (1) to (4). Subsection (1) requires the hearing examiner to admit all testimony having reasonable probative value and subsection (2) of that statute permits the hearing examiner to avail themselves of record and documentary evidence. *See also Rutherford v. Labor & Industry Review Commission,* 2008 WI App 66 (Hearing body not permitted to exclude record because of non-compliance with the rules of evidence).

The letter of direction which forms a basis of the charges for dismissal is highly relevant. Neither it nor testimony about it may be excluded from the record in this case.

Sincerely,

Jennifer Sloan Lattis
Deputy General Counsel
Wisconsin State Bar No. 1000387

cc: Brian Vaughan
Sabina Burton