

Board Policy 405.1, 405.4 and 470.1 Revision FAQ

I. General background information about the proposed revisions.

Q. What prompted the proposed revisions to Board Policy 405.1 *Appointment, Promotion, Tenure, Non-Reappointment, and Dismissal of Faculty*, Board Policy 405.4 *Employment Periods*; and Board Policy 470.1 *Distinguished Professorships*?

A: The Office of General Counsel has been working with other UA System staff to update the Board of Trustees and UA System policies and procedures, covering a wide range of topical areas, for some period of time. In March 2016, the Board of Trustees was apprised of an overhaul of the Universitywide Administrative Memoranda, which have historically been issued by the President's Office to provide guidance and direction to the campuses and units on certain administrative subjects. Many of those Administrative Memoranda were retired because they were obsolete. Those that remained were updated and renamed University of Arkansas Systemwide Policies and Procedures (UASPs). During the review process, some of those policies were merged into existing Board Policies or established as new Board Policies. During the March 2016 Board of Trustees meetings, 11 revised or new Board of Trustees policies were presented and approved by the Board. Since that meeting, the process of updating policies, many of which have not been updated for some period of time, has continued, and various new or revised policies have been presented to the Board of Trustees for consideration, or issued by the President's office as UASPs.

Board Policy 405.1 *Appointment, Promotion, Tenure, Non-Reappointment, and Dismissal of Faculty* was adopted by the Board in 1963, and it was revised on numerous occasions between 1980 and 2001. There have been no revisions since 2001. Board Policy 405.4 *Employment Periods* was last updated in 1998; and Board Policy 470.1 *Distinguished Professorships* was last updated in 1980. However, since the last update of these policies, the University of Arkansas System and our campuses have changed significantly. We have added multiple campuses that do not offer tenure, and each of these campuses have brought with them different practices and policies. The practices on all of our campuses have changed with the times as well. In addition to the changes with our campuses, there have been legal developments impacting these policies. Further, experience in applying the existing policies over time has revealed areas where clarification or revision would benefit meeting the underlying purposes of the policies.

Q. Have campus administrators and faculty provided feedback regarding the proposed changes?

A: Yes. Some faculty members and administrators have expressed support for the proposed changes, while some faculty have shared concerns. We have received supportive feedback about the clarity provided in the policies and the goal of ensuring quality in teaching, research and service across the UA System. The major concerns expressed are: concerns with the more detailed definition for "cause," which comes into play when disciplining or terminating faculty; a suggestion that certain changes would weaken academic freedom and impact faculty due process rights; a concern that the amendments allow faculty to be terminated in one year for receiving an unsatisfactory performance evaluation; a concern that the amendments preclude tenure track

faculty from seeking more than one suspension of the tenure probationary period; and a suggestion that faculty were not involved in the revision process, which they believe could impact accreditation.

II. Amendments to the definition of “cause” related to disciplining or terminating faculty, and additions to the “annual review” section of Board Policy 405.1.

Q: How was the definition of “cause” changed?

A: Under the current policy, cause is defined as:

conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University; examples of such conduct include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty, and moral turpitude.

Under the revised policy, cause is broken out as a separate definition, and defined as:

conduct that demonstrates the faculty member lacks the willingness or ability to perform duties or responsibilities to the University. A faculty member may be disciplined, or dismissed, for cause on grounds including but not limited to unsatisfactory performance or (1) professional dishonesty or plagiarism; (2) discrimination, including harassment or retaliation, prohibited by law or university policy; (3) unethical conduct related to fitness to engage in teaching, research, service/outreach and/or administration, or otherwise related to the faculty member’s employment or public employment; (4) misuse of appointment or authority to exploit others; (5) theft or intentional misuse of property; (6) incompetence, job abandonment, pattern of disruptive conduct or unwillingness to work productively with colleagues, or refusal to perform reasonable duties; (7) threats or acts of violence or retaliatory conduct; or (8) violation of University policy, or state or federal law, substantially related to performance of faculty responsibilities or fitness to serve the University.

Q: Why was the definition of “cause” changed?

It is important to note that under the current policy only a few examples of conduct constituting “cause” are provided, but the policy very specifically states that the conduct is not limited to those specific examples. Thus, the current policy clearly contemplates that there are other types of conduct that can constitute “cause” for purposes of disciplining or terminating faculty.

In revising the cause language, there was an intentional effort to be more explicit with the definition to avoid potential problems with vagueness. In an American Association of University Professor’s (AAUP) article on termination and discipline, the author writes: “Failure to clearly define adequate cause may lead courts to invalidate particular actions or other severe sanctions. *See, e.g., Tuma v. Board of Nursing*, 593 P.2d 711 (Idaho 1979) (invalidating suspension for

"unprofessional conduct"); *Davis v. Williams*, 598 F.2d 916 (5th Cir. 1979) (invalidating regulation prohibiting "conduct prejudicial to good order")."¹

As an example, the revised policy eliminated the use of the term "moral turpitude," which is an amorphous term, and incorporated out specific types of conduct (those grounds identified in (1)-(5), (10)-(11) of the revised policy) that could be considered falling under the general category of "moral turpitude." The intent of the revision is to add precision and specificity, thereby providing more explicit guidance to faculty and removing ambiguity as to the requirements of the policy. For example, there should be no ambiguity that engaging in racial discrimination or sexual harassment by a faculty member is cause for disciplinary action.

Q: How were the examples of "cause" that are now in the new definition determined?

A: Policies from other institutions of higher education were reviewed, and some of the added examples are similar to the examples that appear in those policies. For instance, the University of Florida policy provides:

(1) Just cause for termination, suspension, and/or other disciplinary action imposed on a faculty member shall be defined as incompetence or misconduct, which shall include, but not be limited to, the following:

- (a) Neglect of duty or responsibilities which impairs teaching, research, or other normal and expected services to the University;
- (b) Failure to perform the terms of employment;
- (c) Willful violation of a rules or regulation of the University;
- (d) Failure to discharge assigned duties;
- (e) Conduct, professional or personal, involving moral turpitude;
- (f) Violation of the ethics of the academic profession;
- (g) Action(s) which impair, interfere with, or obstruct; or aid, abet, or incite the impairment, interference with, or obstruction of; the orderly conduct, processes, and functions of the University. Refer to Article V, Section (5)(G) of the University Constitution and Rules 6C1-1.007, 6C1-1.008, and 6C1-7.010, F.A.C.
- (h) Failure to return from an approved leave;
- (i) Failure to maintain professional licensure or clinical privileges necessary to perform assigned duties;
- (j) Threatening or abusive language or conduct;
- (k) Sexual harassment;
- (l) Falsification of records;
- (m) Unauthorized use of state property, equipment or personnel;
- (n) Possession, sale, distribution of alcoholic beverages or nonprescribed drugs;
- (o) Insubordination;
- (p) Possession of unauthorized weapons and/or firearms on university property.

¹ *Discipline and Termination*, Donna R. Euben, October 24, 2004.

Case law concerning faculty dismissals also provided guidance. The 5th Edition, Volume 1 of *The Law of Higher Education* by Kaplin and Lee provides a good summary and discussion of cases involving terminations of tenured faculty for cause.

Most importantly, we looked to our own policies and practices. While the new definition was expanded to provide additional examples for which a faculty member can be disciplined or terminated, the new definition explicitly sets out the type of conduct for which UA System faculty have always been subject to discipline or termination. For example, two additions to the “cause” section that have been the most criticized – “disruptive conduct” and “unsatisfactory performance,” – are not new reasons for which faculty can be disciplined or terminated. Further, under existing campus policies, unsatisfactory performance is typically a stated reason for dismissal of faculty. The UALR and University of Arkansas, Fayetteville policies, which were developed with the involvement of the faculty on those campuses, specifically provide for termination for “unsatisfactory performance,” which typically involves peer review within departments and colleges.

During the past five years, there have been two dismissals of tenured faculty that were heard by the Board of Trustees. In both, the stated grounds for dismissal were not limited to the general examples set out in the current Board Policy 405.1. Rather, more specific grounds for dismissal were invoked, including: (1) disregard of University and departmental policies; (2) frequent and excessive absences and unauthorized outside employment; (3) sustained unsatisfactory teaching; (4) inability and unwillingness to work productively with others; (5) resume update inaccuracies; (6) repeated and sustained unauthorized copying of copyrighted works; (7) engaging in threatening behavior and attempting an act of retaliation toward a suspected accuser; (8) making derogatory and offensive comments regarding culture and national origin of students; (9) making false statements during an investigation; and (10) being emotionally abusive and disrespectful toward students.

Q. What are the expressed concerns of faculty with the inclusion of “pattern of disruptive conduct or unwillingness to work productively with colleagues” as an example of the type of conduct that can give rise to termination?

A: Some faculty have objected to this revision, saying that the inclusion of this quoted language is a way of establishing “collegiality” as a possible basis for faculty termination. While the University has never expressly included “collegiality” among the factors that can constitute cause for dismissal, the University has always considered “a *pattern* of disruptive conduct or unwillingness to work productively with colleagues” as conduct that may give rise to the termination of a tenured faculty member.

Others have expressed concern that this provision is not specific enough, and that criteria should be established to provide further meaning. Nothing in this policy precludes campuses from establishing policies, procedures or criteria, for additional guidance provided they are not inconsistent with this policy.

Further, campuses have already incorporated aspects of collegiality, as germane to professional responsibilities, into their policies. For example, the UA-Fayetteville campus promotion and

tenure document recognizes that “[e]ach faculty member should be actively engaged as a collegial contributor to the life of the academic unit ... and should exhibit respect and cooperation in shared academic and administrative tasks.” Likewise, the Fulbright College personnel document recognizes that a faculty member’s annual performance rating may appropriately take into account “an individual’s demonstrated ability to work productively with colleagues in carrying out the research/creative, teaching and service missions of the department and the College.”

Q: Is the proposed amendment contrary to the AAUP’s position?

A: The AAUP opposes the use of “collegiality” as a stand-alone factor for annual evaluations. The proposed amendment does not do this. Rather, the proposed amendment clarifies the Board’s standard on dismissals to reflect its existing practice, as discussed above. With regard to annual evaluations, the criteria for those are proposed through the governance structure at the campus level, a process beginning with appropriate committees, and ultimately approved by the President. With regard to evaluations, it should be noted that the AAUP has recognized that “a fundamental absence of collegiality will no doubt manifest itself in the dimensions of teaching, scholarship, or, most probably, service.²” The AAUP goes on to state that “efforts to obstruct the ability of colleagues to carry out their normal functions, to engage in personal attacks, or to violate ethical standards” should be considered as “independently relevant” in the evaluation process.

Q: Are the interests of the University of Arkansas and the citizens of Arkansas best served by allowing faculty members to stay in their positions if they (1) have a pattern of engaging in disruptive conduct or (2) demonstrate an unwillingness to work productively with colleagues?

A: No. It is important for faculty members to work productively with their colleagues and avoid unnecessarily disruptive conduct. Disagreement and dissent can, of course, be expressed in a respectful manner. However, combative, uncooperative, and disruptive conduct can ultimately impede learning and scholarship, diminish job satisfaction within the University community, and needlessly consume the time of administrators. Most importantly, such conduct does not serve the interest of creating a productive learning environment for students.³

Q: Are the proposed amendments too subjective to be enforced fairly? For example, could the proposed amendments give rise to a situation in which a respectful dispute with somebody in the chain of command—such as a department chair or dean—serves as the basis for dismissal? What about the possibility of being dismissed for voicing an unpopular opinion?

² *On Collegiality as a Criterion for Faculty Evaluation*, AAUP, 2016:
<https://www.aaup.org/report/collegiality-criterion-faculty-evaluation>

³ Courts have recognized that a university has “an interest in fostering and maintaining mutual respect among faculty, which is . . . not only an academic interest, but a necessary one.” *Carleton College v. NLRB*, 230 F.3d 1075, 1081-82 (8th Cir. 2000).

A: There is no way to articulate a conduct standard that removes subjectivity, but we have tried to explain the standard as clearly as possible. There are multiple protections against arbitrary and capricious dismissal decisions, and these particular examples are unrealistic. First, respectful disagreements do not come within the scope of the proposed amendment's definition of "cause." Second, conduct that is disruptive or uncooperative will typically not be a ground for dismissal unless a *pattern* emerges over a period of time. Third, the Board policy on dismissal, in addition to existing University practice, requires a robust consensus that a faculty member's actions should give rise to a dismissal. The campus's Chancellor, the President, and the Board of Trustees must approve of a disputed for-cause dismissal of a tenured faculty member before the dismissal becomes effective, and the department chair, dean, and provost have opportunities to voice their views along the way. Fourth, there are extensive procedural protections, including the opportunity for a formal hearing before a committee of faculty peers prior to action by the President and the Board.

Q: Would this proposed amendment make a significant change from the existing practice at the University of Arkansas?

A: No. The current Board policy implicitly prohibits faculty members from engaging in a pattern of disruptive or uncooperative conduct. The current policy defines "cause" as a demonstrated lack of willingness to perform the faculty member's job duties, including examples, and says that the offensive conduct is "not limited to" the examples. The proposed amendment merely provides greater clarity on what constitutes "cause" rather than leaving the matter to inference.

Q: Does this policy require a faculty member to be terminated after receiving one unsatisfactory evaluation?

A: No. One of the more substantive changes to the policy is found under the category of Annual Review, beginning at page 16, and reads as follows:

In order to ensure a high quality and productive educational environment, annual review procedures adopted at the campus level must provide for prompt, meaningful and effective means of addressing unsatisfactory faculty performance. Any campus procedures regarding post-tenure review shall not allow greater than one academic year, with active cooperation from the faculty member, for an overall unsatisfactory performance rating to be substantially remedied prior to a recommendation of dismissal on the basis of unsatisfactory performance. In other words, if a faculty member's overall performance is evaluated as unsatisfactory for an academic year, any improvement plans or other remedial measures are expected to result in a satisfactory evaluation by the end of the following academic year; if not, the faculty member may be issued a notice of dismissal on twelve months' notice as provided for in this policy. Again, such period of time for remediation assumes the active cooperation and engagement of the faculty member; otherwise, a shortened timeframe may be utilized.

The objective of the proposed revision is to require individuals who have been placed on professional development plans to undertake active measures to address the performance issues

through an effective professional development plan or other remedial measures that are implemented during the following academic year. The expectation is that the faculty undertaking such plans will make substantial progress in remedying a performance issue in one academic year rather than over another three to four years. If remediation does not result in a satisfactory evaluation, “the faculty member may be issued a notice of dismissal on twelve months’ notice as provided for in this policy”, and dismissal proceedings are not required. The facts and circumstances will dictate that decision. It is reasonable to expect that a faculty member who has been put on notice, through the campus performance evaluation process, that his or her performance is overall unsatisfactory, will be able to demonstrate improvement over the course of the next 12 months. It is also important to note that campus annual review policies and procedures generally involve peer review at the departmental level, meaning that a faculty member’s colleagues have significant involvement in evaluating performance. “Unsatisfactory performance” evaluations are not given lightly under these policies.

Q: How does this provision compare with what currently exists?

A. The current version of 405.1 does not include a comparable provision, but some of our campuses do have provisions that address the period of time that a faculty member will be provided to remediate unsatisfactory performance.

The UALR policy on this issue states:

Annual reviews for tenured faculty will be used for post-tenure review. Academic units will define overall unsatisfactory performance for tenured faculty. If a tenured faculty member receives two unsatisfactory reviews in sequence or three such reviews in five years, the faculty member, departmental group charged with peer review, chair, and the dean shall prepare a professional development plan supported by appropriate resources. The plan shall cover up to three years with the possibility of a one-year extension. During the time period of the professional development plan, progress toward successful completion of the plan will become part of the annual review process for the faculty member. When a faculty member receives two additional unsatisfactory reviews during the professional development plan period, the department chairperson, with majority vote of the departmental peer review committee, and the dean, initiates the process for terminating with cause the tenured faculty member as specified in the *UALR Faculty Handbook*. This policy takes effect January 1, 2001. The policy will be reviewed by the Tenure Committee and the Faculty Senate in the spring of 2006.

The timeframe utilized by the Fayetteville campus is similar.

Q: Under the proposed amendment, is it likely that faculty members will be subject to dismissal after only one performance evaluation?

A: No. The proposed amendment gives faculty members an opportunity to address deficiencies before dismissal proceedings may be commenced. Faculty members will have a full year to remediate performance deficiencies. It is expected under the proposed amendment that faculty members will be cooperative and fully engaged in the process. The changes reflect a

belief that faculty members who receive overall unsatisfactory evaluations should have an opportunity to correct the deficient areas; however, poor job performance should not be accepted for multiple years. The University is an institution of excellence, and its expectations should be high. Faculty who perform at a high (or even satisfactory) level should not be concerned about the possibility of dismissal if the proposed amendments are adopted. The language does include a provision that if a faculty member simply chooses not to actively engage with improvement efforts following the unsatisfactory rating, then a termination notice could be issued more quickly, but those instances should be unusual and rare.

Q: Will the proposed amendment undermine academic freedom?

A: No. The existing Board policy prevents dismissal proceedings from being instituted against a faculty member in violation of sound principles of academic freedom, encompassing protections in research, classroom discussion, and speech as a citizen. The concept of “academic freedom” at the University of Arkansas has never encompassed a right to be repeatedly disruptive or demonstrate an unwillingness to work with colleagues. The proposed amendments provide additional clarity in this regard. It should be noted that academic freedom does not just apply to individual faculty members. The University is also afforded academic freedom in carrying out its academic mission, including with respect to ensuring the quality of its faculty in teaching, research and service.

III. Concerns about changes in the procedures for suspending the tenure probationary period, and dismissing tenured or tenure-track faculty.

Q: Does the proposed amendment restrict the number of times a tenure track faculty member can request a suspension of the tenure probationary period.

A: No. Board Policy 405.1 currently reads: “During the first six years of the probationary period, a tenure-track faculty member may request, for reasons set forth below, that the probationary period be suspended by one (1) year.” The current policy, as written, does not allow a faculty member to request more than a single one-year suspension of the tenure clock. The intent of the revision was to address the issue, and to recognize that there may be circumstances, albeit limited, under which additional requests for suspension of the tenure probationary period should be granted.

Q: Does the amendment remove significant procedural protections that previously existed in the dismissal process?

A: No. There are some minor changes to reflect the fact that the University’s representative always has the right to have counsel present at the dismissal proceedings and that the Board will not subpoena witnesses. These changes reflect longstanding practice. The proposed amendment also dispenses with the “informal committee” at the beginning of the dismissal process, which has proved to be cumbersome, time-consuming, and unnecessary to provide due process.

Q: What specific procedures will protect tenured or tenure-track faculty members from attempts to dismiss them for arbitrary or capricious reasons?

A: The core procedures that govern dismissal proceedings are not affected by the proposed amendments. The dismissal process requires a decision by the President after receiving the Chancellor's recommendation and following a hearing. The President's decision is appealable to the Board of Trustees, and it can be challenged in court. Prior to the President's decision, the process includes prior notice of the grounds for dismissal and a hearing in which the examination and cross-examination of witnesses is permitted. The faculty member may have counsel present. Numerous other procedures are listed in the current policy and maintained in the proposed amendments.

IV. Applicability

Q: If the Board of Trustees adopts the various amendments, will they apply to faculty members who have already received tenure?

A: Yes. Tenure provides a property interest, which is protected by the Constitution and state law. The revisions in the policy do not change the fundamental interest created by tenure, which is the right not be fired except for cause. The revisions simply clarify the interest provided to faculty who are awarded tenure by better defining possible "cause" for dismissing tenured faculty. The Board of Trustees is responsible for governing the university for the benefit of all its stakeholders and always reserves the right to amend its policies.

V. Changes to Board Policy 405.4 Employment Periods

Q: What are the major changes that have been proposed to Board Policy 405.4 Employment Periods?

A: There are two material changes. First, under the existing Board policy, administrators and staff may be terminated for cause or, alternatively, for convenience upon 30 days' prior notice. The proposed amendments would remove the requirement of 30 days' notice that must precede a termination for convenience. In other words, a termination for convenience may occur without prior notice with regard to administrators and staff. Second, under the existing Board policy, faculty who are neither tenured nor on a tenure track may be terminated for cause or, alternatively, for convenience upon 60 days' prior notice. The proposed amendments would reduce the required period of prior notice to 30 days.

Q: Why have changes been proposed to Board Policy 405.4?

Generally speaking, University employees who are neither tenured faculty members nor on a tenure track are at-will employees much like other state employees in Arkansas. (An employee with a multi-year contract is a notable exception). The proposed changes would bring the University more in line with existing practice throughout state government and the private sector.

Q: Do the proposed amendments prohibit campuses from giving greater notice if required under the circumstances? Will there be any flexibility?

A: The proposal continues to allow for flexibility at the campus level. For example, a Chancellor may decide that termination of a faculty member for convenience should not become effective until the end of a semester in order to minimize disruption. To give another example, it may be possible to provide greater advance notice to staff members who may be impacted by a material change or elimination in an academic program.

VI. Concerns about the UA System's process for amending Board policies that affect the standards governing tenured and tenure-track faculty.

Q: What has been the process for drafting the proposed amendments?

A: The UA General Counsel's Office prepared an initial draft of potential changes because it frequently interacts with the policy, with President Bobbitt and Michael Moore, Vice President for Academic Affairs providing substantial input. During the process, we reached out to various deans and other campus administrators for input. A draft of the policies (including a copy with tracked changes) was provided on September 15, 2017 to the Chancellors to distribute to the appropriate persons on their campuses for feedback. The purpose of circulating the redlined draft of the policy changes was to receive feedback and ensure that the voices of faculty could be heard and incorporated into the process. President Bobbitt and General Counsel JoAnn Maxey met with the Chancellors on October 2 to obtain initial feedback. Although the objective was to present these policies to the Board of Trustees for consideration at the November 8-9 meeting, a formal presentation of the revised policies to the Board of Trustees for a vote will not occur in November because some of the feedback we received was that more time was needed to allow stakeholders to provide input. As a result, the process of receiving and reviewing feedback is ongoing.

Q. Does the process jeopardize Higher Learning Commission (HLC) accreditation?

A. As noted above, the purpose of distributing the proposed policies broadly was to gain feedback from campus administration and faculty before adopting any amendments. Additionally, the timeframe for feedback is being extended to further allow for comment. It should also be noted that nothing contemplated in the tenure revisions is out-of-step with the Criteria or Assumed Practices of HLC. HLC accredits a wide variety of institutions – public, private, for-profit and non-profit, with and without tenure. The HLC standards are more general in nature. The Criteria speak to needing to involve a variety of constituencies in governance but delegate administration of the institution to the institution's administration and academic oversight to the faculty. The process for policy revisions is in keeping with those standards.

Q: Will the final policy, once adopted, reflect all of the changes that faculty members would like to see?

A: As explained above, the proposed amendments concern subjects that fall within the responsibility of the Board of Trustees. Therefore, the Board has discretion to decide whether to adopt any amendments, including whether to adopt any refinements to the proposed drafts, based on whether the proposed changes will further the best interests of the University.

Q: How will faculty members be able to give input on the proposed amendments in the coming weeks?

A: They may email their comments to feedback@uasys.edu. Faculty members are urged to aggregate their comments and submit them to the President through bodies such as faculty senates.

Q: What is the cut-off date for providing comments?

A: We would like to receive all comments by December 15, 2017.