

UNIVERSITY OF ILLINOIS URBANA-CHAMPAIGN SENATE
COMMITTEE ON ACADEMIC FREEDOM AND TENURE
(Final; Information)

AF.23.01 Statement of Procedures for Article X Hearings

CONTEXT

The University of Illinois Urbana-Champaign convened an Article X hearing before the Senate Committee on Academic Freedom and Tenure (AF) to hear charges that a faculty member “can no longer be relied upon to perform those duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility”. There followed:

- some rule making by AF to govern the hearing;
- a dispute about discovery;
- some 40 hours of testimony under oath, transcribed by a stenographer;
- written final briefings to AF;
- various exchanges within the committee to establish consensus; and
- a report detailing the committee’s findings.

This document is a heavily redacted version of AF’s report. Redactions have been identified with diamond brackets <>. The original document is very long (approx 120 pp), and mostly contains material that would identify the faculty member or witnesses. Redaction is intended to conceal the identity of participants, but will inform the Senate of the current rules for, current procedures for, process of reasoning during, and main outcomes of, the hearing. Some minor infelicities of wording have been corrected. It is AF’s intention that the explicit description of procedures, reasoning, etc. will ensure that any future Article X hearing has a precedent to work from and will have a clean procedural structure. AF intends that potential participants have some prospect of understanding on what grounds AF will make findings.

Hearing participants from AF felt strongly that various acts and omissions by members of the University community resulted in unnecessary difficulties before and at the hearing. A further document is in preparation, detailing to the extent possible, AF’s causes of dissatisfaction with various participants in the hearings. It is AF’s intention that that document will result in procedural innovations within the University administration to avoid further missteps.

RETROSPECTIVE REFLECTIONS

This document mostly describes what rules and procedures AF applied. In retrospect, further rules and procedures would likely be helpful. In particular, although *Statutes* confer broad rulemaking powers on AF, AF believes that fairness requires rules, procedures and standards be

developed well in advance of hearings; should be publicized; and should be modified only in unforeseen circumstances. AF will consider making rules to ensure:

- Better control of testimony, likely by making rules about how much time is available for testimony. AF allowed each side 20 hrs in this hearing, but believes that a fair outcome could have been achieved with less time consumed.
- Better developed procedures for focusing the hearing. AF believes that no charge should be considered that is not supported by witness testimony at the hearing.
- More formal rules for discovery. AF believes that better developed discovery procedures would have simplified the hearing process.
- Specific rules for final briefs. AF believes that the University's final brief should be required to identify, for each charge, testimony in support of that charge. AF believes that the respondent's final brief should identify, by charge, defenses or testimony tending not to support that charge.
- Specific procedures for cases where a faculty member's scholarship or teaching might be part of the dispute. AF believes that while such a hearing might be rare, it is likely to be accompanied by heated and bitter disagreements. AF believes that AF should consider procedures for such a hearing in advance.

Possible refinements of the tests to determine whether a faculty member should be relied on. AF believes that discussion and reflection may improve these tests, and there should be further effort by AF to formalize how this decision should be made.

1. Summary	5
2. Events	6
3. Procedures and standards	6
I. What must be determined	6
II. AF's authority	7
III. AF's rules for the hearings	7
IV. What must be proven	7
V. Assessing violations of professional responsibility	9
VI. Patterns of behavior and standards of proof	10
4. Redacted	11
5. Other findings	11
I. The code of conduct	11
II. Redacted	11
III. Redacted	11
IV. Redacted	11
V. Redacted	11
VI. Redacted	11
Several redacted sections offering detailed findings on general defenses, credibility and charges	12
Appendix I: Hearing Rules	13
Appendix II: AF's request for final briefs	15
Appendix III: AF's principles for discovery	19
Background:	19
The discovery requests:	19
AF's role and powers in an Article X hearing:	19
Non participants:	21
AF Principles for discovery:	21
Applying this analysis to disclosure:	22

Strong Words:	23
Appendix IV: Charge document	23

1. Summary

The Senate Committee on Academic Freedom and Tenure of the University of Illinois at Urbana-Champaign (AF in what follows) held hearings under Article X.1.d(2) to examine the President's charges that a tenured professor could not be relied on to perform that tenured professor's duties and functions in a manner consonant with professional standards of competence and responsibility.

AF concludes:

- The tenured professor's extramural conduct demonstrates clearly and convincingly that that tenured professor can no longer be relied upon to perform that tenured professor's duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility.

As to procedure, AF finds:

- AF's powers and responsibilities flow from the *Statutes*, which describe (a) the only available criteria for the dismissal of a tenured professor; and (b) the role and powers of an Article X hearing committee. The University cannot create grounds for dismissal of a tenured professor that are not present in *Statutes*. AF takes the position that an attempt to represent a code of conduct violation that does not meet Article X.1.d conditions as grounds for dismissal might in itself be a violation of academic freedom. Any such attempt should be closely scrutinized by AF and the Senate, and could be treated as a serious violation of the academic freedom rights offered to all academic staff under Article X.2(a).

As to circumstances, AF finds:

- <material relegated to second document>.
- <material relegated to second document>

As to charges, AF finds:

- The tenured faculty member's scholarly opinions are not a significant part of the dispute. The charges are not an attempt to dismiss a faculty member with inconvenient scholarly opinions.
- The major elements of <some charges, broken out by numbers> are proven by substantial evidence. The proven elements of these charges demonstrate repeated failures to behave in a manner consonant with professional standards of responsibility, and that have resulted in harm to the University community.
- The major elements of <some charges, broken out by numbers> are proven by substantial evidence. The proven elements of these charges do not individually rise

to the standard required for Article X.1.d(2) dismissal. However, the number of distinct acts, each of which is a failure to behave in a manner consonant with professional standards of responsibility, serves to confirm that the tenured faculty member can no longer be relied upon to perform their duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility.

- <A number of> charges were not supported by testimony, and should have been dropped. AF does not attend to these charges because AF believes that due process requires the respondent faculty member be able to confront their accusers.
- <A number of> charges were portmanteau charges. AF does not rely on these charges.
- One charge could not be mapped unambiguously to testimony, and could refer to at least two sets of events. AF does not rely on this charge.

In reaching these conclusions and findings, AF relies on testimony at various sets of hearings, and on summary briefs from counsel for the University and for the tenured faculty member. AF does not rely on <a report prepared internally> because AF's conclusions do not require reliance on that report. AF does not rely on <a report prepared by outside counsel, name redacted> because AF finds errors in that report.

2. Events

<This section consists entirely of confidential material and is redacted.>

3. Procedures and standards

It is AF's intention to produce a detailed record of the standards and procedures used when handling charges against the respondent faculty member. This record is intended to supply precedent for future hearings so participants in any future hearing can know how a case will be considered and make reasonable judgements about likely outcomes. Further, this record is intended to inform the Trustee's decision should one be solicited. Finally, a detailed record may inform any other proceedings that flow from this matter.

I. What must be determined

AF is required to determine whether

with all due regard for the freedoms and protections provided for in Article X, Section 2, of these *Statutes*, a faculty member's performance of university duties and functions or extramural conduct is found to demonstrate clearly and convincingly that the faculty member can no longer be relied upon to perform those duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility;

II. AF's authority

The hearings flow from the *Statutes*, which describe (a) the only available criteria for the dismissal of a tenured professor (*Statutes* X.1.d(5)); and (b) the role and powers of an Article X hearing committee (*Statutes* X.1.e(5)). Once AF has prepared a report, parties are entitled to prepare responses (*Statutes* X.1.e(6)). The president then determines whether to pass the matter to the trustees (*Statutes*, X.1.e(7)), and can do so even if AF does not find the faculty member cannot be relied upon (*Statutes*, X.1.e(7)). The Trustees must then decide whether dismissal is appropriate (*Statutes*, X.1.e(7)).

Article X proceedings are a statutory matter, rather than a legal proceeding. AF has no power to compel any person to do anything. Furthermore, AF members are not necessarily lawyers, and so AF should not attempt to interpret Federal or State law. Failure of the *Statutes* to conform to Federal or State law is a matter for the courts, not for AF. Finally, AF has no power to punish.

III. AF's rules for the hearings

Statutes provide that

“(e)xcept as hereinbefore or hereinafter provided, the hearing shall be conducted according to such rules as the committee may from time to time establish,” (*Statutes*, X.1.e(5))

referring to the Senate Committee on Academic Freedom and Tenure (AF). AF was unable to find a record of rules that the committee has established in the past. To resolve this case, AF should do as *Statutes* direct. AF made rules for the hearings (Appendix I, for reference) and for discovery (Appendix III, for reference). These rules were quite often followed by counsel; egregious rule violations were noted by the AF chair on the record, or after hearings. Counsel have had the opportunity to identify one another's violations.

IV. What must be proven

For an Article X case against a faculty member to succeed, there must be proven instances of conduct of sufficient impropriety. The standard of proof is discussed below. AF must be careful about what test the *Statutes* apply to determine whether a faculty member can be relied on. Reading the statute to mean that the University must prove that accused conduct will occur in the future is a nonsense — the test could not be met. This reading cannot apply because there is no evidence that the *Statutes* intend to create a test that, for pure reasons of formal logic, exonerates any faculty conduct of whatever kind or severity.

Furthermore, the *Statutes* do not necessarily anticipate that conduct will recur in future — the test is that conduct demonstrate clearly and convincingly that “the faculty member can no longer be relied upon to perform those duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility” (where

“those” clearly refers to “university duties and functions”). There exists conduct that demonstrates a faculty member cannot be relied on even if the conduct will not recur. Severe acts of plagiarism might meet this test even if there are measures put in place to prevent recurrence. This means that demonstrating clearly and convincingly that a faculty member can no longer be relied upon is not the same as demonstrating that the accused conduct will certainly occur in future.

Note the phrase “with all due regard for the freedoms and protections provided for in Article X, Section 2, of these *Statutes*.” X.1.d pays “all due regard” to X.2.a. This certainly means that AF should scrutinize cases where the topics of the accused faculty member’s scholarship are in controversy with particular care. AF has made no rules for dealing with such a case, because it has not yet been presented with one. In this particular matter, no party asserts or could credibly assert that the respondent faculty member’s scholarship is in controversy.

AF has no record of precedent of what tests to apply to determine whether a faculty member cannot be relied on. The reference in the *Statutes* to “professional standards of competence and responsibility” ; AF’s rule making powers (*Statutes*, X.1.e.5); and the overall procedure for Article X hearings imply that AF should use its judgement as members of the faculty. In evaluating this case, AF used a series of tests:

- Conduct must be proven in accord with substantial evidence (the “proven conduct” test). Proven conduct must involve a failure to meet professional standards of competence and responsibility. One instance of an extremely severe failure may be sufficient. Alternatively, repeated instances of severe failures would be sufficient. How conduct is to be assessed under this test is described below (3.V of this document). AF uses this test because minor errors of judgement should not trigger an Article X hearing, otherwise the freedoms of Article X.2 would be a nullity (“with all due regard for the freedoms and protections provided for in Article X, Section 2, of these *Statutes*”, *Statutes* X.1.d(2)).
- The conduct must have caused proven harm to the University community (the “resulting harm” test). How harm is assessed under this test is described below (3.V of this document). AF uses this test because conduct that does not create harm should not trigger an Article X hearing, otherwise the freedoms of Article X section 2 would be a nullity (“with all due regard for the freedoms and protections provided for in Article X, Section 2, of these *Statutes*”, *Statutes* X.1.d(2)). AF recognizes that some future case might involve proven harm to some other individual or community, but does not need to resolve that issue here.
- The decision maker should be confident that relying on the faculty member could result in harm to the University community that exceeds the harm resulting from preventing a scholar from pursuing inquiry, discourse, teaching, research and publication freely, and that this harm could be foreseen (the “balance” test). AF uses this test for two reasons. First, the plain meaning of “can no longer be relied on” implies that relying on someone would likely result in foreseeable harms. Second, the

standard for dismissal under Article X should be demanding (implying these harms should be severe), otherwise the freedoms of Article X.2 would be a nullity (“with all due regard for the freedoms and protections provided for in Article X, Section 2, of these *Statutes*”, *Statutes* X.1.d(2)). A component of this balance test is considering attempts by the accused faculty member to amend their behavior (<redacted example>), because such attempts might suggest that relying on the faculty member would not result in harm.

- The relevant unit should contain at least one reasonable faculty member who believes that relying on the respondent faculty member would result in harms (the “no uniform opinion for retention” test). AF uses this test with caution. The test may not have value in a very large department, where the size of the department improves the chance of encountering a faculty member with eccentric views. In a small department, the absence of such a faculty member might just be a small-sample effect. A test of this kind is important, however. If there was uniform confidence across a unit that a faculty member should be relied on, then AF should need extraordinary evidence to disagree with that opinion. Similarly, if there were no reasonable faculty members in the discipline who felt that the respondent faculty member could not be relied on, AF should need extraordinary evidence to disagree with that opinion. This component of the test helps an Article X hearing avoid being distracted by overheated unit politics, but may not always be practical. This test is asymmetric by design. The **presence** of faculty members in a unit who believe the accused faculty member can be relied on is not dispositive. The **absence** of faculty members in a unit who believe an accused faculty member can not be relied on would make it very difficult for AF so to find.

These tests may require refinement to encompass the circumstances of future hearings. It is AF’s intention that each test should be met before AF could conclude a faculty member could not be relied on. AF believes an explicit statement of the tests used has value because it allows participants to understand AF’s reasoning and because it could be used to assess the likely outcome of future Article X hearings.

V. Assessing violations of professional responsibility

AF takes the position that extremely severe violations of professional responsibility are relatively straightforward to identify. These are acts or omissions such that a reasonable faculty member and most lay persons would agree disqualify the actor from serving on a faculty — examples might include: battery of a colleague; major and knowing plagiarism; selling or bartering grades; or clear scientific fraud. Typically, for such violations harms are obvious as well.

The current matter requires some care to identify what is a severe violation of professional responsibility, and what harms might meet the resulting harm test. None of the alleged violations would be likely to attract criminal prosecution, for example, and a lay person might see the alleged harms as minor annoyances. However, AF takes the position that conduct that causes reasonable faculty to have a reasonable concern they are not freely able to engage in teaching,

research, and publication may be a severe failure of professional responsibility. Conduct that repeatedly degrades or humiliates members of the academic staff (while not being in itself scholarly) may be a severe failure of professional responsibility for at least two reasons. First, the vast majority of reasonable faculty members would agree that deliberate degrading or humiliation of academic staff, at least to a sufficient degree, is a severe failure of professional responsibility. Second, repeatedly degrading or humiliating a member of the academic staff will tend to cause them to exercise their academic freedoms ineffectually or not at all. AF uses “repeatedly” because an Article X hearing is not the proper vehicle to resolve minor disputes about civility. For conduct to be a severe violation of professional responsibility, the respondent must either be shown to have known that the conduct was degrading or humiliating, or there must be strong reasons to believe that the faculty member should have known the conduct would be degrading or humiliating.

In this matter, there are allegations of conduct that affect people who are not academic staff. This conduct would, however, have tended to cause them to have a reasonable concern they are not freely able to engage in teaching, research, and publication may be a severe failure of professional responsibility. AF takes the position that conduct that is a severe violation of professional responsibility when applied to members of the academic staff will mostly remain a severe violation of professional responsibility when applied to others, and so can be used to assess whether a faculty member can be relied on.

VI. Patterns of behavior and standards of proof

< Redacted material that could tend to identify the respondent.>

A sufficiently careful respondent may be able to evade responsibility for a large number of <acts of the form alleged>, because each act may be difficult to prove beyond a reasonable doubt. If the acts are sufficiently minor, and the circumstances are carefully chosen, this pattern would apparently not meet relevant standards under federal law, and might lead to a finding that the respondent faculty member had not engaged in <conduct reprehensible to federal law> (see 5.1 of this document). At the same time, a large number of such acts, established according to the appropriate standard of proof, would be a strong indication that the respondent faculty member could not be relied on. But the allegation that a large number of such acts occurred is not a sufficient reason for Article X.1.d(2) dismissal — enough of the acts must actually have occurred. AF must therefore attend closely to standards of proof for the conduct it relies on in any finding.

<Redacted material that might tend to identify the faculty member>

Article X.1.d requires that the faculty member’s “conduct is found to demonstrate clearly and convincingly that the faculty member can no longer be relied upon.”

Article X.1.d is silent on the standard of proof required as to whether the conduct occurred. This is dealt with by X.1.e.5, which has

The committee shall not be bound by technical rules of evidence, but all findings, conclusions, and recommendations of the committee shall be supported by and be in accord with substantial evidence. The appointee shall be entitled to be present at all sessions of the committee when evidence is being received and to be accompanied by an adviser of the appointee's choice who may act as counsel.

Any finding by AF "shall be supported by and in accord with substantial evidence". This means that AF can rely only on conduct where AF finds that there is substantial evidence that it did occur, not that conduct must be proven to have occurred clearly and convincingly. In summary, AF should only concern itself with conduct that would tend to "demonstrate clearly and convincingly that the faculty member can no longer be relied upon" and where there is substantial evidence that that conduct occurred.

4. Redacted

5. Other findings

I. The code of conduct

There are some references to a code of conduct in the papers in this matter. This code of conduct is merely hortatory, and has no direct relevance. It may be difficult to meet criteria for dismissal without violating the code of conduct; but a faculty member may violate the code of conduct without meeting criteria for dismissal. The grounds for dismissal of a tenured faculty member are explicitly stated in *Statutes* (X.1.d), and the wording is absolutely clear that there are no other grounds ("Due cause for dismissal shall be deemed to exist only if").

It follows that the only way to expand or modify grounds for dismissal is to revise the *Statutes*. The University cannot create grounds for dismissal that are not present in *Statutes* by writing a code of conduct or any other act short of revising the *Statutes*. AF dismisses any suggestion that violations of the code of conduct are themselves grounds for dismissal. AF takes the position that an attempt to represent a code of conduct violation that does not meet Article X.1.d conditions as grounds for dismissal might in itself be a violation of academic freedom. Any such attempt should be closely scrutinized by each AF and each Senate at each campus of the University of Illinois, and could be treated as a serious violation of the academic freedom rights offered to all academic staff under Article X.2(a).

II. Redacted

III. Redacted

IV. Redacted

V. Redacted

VI. Redacted

Several redacted sections offering detailed findings on general defenses, credibility and charges

<The structure and content of this material must be redacted to preserve confidentiality. A few sentences are preserved below, to inform future proceedings>

AF takes the position that faculty members inherit with their powers and privileges a duty to inform themselves about acceptable professional conduct, and that failing to know that some kinds of conduct are unacceptable is negligent.

<redactions>

The respondent faculty member argues that <the respondent faculty member> is an eminent scholar who has brought prestige to the University.

AF takes no position on the merits of this argument, which is not relevant to AF's enquiry. AF cannot impose any penalty, and so cannot weigh <the respondent faculty member's> value to the University against any penalty AF might impose. AF must determine whether the respondent faculty member's extramural conduct demonstrates clearly and convincingly that <the respondent faculty member> can no longer be relied upon to perform <the respondent faculty member's> duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility. Any question of the respondent faculty member's value to the University is a matter the Trustees may wish to weigh in a dismissal hearing, but does not bear on whether the respondent faculty member can be relied on.

<redactions>

Appendix I: Hearing Rules

The following description of procedures and rules was circulated to AF members and counsel before the hearing.

AF hearing procedures and rules:

AF will hear evidence that may lead to the dismissal of a faculty member under Article X. Such hearings are relatively rare, and there is little statutory constraint on procedure. This document lays out procedure for the hearings to be held in Jan 2022. The first block of hearings deals with the University's case; the second block, covering the faculty member's response, is yet to be scheduled. Because hearings are relatively uncommon, experience is limited and rules and procedures are vague. I have found no written record of hearing rules made by the committee in the past. The committee has accepted a procedure and set of rules, below, which is intended to be fair, capture past practice, be reasonably flexible, be familiar to attorneys, and allow the outcome to be supported by and in accord with substantial evidence.

Rules:

Generally, the hearing should proceed as efficiently as possible consistent with fairness and accuracy. The chair will try to move proceedings away from irrelevant material.

(a) confidentiality:

The hearings are confidential. Committee members should not reveal hearing materials to non-committee members. Attorneys and clients may discuss the hearing with one another, but may not release materials outside the hearing. Press enquiries should be directed to the AF chair <redacted email>.

(b) participants:

The hearings will be attended by:

A. Attendees who can speak at some points:

- members of AF
- attorney(s) representing the University
- attorney(s) representing the faculty member
- witnesses (who will appear one at a time)

B. Attendees who can only observe:

- Administrative Assistant to AF
- Representative(s) of University Counsel
- Representative(s) of the provost's office

(c) structure:

- By agreement of the sides, we will have opening statements, max 30 mins each side.
- The order of witnesses may be affected by time or schedule constraints but the case for the University should be presented before the case for the faculty member starts unless absolutely impossible.
- The faculty member is not required to testify, but may do so.
- No witness is immune from cross-examination.
- No closing arguments, but closing briefs on paper.
- A transcript will be available to AF, the University and the faculty member.
- The committee may meet alone, as needed, to discuss procedural matters and exercise rule making powers.

(d) witnesses:

- The witness is sworn in (the stenographer does this).
- An attorney for the party calling the witness conducts a direct examination.
- An attorney for the other party conducts a cross-examination.
- An attorney for the party calling the witness may conduct a re-direct examination, if required.
- Each member of the committee may ask questions relevant to the hearings, as necessary. Chair will proceed in alphabetical order of surname.

(e) testimony:

- Questions and testimony should be relevant.
- Generally, hearsay evidence (for example, "I heard someone else say") is not acceptable.
- Questions should not encourage witnesses to speculate.
- Questioners should not themselves testify in the question.
- Questions may be persistent, but questioners should not bully or badger witnesses.
- During direct examination, questioners should not lead witnesses (as is usual).
- During cross examination, questioners may lead witnesses (as is usual).
- If a committee member wishes to raise some matter outside the committee question period, notify the chair using a text to redacted or with email to redacted (and AF in the subject).

- Attorneys should not object unless absolutely necessary. If you absolutely have to object to a question, notify the chair using a text to redacted or with email to redacted (and AF in the subject). You will have the opportunity to identify persistent abuse of the rules in closing briefs, using the transcript.

(f) rule-making:

There is not enough history of holding hearings to construct detailed rules about exceptions (for example, the circumstances under which hearsay evidence is acceptable; whether evidence obtained improperly is acceptable; etc.). The committee's power to make and impose rules is described in the statute. If counsel feels an exception is absolutely necessary, notify the chair using a text to redacted or with email to redacted (and AF in the subject). Explain what the exception is and why it is needed, and the committee will make a rule at the time; in doing so, it will hear a response to that request from the other side.

If some other situation arises, the committee may as necessary meet briefly to make a rule to deal with that situation.

Appendix II: AF's request for final briefs

<Redacted material>

DRAFT Instructions to AF:

What AF must do:

We must determine whether:

“with all due regard for the freedoms and protections provided for in Article X, Section 2, of these *Statutes*, a faculty member's performance of university duties and functions or extramural conduct is found to demonstrate clearly and convincingly that the faculty member can no longer be relied upon to perform those duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility;” (*Statutes*, X.1.d)

Pretty much all our thinking should use this as a reference point. While there are some references to a code of conduct in the papers in this matter, the code of conduct has no direct relevance. The hearings flow from the *Statutes*, which describe (a) the only available criteria for the dismissal of a tenured professor; and (b) the role and powers of an Article X hearing committee. It may be difficult to meet criteria for dismissal without violating the code of conduct; but one may violate the code of conduct without meeting criteria for dismissal.

The question of what “professional standards of competence and responsibility” means is AF's problem. We can be informed by various sources (for example, the code of conduct), but we should use our judgement. There is no reason to believe that violations of the code of conduct necessarily establish grounds to find that a faculty member cannot be relied on (etc). The code

of conduct is not part of the *Statutes* and hasn't gone through the kind of review that *Statutes* go through. Any party who wants the code of conduct to be part of the *Statutes* should go through the necessary formal process to establish it there.

Article X Section 2:

This is pretty explicit about what academic freedom the system provides. I reproduce it here for reference.

Section 2. Academic Freedom

a. It is the policy of the University of Illinois System to maintain and encourage full freedom within the law of inquiry, discourse, teaching, research, and publication and to protect all members of the academic staff against influences, from within or without the University of Illinois System, which would restrict the member's exercise of these freedoms in the member's area of scholarly interest. Academic freedom includes the right to discuss and present scholarly opinions and conclusions both in and outside the classroom. The right to the protection of the University of Illinois System shall not, however, include any right to the services of the University of Illinois System counsel or the counsel's assistants in any governmental or judicial proceedings in which the academic freedom of the staff member may be in issue.

b. As a citizen a member of the academic staff may exercise the same freedoms as other citizens without institutional censorship, discipline, or restraint. A member of the academic staff should be mindful, however, that accuracy, forthrightness, and dignity befit association with the system and a person of learning and that the public may judge that person's profession and the system by the individual's conduct and utterances.

c. If, in the president's judgment, a member of the academic staff exercises freedom of expression as a citizen and fails to heed the admonitions of Article X, Section 2b, the president may publicly disassociate the Board of Trustees and the University of Illinois System from and express their disapproval of such objectionable expressions.

d. A member of the academic staff who believes that he or she does not enjoy the academic freedom which it is the policy of the University of Illinois System to maintain and encourage shall be entitled to a hearing on written request before the Committee on Academic Freedom and Tenure of the appropriate University senate. Such hearing shall be conducted in accordance with established rules of procedure. The committee shall make findings of facts and recommendations to the president and, at its discretion, may make an appropriate report to the senate. The several committees may from time to time establish their own rules of procedure.

Standards:

Statutes establish standards for the hearing:

"The committee shall not be bound by technical rules of evidence, but all findings, conclusions, and recommendations of the committee shall be supported by and be in accord with substantial evidence. The appointee shall be entitled to be present at all sessions of the committee when evidence is being received and to be accompanied by an

adviser of the appointee's choice who may act as counsel. Likewise, the president or the president's designee, together with counsel if the president desires counsel, shall be entitled to be present at all sessions of the committee when evidence is being received. Each party shall have the right within reasonable limits to question witnesses and, when all the evidence has been received, to make an argument in support of its position, either in person or by counsel. A full stenographic transcript shall be made of the hearing unless both parties agree to the making of a record in a briefer form." (*Statutes*, X.1.e.5)

AF recommendations must be supported by and in accord with substantial evidence. One way that "a faculty member's performance" can "demonstrate clearly and convincingly that the faculty member can no longer be relied upon to perform those duties and functions... in a manner consonant with professional standards" is by demonstrating a pattern of infractions. Furthermore, AF "shall not be bound by technical rules of evidence". It follows that, by the wording of the *Statutes*, AF may reconsider disciplinary matters that have been decided in some other forum.

AF's "findings, conclusions and recommendations" must be "supported by and in accord with substantial evidence", so AF must form its own opinion as to matters that have been decided in some other forum. While a hearing is not an investigation, the hearing must determine whether the conduct occurred ("substantial evidence"). This means that a faculty member could, for example, argue that the other forum had wrongly decided a matter; or that their behavior had been amended by the other forum's sanctions.

Points to think about:

Here are some points to consider in developing an analysis:

- If one assumes that all allegations are true, would one find that the faculty member can no longer be relied on (etc. - formal wording above)? If no, we must stop. Otherwise, we continue.
- We do not need to determine the truth of each allegation. If we can identify some acts that cause us to find that the faculty member can no longer be relied on (etc. - formal wording below), and we believe those acts occurred (the standard is "supported by substantial evidence"), then we need not resolve whether other acts occurred.
- AF has no power of punishment. *Statutes* provide that AF prepares a report to the President, who may then take the issue up with the trustees, as below.
- It is the University's duty to establish that the faculty member's acts mean they can no longer be relied on (etc).
- <redacted as likely to identify a participant>

- AF does not need to grade the transcripts; there might be lots of irrelevant mischief there. The only points that matter are ones that resolve whether the faculty member can no longer be relied on (etc.)

What happens after AF has reported:

AF gives its report to the President, as above.

If the committee recommends that charges be dropped and the president concurs, the case shall be considered closed. (*Statutes*, X.1.e.6)

If either AF does not recommend the charges be dropped OR if the president does not concur, there is a hearing in front of the Board of Trustees. In at least one case in the past, AF has found that there were no grounds for dismissal and the president has nonetheless referred the case to the Board of Trustees. AF gets to send a representative to that hearing. The Board chooses any action to take.

(7) Hearing by Board of Trustees. Within thirty days after transmittal of the findings, conclusions, and recommendations of the Committee on Academic Freedom and Tenure, or if the appointee filed no request for a hearing before that committee within fifteen days after the expiration of the period specified in subparagraph 1e(3) for the filing of such a request, the president may cause the charges to be filed with the Secretary of the Board of Trustees along with the findings, conclusions, and recommendations, if any, of the Committee on Academic Freedom and Tenure and the record of the hearing before the committee, if one was held. Notice of such filing of charges shall be delivered to the appointee personally or shall be mailed to the appointee by the Secretary of the Board of Trustees by registered mail within five days after such filing. Within ten days after such delivery or mailing of notice of the filing of the charges with the Secretary of the Board of Trustees, the appointee may file with the Secretary of the board a written request for a hearing before the Board of Trustees. Notice of the time and place of the hearing which hearing shall be not less than twenty days after the date of the filing of the appointee's request shall be delivered to the appointee personally or mailed to the appointee by registered mail. The date of the hearing shall be not less than fifteen days from the date of such delivery or mailing of the notice of hearing to the appointee. The appointee shall have the right to appear at the hearing, with counsel if desired, to reply to the charges and to present evidence. Counsel for the University of Illinois System shall represent the system administration at the hearing and shall have the right to present evidence in support of the charges. The board shall not be bound by technical rules of evidence in hearing and deciding the case.

The board will give due consideration to the findings, conclusions, and recommendations of the Committee on Academic Freedom and Tenure, and the remainder of the record relevant to the charges before said committee, and in all cases where a report was made by the committee will invite a member of the committee designated by its chair to attend the hearing and make a statement before the board.

If the board concludes that the appointee should be dismissed or asked to resign, the effective date of such dismissal or resignation shall not be less than one year from the date of the board's decision unless the board, in its discretion, determines that an earlier

effective date is justified by the gravity of the appointee's conduct in question. (*Statutes*, X.1.e.7)

Appendix III: AF's principles for discovery

A discovery dispute arose before the hearings were held. AF resolved the dispute using its rule-making powers as below:

Background:

The University seeks to dismiss a tenured professor ("appointee") under Article X.1.6.d:

"with all due regard for the freedoms and protections provided for in Article X, Section 2, of these *Statutes*, a faculty member's performance of university duties and functions or extramural conduct is found to demonstrate clearly and convincingly that the faculty member can no longer be relied upon to perform those duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility". (*Statutes*, X.1.6.d)

A statement of charges has been filed, and served on the appointee. The appointee has requested a hearing. There is a disagreement between the appointee and the University as to what material should be disclosed by the University in advance of the hearing. Strong words have been used.

The discovery requests:

<Redacted>

Shared issues:

The disagreements above appear to rest on a set of shared issues.

- What are AF's role and powers in an Article X hearing? In particular, what effect does FERPA have on Article X hearings? and to what extent are AF hearings required to be consistent?
- Is the University required to disclose material related to non-participants?
- To what extent is a respondent faculty member entitled to discovery of material that might be exculpatory?

AF's role and powers in an Article X hearing:

While there are some references to a code of conduct in the papers in this matter, the code of conduct has no direct relevance. The hearings flow from the *Statutes*, which describe (a) the only available criteria for the dismissal of a tenured professor; and (b) the role and powers of an Article X hearing committee. It may be difficult to meet criteria for dismissal without violating the code of conduct; but one may violate the code of conduct without meeting criteria for dismissal. *It follows that only an analysis of the Statutes can help.*

Statutes provide that

“(e)xcept as hereinbefore or hereinafter provided, the hearing shall be conducted according to such rules as the committee may from time to time establish,” (*Statutes*, X.1.6.e.5)

referring to the Senate Committee on Academic Freedom and Tenure (AF). This implies that AF must resolve this dispute. There is no record of rules that the committee has established. To determine how to resolve this dispute, AF should consider its role in the Article X process. AF is not a Federal or State court, and should be bound by the University *Statutes*; failure of the *Statutes* to conform to Federal or State law is a matter for the courts, not for AF. *It follows that AF is not required to interpret FERPA to reach a conclusion.*

Statutes establish standards for the hearing:

“The committee shall not be bound by technical rules of evidence, but all findings, conclusions, and recommendations of the committee shall be supported by and be in accord with substantial evidence. The appointee shall be entitled to be present at all sessions of the committee when evidence is being received and to be accompanied by an adviser of the appointee’s choice who may act as counsel. Likewise, the president or the president’s designee, together with counsel if the president desires counsel, shall be entitled to be present at all sessions of the committee when evidence is being received. Each party shall have the right within reasonable limits to question witnesses and, when all the evidence has been received, to make an argument in support of its position, either in person or by counsel. A full stenographic transcript shall be made of the hearing unless both parties agree to the making of a record in a briefer form.” (*Statutes*, X.1.6.e.5)

AF recommendations must be supported by and in accord with substantial evidence. One way that “a faculty member’s performance” can “demonstrate clearly and convincingly that the faculty member can no longer be relied upon to perform those duties and functions... in a manner consonant with professional standards” is by demonstrating a pattern of infractions. Furthermore, AF “shall not be bound by technical rules of evidence”. *It follows that, by the wording of the Statutes, AF may reconsider disciplinary matters that have been decided in some other forum.*

AF’s role: University’s counsel asserts that “this hearing is not a re-investigation”, rather “portions of the conduct reported merits review under the Article X process”. AF must determine whether the “faculty member’s performance of university duties and functions or extramural conduct is found to demonstrate clearly and convincingly that the faculty member can no longer be relied upon”, rather than whether a particular sanction is justified for a particular behavior. AF’s “findings, conclusions and recommendations” must be “supported by and in accord with substantial evidence”, so AF must form its own opinion as to matters that have been decided in some other forum. While a hearing is not an investigation, the hearing must determine whether the conduct occurred (“substantial evidence”). This means that a

faculty member could, for example, argue that the other forum had wrongly decided a matter; or that their behavior had been amended by the other forum's sanctions. *It follows that the faculty member is entitled to discovery in some detail.*

AF's powers: AF has no direct power to compel any party to act in any way. The *Statutes* imply that AF can dismiss charges that are not "supported by, and .. in accord with clear and substantial evidence", and that "the hearing shall be conducted according to such rules as the committee may from time to time establish". AF has a role in this dispute because AF may reasonably:

- decide that a charge for which material has not been disclosed by the University is not supported by substantial evidence;
- discount exculpatory evidence that the faculty member relies on, but did not disclose to the University before the hearing;
- interpret exculpatory evidence that the faculty member plausibly asserts the University holds, but has not been disclosed, in ways that are unfavorable to the University.

Consistency: *Statutes* do not require that hearings follow the same set of rules for each case. AF hearings are rare, so differences in procedure from hearing to hearing are not necessarily evidence of unfairness. *The University's actions in the Article X proceeding against other faculty members are not relevant.*

Non participants:

As University Counsel notes, there may be persons whose names appear in investigator notes, but who "do not wish to participate or be identified". There is no option to participate without being identified, and AF excludes that case from consideration. AF has no power to subpoena. AF is unable to consider any evidence from a person who does not wish to participate. While AF is not bound by formal rules of evidence, I expect that AF will refuse to consider evidence from a third party about the experience, beliefs, opinions, etc. a person who does not wish to participate. *It follows that the respondent faculty member has no right to have the names disclosed of people who do not wish to participate or be identified.*

AF Principles for discovery:

The *Statutes* require the University to disclose the charges it makes, and support them by substantial evidence disclosed in the presence of the appointee. It follows that the University cannot make charges for which it is unable to disclose material it relies on. Furthermore, the *Statutes* require that the appointee should receive:

- **a list of the charges;**
- **a list of the witnesses the University intends to call, together with contact information;**
- **any evidence the University intends to use in support of these charges;**
- **any evidence the University possesses that the University knows or should reasonably believe to be exculpatory.**

A list of the charges is explicitly required in *Statutes*, X.1.6.e.1

A list of the witnesses the University intends to call, together with contact information is implicit in the provision “Each party shall have the right within reasonable limits to question witnesses and, when all the evidence has been received, to make an argument in support of its position, either in person or by counsel.” *Statutes*, X.1.6.e.5. Appointee would not be able to question witnesses without preparation.

Any evidence the University intends to use in support of these charges is implicit in the provision “Each party shall have the right within reasonable limits to question witnesses and, when all the evidence has been received, to make an argument in support of its position, either in person or by counsel.” *Statutes*, X.1.6.e.5. Appointee would not be able to question witnesses without preparation, knowing what evidence the University intends to use in support of these charges.

Any evidence the University possesses that the University knows or should reasonably believe to be exculpatory is implicit at least in the requirement that “a faculty member’s performance of university duties and functions or extramural conduct is found to demonstrate clearly and convincingly that the faculty member can no longer be relied upon to perform those duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility” *Statutes*, X.1.6.d. The University could not demonstrate the faculty member could not be relied on clearly and convincingly if the University possessed exculpatory evidence that it knowingly concealed; indeed, the University deliberately concealing exculpatory evidence would suggest that other evidence might not be clear or convincing.

Applying this analysis to disclosure:

First, AF is unable to compel any party to behave in any way. The analysis above suggests how AF should respond to various events that may occur.

The code of conduct: The code of conduct has no direct relevance. The hearings flow from the *Statutes*, which describe (a) the only available criteria for the dismissal of a tenured professor; and (b) the role and powers of an Article X hearing committee. It may be difficult to meet criteria for dismissal without violating the code of conduct; but one may violate the code of conduct without meeting criteria for dismissal. AF should ignore or refuse to hear anything that does not directly address the criteria for dismissal laid out in the *Statutes*, in this case:

“with all due regard for the freedoms and protections provided for in Article X, Section 2, of these *Statutes*, a faculty member’s performance of university duties and functions or extramural conduct is found to demonstrate clearly and convincingly that the faculty member can no longer be relied upon to perform those duties and functions within the University of Illinois System in a manner consonant with professional standards of competence and responsibility”. (*Statutes*, X.1.6.d)

<Redacted material>

Strong Words:

AF is unable to compel any party to behave in any way. However, a difficult hearing will not be simplified by unsupported allegations of misconduct, which might tend to discredit the source. The assertion that redactions are a deliberate attempt by the University to conceal exculpatory evidence is extraordinary (a conspiracy between University officials and counsel to deceive an Article X hearing); would, if true, demand an extraordinary response from AF; and, to be proven, would require extraordinary evidence.

Appendix IV: Charge document

<Redacted>

ACADEMIC FREEDOM AND TENURE
David Forsyth, Chair
Maria Chu
William Maher
Kevin McSweeney
Yiran Gao
Ann Reisner
Stephanie Sanders-Smith
Landria Seals Green
Jiahao Zhang