

SOUTH DAKOTA BOARD OF REGENTS

Academic and Student Affairs
Consent

AGENDA ITEM: 6 – B (2)

DATE: October 5-6, 2022

SUBJECT

BOR Policy 4:4 – Non-Faculty Exempt Employment Provisions; BOR Policy 4:7 – Grievance – Faculty; and BOR Policy 4:14 – Faculty Discipline and Disciplinary Procedures (Second Reading)

CONTROLLING STATUTE, RULE, OR POLICY

[BOR Policy 4:4](#) – Non-Faculty Exempt Employment Provisions

[BOR Policy 4:7](#) – Grievance – Faculty

[BOR Policy 4:14](#) – Faculty Discipline and Disciplinary Procedures

BACKGROUND / DISCUSSION

The proposed changes to BOR Policies 4:4, 4:7 and 4:14 provide additional clarification around areas of ambiguity, specific to what constitutes a grievance and the appeal processes associated therewith, in addition to establishing an intermediate legal review prior to the imposition of discipline that would result in demotion or discharge. Grievances currently require an “alleged misinterpretation, misapplication or violation of a specific term or provision...that directly affect terms and conditions of employment of the individual employee.” However, filings by employees frequently fail to assert any specific factual basis for the allegation and instead rely merely on conclusions or outcomes. Expounding the definition of grievance is intended to provide additional direction as to what is required when asserting a grievance, providing better guidance to our employees as they navigate the processes in policy. The intermediate legal review is intended to insert a neutral assessment into the process, providing an opportunity to identify and/or correct potential issues sooner rather than later.

IMPACT AND RECOMMENDATION

The proposed revisions set forth in BOR Policies 4:4, 4:7 and 4:14 provide additional clarification regarding the grievance process, ensure employees maintain the appropriate due process (i.e., grievance rights) for disciplinary matters, while also building in an

(Continued)

DRAFT MOTION 20221207_6-B(2):

I move to approve the second and final reading of the proposed revisions to BOR Policy 4:4, BOR Policy 4:7 and BOR Policy 4:14, as presented.

opportunity to identify issues and correct deficiencies prior to the imposition of certain disciplinary action, ultimately benefiting both employees and the institutions.

There have been no additional revisions since the first reading of this policy at the October 2022 BOR meeting.

Board staff recommends approval.

ATTACHMENTS

Attachment I – Proposed Revisions to BOR Policy 4:4

Attachment II – Proposed Revisions to BOR Policy 4:7

Attachment III – Proposed Revisions to BOR Policy 4:14

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Non-Faculty Exempt Employment Provisions

NUMBER: 4:4

A. PURPOSE

To define the process and provisions relating to the appointment, employment, conduct expectations, compensation practices, remedial action procedures, and grievance procedures for Non-Faculty Exempt (NFE) employees. This policy supersedes all other BOR policies relating to NFE employees.

B. DEFINITIONS

1. **Day:** Calendar days
2. **Executive Director:** The chief executive officer of the SD Board of Regents.
3. **Grievance:** An alleged misinterpretation, misapplication or violation of a specific term or provision of Board policy, or other agreements, contracts, policies, rules, regulations or statutes that directly affect terms and conditions of employment for the individual employee; provided the allegations assert a specific factual basis for the claim that, if proven, would establish that an action attributable to the administration deprived the grievant of a right arising under such term or provision. A grievant may not rely upon mere conclusions, general allegations, and speculative statements to establish a factual basis for the claim that a term or provision has been misinterpreted, misapplied, or violated.
4. **Institution:** Black Hills State University, Dakota State University, Northern State University, South Dakota School of Mines & Technology, South Dakota State University, South Dakota School for the Blind and the Visually Impaired, South Dakota School for the Deaf, University of South Dakota, and the Office of the Executive Director.
5. **Internal Equity Adjustment:** A salary adjustment to reduce or eliminate an internal pay rate disparity within an Institution or defined Institutional department.
6. **Market Equity Adjustment:** A salary adjustment to reduce or eliminate an external pay rate disparity using recognized market data and peer groups.
7. **Non-Faculty Exempt (NFE):** Employees who are exempt from the Civil Service Act by virtue of their administrative and professional functions.
8. **Performance Adjustment:** A salary adjustment made in recognition of work performance that meets or exceeds performance standards documented through an established review process.
9. **President:** The chief executive officer of a South Dakota Board of Regents University.

10. Student Employee: Student employees, including teaching and research fellows, are exempt from the Civil Service System. Student employees are considered temporary employees and not eligible for benefits unless meeting the requirements under the Affordable Care Act.

11. Superintendent: The chief executive officer of a South Dakota Board of Regents Special School.

C. POLICY

1. Appointment

All NFE Institutional personnel will be employed upon the approval of the President, Superintendent, or Executive Director. BOR Policies 1:5 and 1:6 outline when Board approval is required for appointment.

- 1.1. If an Institution wishes to hire a candidate who was previously terminated for cause, or who resigned in lieu of termination, the President or their delegate, and the Office of the Executive Director shall be advised of the circumstances surrounding the termination. The President, Superintendent, or Executive Director will approve or deny the rehire based upon legitimate business and position related reasons.
- 1.2. If an Institution appoints a candidate who is employed by another Institution, the Institutions shall share position related information with the requesting academic or human resource office, and the appointing authority will consider that legitimate business and position related information in the hiring process prior to appointment.

2. Employment Contracts

- 2.1. Upon appointment of a benefit-eligible employee, the University or Special School will issue an employment contract, which may be renewed annually at the discretion of the University President or Superintendent.
- 2.2. NFE employment contracts shall not be more than one year in length, unless otherwise specified in, and issued pursuant to, BOR Policy 4:49.
- 2.3. During a valid contract term, NFE employees may be reassigned for non-discriminatory purposes without cause to any position, so long as the salary is not decreased during the term of the current contract.
- 2.4. NFE Employment contracts may be non-renewed without cause by providing written notice of the non-renewal to the NFE employee prior to the expiration of the current contract term.
- 2.5. An NFE employment contract creates no obligation of the Institution for continued employment beyond the term of the contract and non-renewal of the contract is not an action which can be grieved under BOR or Institutional policy.
- 2.6. NFE employment contracts may be terminated for cause, or as a part of a reduction in force in conformity with this policy and applicable law.

3. Compensation Administration

- 3.1. All compensation adjustments that meet the criteria identified in BOR Policy 1:5(5) and 1:6(4) require Board approval.

3.2. Compensation upon Hire or Transfer

- 3.2.1. Compensation for employees at hire or transfer will be set comparative to the market value of the position as well as the internal equity of the Institution.
- 3.2.2. Institutional hiring authorities shall consult with human resources on compensation decisions at hire or transfer, and the Institution shall consider the position requirements, institutional priorities and the candidate's education, experience, skills, and abilities.

3.3. Annual Salary Adjustments

Decisions concerning annual salary policy adjustments will be made in accordance with legislative process and BOR policies. The President, Superintendent or Executive Director determines the Institutional priorities and establish guidelines for salary allocations.

- 3.3.1. Administrators responsible for making individual salary recommendations will follow approved guidelines:
 - 3.3.1.1. The Legislature will identify the salary pool and the Board will approve a total salary policy pool for which Institutions can distribute based on market, performance or institutional priorities.
 - 3.3.1.2. The President, Superintendent or Executive Director can apply institutional priorities to a specific department or area of concentration so long as it is a portion of the total salary policy pool.
 - 3.3.1.3. Administrator recommendations will be reviewed by the appropriate Vice President and/or President.
 - 3.3.1.4. All annual salary policy for benefit eligible employees must be applied through the HRFIS system, those meeting the criteria for Board approval in BOR Policy 1:5 or 1:6 must be report to the Board for approval at its regularly scheduled meeting in May.

3.4. Other Base Salary Adjustments

- 3.4.1. Additional Duty Pay: An increase, permanent or temporary, to base salary ~~not exceeding ten percent (10%)~~ may be granted based on a documented additional workload.
- 3.4.2. Duties and Responsibilities Changes: An increase based upon significant change in the duties, scope and responsibility of a position as documented in an approved position description.
 - 3.4.2.1. The adjustment shall be consistent with previous institutional priority decisions of the Institution and must be made in light of internal equity.
- 3.4.3. Internal Equity Adjustment: An increase to base salary to reduce or eliminate documented institutional internal salary disparities that are found after an analyses of position duties, individual qualifications, experience, longevity, work performance or institutional priorities.

- 3.4.4. Market Adjustment: An increase to base salary to reduce or eliminate a documented external salary inequity.

3.5. Instruction of Academic Courses

- 3.5.1. An NFE employee may be allowed to instruct an undergraduate or graduate course with the appropriate approval process at the Institution.
- 3.5.2. Compensation for the instructional work should be comparable to the rates provided to temporary faculty for comparable instruction.
- 3.5.3. If the instructional workload is assigned as an overload, the work related to course instruction should be completed outside of the scope of the employee's regular position.

4. Reduction in Force

- 4.1. An Institution may lay off or reduce the percent time of an NFE employee during a current contract term for the following reasons:

- 4.1.1. Legislative action;
- 4.1.2. Loss of grant, contract or other funding;
- 4.1.3. Governor's executive order; or
- 4.1.4. Reorganization. An Institution may only use this as a means to lay off an employee for such occasions as privatization, the movement of a function to another state agency, the elimination of an organizational function, the consolidation of departments or functions, or a reduction in a program's activities.

4.2. Layoff Notification

- 4.2.1. An employee shall be given a minimum of fourteen (14) calendar day's written notice prior to the effective date of the layoff or reduction in percent time. The notice shall include:
 - 4.2.1.1. The effective date and reason(s) for the layoff;
 - 4.2.1.2. Information concerning the right to appeal;
 - 4.2.1.3. The timeline in which the employee may present reasons in writing why the layoff should not take place;
 - 4.2.1.4. Notice is effective the day of deposit in the mail of a certified notice, the date electronically sent, or the date personally delivered to the employee.
- 4.2.2. A copy of the layoff notification should be forwarded to the system human resources officer at the time the action is taken.

4.3. Priorities for Layoff

- 4.3.1. When more than one NFE employee exists in any classification, department, or geographic location designated for a reduction in force, the following criteria will be used to identify the employee(s) who will be laid off or have reduced hours:

- 4.3.1.1. Performance;
- 4.3.1.2. Longevity with the Institution and employment status;
- 4.3.1.3. Special knowledge, skills, abilities and potential of the employee;
- 4.3.1.4. Type and mixture of funding for position and fund status;
- 4.3.1.5. Future needs of the department;
- 4.3.1.6. Geographic location.

4.4. Benefits

- 4.4.1. Any accrued and vested leave will be paid in accordance with South Dakota administrative rules and statutes.

5. Code of Conduct

Employees are expected to maintain an effective, orderly, safe and efficient work environment.

5.1. Professional Conduct/Misconduct Defined

- 5.1.1. Disciplinary action, up to and including termination, may be taken, upon notice and a right to respond, for conduct within or outside the scope of employment. Disciplinary action may be taken for just cause, including, but not limited to the reasons listed below:
 - 5.1.1.1. The employee has violated any Board of Regents or institutional policy;
 - 5.1.1.2. The employee violated a confidentiality agreement, non-disclosure agreement, policy, regulation, or law;
 - 5.1.1.3. The employee disrupts the efficiency or morale of the department;
 - 5.1.1.4. The employee is careless or negligent with the money or other property of the state or property belonging to any person receiving services from the state or has stolen or attempted to steal money or property of the state or property belonging to any person receiving services from the state;
 - 5.1.1.5. The employee has failed to maintain a satisfactory attendance record based on the established working hours or has had unreported or unauthorized absences;
 - 5.1.1.6. The employee has made a false or misleading statement or intentionally omitted relevant information during the application and selection process;
 - 5.1.1.7. The employee has intentionally falsified a state record or document;
 - 5.1.1.8. The employee has violated statutes or standard work rules established for the safe, efficient, or effective operation of the campus;
 - 5.1.1.9. A failure to correct deficiencies in performance which have been documented, whether in email or print, and communicated to the employee;
 - 5.1.1.10. A breach of recognized published standards of professional ethics for the employee's profession;

5.1.1.11. Conviction of any felony or the conviction of a misdemeanor involving immoral actions;

5.1.1.12. The unlawful or unauthorized manufacture, distribution, dispensing, possession or use of alcohol or controlled substances while on duty or while on premises owned and controlled by the Board of Regents or used by the Board of Regents for educational, research, service or other official functions.

5.1.1.13. Insubordination,

5.1.1.14. The use of alcohol, marijuana, or other controlled substances, which impairs performance of duties.

5.1.1.15. Theft of state owned or controlled property.

5.1.1.16. Intentionally and wrongfully counseling, inciting, or participating in a prohibited student or employee activity.

5.1.1.17. Any substantial or irremediable impairment of the ability of a staff employee to perform assigned duties.

5.2. Termination of Faculty Appointment

If an NFE employee holds faculty rank, and/or tenure, then the appropriate faculty termination procedures shall be applied.

6. Remedial Action Procedures

6.1. Remediation may consist of one of the following actions:

6.1.1. Corrective Action:

6.1.1.1. Verbal warnings or directives which do not constitute discipline; or

6.1.1.2. Written warnings or directives to be filed in the personnel file of the employee which do not constitute discipline.

6.1.2. Discipline:

6.1.2.1. Required training or current substance abuse treatment at the cost of the employee;

6.1.2.2. Suspension from duties with, or without, loss of pay commensurate therewith;

~~6.1.2.3. Reassignment;~~

~~6.1.2.4.~~ 6.1.2.3. Demotion, which does not include any change(s) in employment status occurring at the expiration of a term contract or any alteration(s) in employment status authorized in the employee's existing contract of employment; or

~~6.1.2.5.~~ 6.1.2.4. Discharge.

6.2. Procedures

6.2.1. Corrective Action Procedures

Corrective action may be imposed immediately, upon communication of the corrective action to the employee, pursuant to the discretion of an employee's supervisor. Employees who have had corrective action imposed may request review of the action through the grievance procedure set forth in Section 7 below, subject to the limitation(s) of Section 7.2.3.4.1.

6.2.2. Disciplinary Procedures

6.2.2.1. Legal Review Panel

Prior to providing written notice pursuant to Section 6.2.2.2 below for discipline that would result in demotion or discharge, the administration shall submit the intended discipline, the allegations supporting the intended discipline, and any evidence or documentation upon which the intended discipline is based to an internal legal review panel appointed by the Board of Regent's Executive Director, or as delegated, the institutional President. The legal review panel will be comprised of legal counsel, a human resources representative of the Board of Regents or institution, and an additional representative designated by the panel's appointing authority. The panel will conduct a review of the intended discipline and supporting materials, and provide a recommendation to the administrator for consideration. Employees may be placed on paid administrative leave during the legal panel review process in accordance with applicable policies. Any review and recommendation of the legal review panel shall be conducted under attorney-client privilege and shall not be included in the supporting materials provided to the employee, made part of the employee's personnel file, or otherwise disclosed or shared without the express written permission of the Board of Regents or its authorized designee. The legal review panel may be requested to review other employment actions; however, the legal review panel will not be used for discipline resulting from sexual harassment proceedings conducted in accordance with BOR Policy 1:17.

6.2.2.1.6.2.2.2. Stage One: Pre-Discipline Conference

If the administration determines that there are reasonable grounds for discipline, the employee will be furnished written notice of the allegations supporting the determination, an explanation of the evidence relied upon by the administration, and the intended disciplinary action. The matter will be discussed with the employee at a personal conference which will be held at a time not sooner than fourteen (14) calendar days, nor later than twenty-one (21) calendar days from the date of the transmission of the written notice, unless otherwise agreed by the employee and the administration. The employee may bring to this conference a representative chosen by the employee. At the close of the personal conference, or within seven (7) calendar days thereafter, the administration will notify the employee whether it will discipline the employee, how and the effective date of the discipline.

6.2.2.2.6.2.2.3. Stage Two: Post-Discipline Hearing Rights

Employees who have been disciplined after completion of the Stage One conference may appeal the action through the grievance procedure set forth in Section 7 below. Any grievance appeal under this section will begin at Step Two in Section 7.2.2.

7. Grievance Procedures

The grievance procedure provides a just and equitable method for resolution of grievances that affect the terms and conditions of employment.

7.1. General Provisions

- 7.1.1. Grievance procedures are available to NFE employees.
- 7.1.2. No offer of settlement of a grievance by either party shall be admissible as evidence in later grievance proceedings or elsewhere.
- 7.1.3. No settlement of a grievance shall constitute a binding precedent in the settlement of similar grievances.
- 7.1.4. If the grievant fails to act within the time limits provided herein, the administration will have no obligation to process the grievance and it will be deemed withdrawn.
 - 7.1.4.1. The parties to any grievance may, by mutual written agreement, waive the time limits provided herein.

7.1.5. If the administration fails to act in time, the grievant may proceed to the next review level by filing the grievance with the appropriate official and within the timeframe required under Section 7.6.2 and any subsequently issued decision on the matter at the bypassed level will be void.

7.1.5.7.1.6. If the grievant fails to state a grievance as defined in Section B.3 in any filing under the grievance procedure, the administration will have no obligation to process the filing beyond providing notice to the grievant within five (5) days of receipt of the filing that the filing failed to meet the definition of a grievance, after which the filing will be dismissed.

7.1.6.7.1.7. The Board, administration, or supervisors shall not retaliate against any non-faculty exempt employee for filing or participating in a grievance.

7.1.7.7.1.8. Employees who voluntarily terminate their employment shall have their grievances under this policy immediately withdrawn and shall not benefit by any later settlement of an individual or group grievance.

7.1.8.7.1.9. Grievance records shall not be maintained in the individual's personnel files but shall be maintained in a separate file.

7.1.9.7.1.10. Required written notice may be sent via the Postal Service, delivered by hand, or sent through electronic mail.

7.1.9.1.7.1.10.1. Notice will be effective on the date postmarked by the Postal Service, on the date delivered by hand or on the date sent electronically, provided that, where disruption of institutional electronic communications systems interferes with delivery of an electronic notice, the effective date

of notices sent electronically will be delayed until service has been restored.

~~7.1.10.~~7.1.11. Grievances will be filed with the lowest administrative level having the authority to dispose of the grievance. If the office of the President, Executive Director, or Vice President represents the lowest administrative level having authority to dispose of the grievance, then the grievance will be filed at Step 2, Step 3 or Step 4 as applicable.

~~7.1.11.~~7.1.12. Throughout the grievance process, the grievant shall include copies of the original grievance and all responses and decisions from prior steps, if any.

~~7.1.12.~~7.1.13. Throughout each step of the grievance process, any decision issued by the institution shall be provided simultaneously to the grievant and each administrator who issued a decision in prior steps, if any. All decisions issued by the institution in response to a grievance shall include a statement of findings and conclusions supporting the decision.

~~7.1.13.~~7.1.14. Informal resolution may be attempted by the parties to a grievance at any point during the grievance procedure. If a grievance is resolved informally, the institution will be under no obligation to proceed further with the grievance.

~~7.1.14.~~7.1.15. If the deadline for any action(s) set forth herein falls on a Saturday, Sunday, legal holiday, or any other day in which the institution's administrative offices are closed, the timeframe for the action shall continue to run until the end of the first day thereafter when the institution's administrative offices are open.

7.2. Grievance Procedures

7.2.1. Step One – Grievance to Immediate Supervisor

7.2.1.1. An employee may file a grievance in writing with the immediate supervisor within fourteen (14) days of the date on which the grievant knew, or should have known, of the action or condition which occasioned the grievance.

7.2.1.2. The supervisor, upon receipt of the grievance, will investigate and provide a response to the grievant within seven (7) days.

7.2.1.3. If the employee is not satisfied with the response, the employee has seven (7) days to proceed to the next step.

7.2.2. Step Two – Grievance to Vice President

7.2.2.1. The employee may submit, in writing, a grievance of decision of the supervisor to the appropriate Vice President of the institution.

7.2.2.2. A written response shall be delivered to the employee within fourteen (14) days following receipt.

7.2.2.3. If the employee is not satisfied with the response, the employee has seven (7) days to proceed to the next step.

7.2.3. Step 3 – Grievance to President, Superintendent, or Executive Director

7.2.3.1. The employee may grieve, in writing, the decision from step two to the President, Superintendent, or Executive Director.

7.2.3.2. The President, Superintendent, or Executive Director shall investigate the matter, personally or through an appointed designee or panel.

7.2.3.3. A written response shall be delivered to the grievant within fourteen (14) days following receipt.

7.2.3.4. If the employee is dissatisfied with the response rendered, the employee has seven (7) days following receipt to proceed to step four.

7.2.3.4.1. If the employee has filed a grievance based on corrective action imposed pursuant to Section 6.2.1. of this policy, the employee has seven (7) days to request review of the response pursuant to Board Policy 1:6.C.5.

7.2.4. Step 4 – Grievance to the Board

7.2.4.1. The employee may grieve the decision of the President to the Board.

7.2.4.1.1. If the employee has filed a grievance ~~based on corrective action imposed pursuant to Section 6.2.1. of this policy, the only additional grievance process available shall be under Board Policy 1:6.C.5.~~ which is not based on a reduction in force conducted pursuant to Section 4 of this policy or discipline imposed pursuant to Section 6.1.2 of this policy, the only additional grievance process available shall be under Board Policy 1:6:C.5.

7.2.4.2. For grievances not governed by Section 7.2.4.1.1 above, The Executive Director shall select a hearing examiner within fourteen (14) days following receipt of the grievance.

7.2.4.3. The hearing examiner shall hold a hearing pursuant to SDCL ch. 1-26 with all parties involved in the grievance no later than thirty (30) days after the hearing examiner is appointed. The hearing examiner shall prepare a proposed determination including findings of fact and conclusions of law for the Board's consideration. The proposed determination shall be provided to the board within thirty (30) days of the hearing or fourteen (14) days prior to the next regularly scheduled Board meeting, whichever is sooner.

7.2.4.4. The Board's decision shall be issued to the employee within ten (10) days from the date the grievance is considered by the Board. If the Board fails to respond within the specified time period, or if the employee is not satisfied with the decision, the employee may grieve in accordance with South Dakota Codified Law Chapter 1-26

FORMS / APPENDICES:

None.

SOURCE:

BOR August 2019; BOR May 2021; BOR December 2021.

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Grievance--Faculty

NUMBER: 4:7

I. Faculty Grievance Procedure

The following grievance procedure is applicable to non-bargaining unit faculty. Special Schools bargaining unit faculty grievance procedures are contained in the Special Schools COHE/BOR contract.

A. Purpose

All problems should be resolved, whenever possible, before the filing of a grievance. Open communication is encouraged between administrators and faculty members so that resorting to the formal grievance procedure will not be necessary. The purpose of this policy is to promote prompt and efficient procedures for investigating and resolving grievances.

B. Resorting to Other Procedures

If the faculty member seeks resolution of any civil rights claim in any forum or by any set of procedures other than those established in this policy, whether administrative or judicial, the institution or Board will be under no obligation to proceed any further with the matter unless the grievant is under an obligation to exhaust administrative remedies in order to bring such other action. The act of filing an action or claim in any other forum in order to avoid violating a time limitation will not be considered a violation of the intent of this policy.

C. Definitions

- (1) Day: Calendar days.
- (2) Executive Director: The chief executive officer of the Board of Regents.
- (3) Grievance: An alleged misinterpretation, misapplication, or violation of a specific term or provision of Board policy, or other agreements, contracts, policies, rules, regulations, or statutes that directly affect terms and conditions of employment for the individual employee; provided the allegations assert a specific factual basis for the claim that, if proven, would establish that an action attributable to the administration deprived the grievant of a right arising

under such term or provision. A grievant may not rely upon mere conclusions, general allegations, and speculative statements to establish a factual basis for the claim that a term or provision has been misinterpreted, misapplied, or violated.

- (4) Grievant: A named faculty member or a group of named faculty members who has filed a grievance under this procedure.
- (5) Institution: Black Hills State University, Dakota State University, Northern State University, South Dakota School of Mines & Technology, South Dakota State University, South Dakota School for the Blind and Visually Impaired, South Dakota School for the Deaf, University of South Dakota, and the Office of the Executive Director.
- (6) President: The chief executive officer of a South Dakota Board of Regents University.
- (7) Superintendent: The chief executive officer of a South Dakota Board of Regents Special School.

D. General Provisions:

- 1) No offer of settlement of a grievance by either party to the grievance will be admissible as evidence in later grievance proceedings, or elsewhere. No settlement of a grievance will constitute a binding precedent in the settlement of similar grievances.
- 2) If the grievance concerns non-renewal, denial of promotion, or denial of tenure, the grievance review will be limited to determining whether the decision was the result of failure to follow procedures. The burden of proof in such cases shall rest with the grievant.
- 3) Neither the institution nor the Board of Regents will retaliate or effect reprisals against any faculty member for processing or participating in a grievance.
- 4) In the event a grievance is filed near the end of an academic year and strict adherence to time limits will result in hardship to any party, the parties will do everything reasonable to allow the grievance to be processed in an expeditious manner.
- 5) If the grievant fails to act within the time limits provided herein, the administration will have no obligation to process the grievance and it will be deemed waived.

- 6) If the administration fails to act in time, the grievant may proceed to the next review level by filing the grievance with the appropriate official and within the timeframe required under Section E and any subsequently issued decision on the matter at the bypassed level will be void.
- 7) If the grievant fails to state a grievance as defined in Section 1.C.(3) in any filing under the grievance procedure, the administration will have no obligation to process the filing beyond providing notice to the grievant within five (5) days of receipt of the filing that the filing failed to meet the definition of a grievance, after which the filing will be dismissed.
- 87) The parties to the grievance may, in their discretion, waive any of the time limitations provided for herein; provided, however, that such waiver must be in writing and signed by both parties involved at the particular level or step of the grievance process.
- 98) Required written notice may be sent via the Postal Service, delivered by hand, or sent through electronic mail. Notice will be effective on the date postmarked by the Postal Service, on the date delivered by hand, or on the date sent electronically, provided that, where disruption of institutional electronic communications systems interferes with delivery of an electronic notice, the effective date of notices sent electronically will be delayed until service has been restored.
- 109) Grievance records will not be maintained in any faculty member's institutional personnel file.
- 110) In the case of a grievance concerning discipline or a termination pursuant to reduction procedures, the burden of proof will rest upon the administration to the extent required by law. In all other cases the burden of proof will rest upon the grievant.
- 124) Each party to the grievance will bear his own expense in a grievance proceeding. The institution or the Board will bear the expense of providing the Hearing Examiner and all attendant costs thereto.
- 132) A grievant will be permitted at any time prior to the time the Hearing Examiner sets the matter down for hearing, by written notice, to amend a grievance by further specifications. However, the filing of such amendments will not act to extend any time constraints.
- 143) Throughout the grievance process, the grievant shall include copies of the original grievance and all responses and decisions from prior steps, if any.
- 154) Throughout each step of the grievance process, any response or decision issued by the institution shall be provided simultaneously to the grievant and

each administrator who issued a decision in prior steps, if any. All decisions issued by the institution in response to a grievance shall include a statement of findings and conclusions supporting the decision.

- 165) Faculty members, in processing grievances, may represent themselves or may be represented by someone of their choice.
- 176) The grievance proceedings will be maintained as confidential, subject only to the necessity of the parties to prepare their cases. All meetings and conferences will be held in a confidential setting.
- 187) Informal resolution may be attempted by the parties to a grievance at any point during the grievance procedure. If a grievance is resolved informally, the institution will be under no obligation to proceed further with the grievance.
- 198) If the deadline for any action(s) set forth herein falls on a Saturday, Sunday, legal holiday, or any other day in which the institution's administrative offices are closed, the timeframe for the action shall continue to run until the end of the first day thereafter when the institution's administrative offices are open.

E. Grievance Procedure

1) Step One

- a. The grievant may file a grievance in writing with the lowest administrative level having authority to dispose of the grievance within fourteen (14) days of the date on which the grievant knew, or should have known, of the action or condition which occasioned the grievance.
 - i. If the appropriate Vice President of the institution is the lowest administrative level having authority to dispose of the grievance, the grievance will be filed as a first instance at Step Two. The applicable filing period remains fourteen (14) days.
 - ii. If the President or Superintendent is the lowest administrative level having authority to dispose of the grievance, the grievance will be filed as a first instance at Step Three. The applicable filing period remains fourteen (14) days.
- b. The administrator, upon receipt of the grievance, will investigate and provide a response to the grievant within seven (7) days of receipt of the grievance.
- c. If a grievant is not satisfied with the response, the grievant has seven (7) days to proceed to Step Two.

2) Step Two

- a. The grievant may file, in writing, a grievance of the Step One decision with the appropriate Vice President of the institution.
- b. The Vice President of the institution shall review the grievance and provide a response to the grievant within fourteen (14) days following receipt of the grievance.
- c. If a grievant is not satisfied with the response, the grievant has seven (7) days to proceed to Step Three.

3) Step Three

- a. The grievant may file, in writing, a grievance of the Step Two decision with the President or Superintendent of the institution.
- b. The President or Superintendent shall, personally or through a designee, review the grievance and provide a response to the grievant within fourteen (14) days.
- c. If a grievant is not satisfied with the response, the grievant has seven (7) days to proceed to Step Four.
 - i. If the grievant has filed a grievance based on corrective action imposed pursuant to Board Policy 4:14.1.D.1., the grievant has seven (7) days to request review of the response pursuant to Board Policy 1:6.C.5.

4) Step Four

- a. The grievant may file, in writing, a grievance of the Step Three decision with the Board.
 - i. If the grievant has filed a grievance which is not based on a reduction in force conducted pursuant to BOR Policy 4:23 or discipline imposed based on corrective action imposed pursuant to Board Policy 4:14.1.D.1., the only additional grievance process available shall be under Board Policy 1:6.C.5.
- b. For grievances not governed by Section E.4.a.i above, ~~The~~ Executive Director shall select a hearing examiner within fourteen (14) days following receipt of the grievance.
- c. The hearing examiner shall hold a hearing pursuant to SDCL ch. 1-26 with all parties involved in the grievance no later than thirty (30) days after the hearing examiner is appointed. The hearing examiner shall prepare a proposed determination including findings of fact and conclusions of law for the Board's consideration. The proposed determination shall be provided to the board within thirty (30) days of the hearing or fourteen (14) days prior to the next regularly scheduled Board meeting, whichever is sooner.
- d. The Board's decision shall be issued to the grievant within ten (10) days from the date the grievance is considered by the Board. If the

Board fails to respond within the specified time period or if the grievant is not satisfied with the decision, the grievant may grieve to the circuit court in accordance with SDCL ch. 1-26.

SOURCE: Current Policy Manual 5.4.6; BOR April 2009; BOR May 2021; BOR December 2021.

SOUTH DAKOTA BOARD OF REGENTS**Policy Manual****SUBJECT:** Faculty Remediation and Remediation Procedures**NUMBER:** 4:14

1. Remediation and Remediation Procedures**A. Preamble**

The Board, through its institutional administrators, has the duty to maintain a competent, productive, effective and ethical workforce and to ensure observance of obligations and rights established by law, rule or policy and implicated in university operations. This duty extends to supervision of faculty member conduct. To discharge this duty, the Board and its administrators possess the inherent power to discipline employees, including faculty members, who fail to adhere to expectations for competent, productive, effective and ethical teaching, research or service, who violate laws, rules or policies implicated in university operations, or who engage in misconduct, neglect of duty, insubordination or otherwise unacceptable conduct. This article ensures that the exercise of the power to remediate conduct comports with the requirements of due process.

B. Alternative Measures

Subject to the reserved authority required by *Worzella v. Board of Regents of Education*, 77 S.D. 447, 93 N.W.2d 411 (S.D. 1958), the Board has delegated to institutional administrators provisional authority to discipline any faculty members for failure to adhere to expectations for: competent, productive, effective and ethical teaching, research or service; violation laws, rules or policies implicated in university operations; or misconduct, neglect of duty, insubordination or otherwise unacceptable conduct, including such conduct identified in section 2 of this policy. The authority delegated to institutional administrators must be exercised consistently with Board policy. The delegated authority includes the power to determine the discipline to be imposed and its effective date.

Taking into consideration the circumstances that warrant discipline or corrective actions, past service, scholarly achievements and other mitigating or aggravating circumstances, remediation may consist of one of the following actions:

1. Corrective Action:

- a. Verbal warnings or directives which do not constitute Discipline; or
- b. Written warnings or directives to be filed with the personnel file of the faculty member which do not constitute Discipline.

2. Discipline:

- a. Required training or current substance abuse treatment at the cost of the faculty member;
- b. Suspension from duties with, or without, loss of pay commensurate therewith;
- ~~c. Reassignment;~~
- c. Demotion, which does not include any change(s) in employment status occurring at the expiration of a term contract or any alteration(s) in employment status authorized in the faculty member's existing contract of employment; or
- d. Discharge.

C. Interim Suspension

Unlike a disciplinary suspension under paragraph B.2.b. above, an interim suspension from duties during the pendency of an active review of allegations of conduct warranting discipline is not deemed to be a discipline under this article.

The decision to place a faculty member on interim suspension pursuant to this section does not require compliance with the Stage One notice procedures set forth in section D.2., below, but an informal pre-suspension process will ordinarily be provided. Absent the need for quick action or manifest impracticality, a faculty member will be informed, either orally or in writing, of the basis for the suspension, given an explanation of the evidence supporting the action and afforded an opportunity to respond before being placed on interim suspension.

In circumstances that require quick action or where the pre-suspension process is impractical, and where independent third-party findings confirm reasonable grounds for the allegations against the faculty member, the administration may place a faculty member on interim suspension before providing the requisite information, explanation and opportunity to respond.

The administration may withhold pay where the circumstances that trigger the interim suspension implicate public trust in ways that would preclude continued discharge of assigned responsibilities.

D. Procedures

1. Corrective Action Procedures

Corrective action may be imposed immediately, upon communication of the corrective action to the faculty member, pursuant to the discretion of the faculty member's supervisor. Faculty members who have had corrective action imposed may request review of the action through the grievance procedures established in Board Policy No. 4:7, subject to the limitation(s) in Board Policy 4:7.I.E.3.c.i. Any grievance appeal under this section will begin at Step 3 of Board Policy No. 4:7.I.E.

2. Disciplinary Procedures

a. Legal Review Panel

Prior to providing written notice pursuant to Section D.2.b below for discipline that would result in demotion or discharge, the administration shall submit the intended discipline, the allegations supporting the intended discipline, and any evidence or documentation upon which the intended discipline is based to an internal legal review panel appointed by the Board of Regent's Executive Director, or as delegated, the institutional President. The legal review panel will be comprised of legal counsel, a human resources representative of the Board of Regents or institution, and an additional representative designated by the panel's appointing authority. The panel will conduct a review of the intended discipline and supporting materials, and provide a recommendation to the administrator for consideration. Faculty members may be placed on paid administrative leave during the legal panel review process in accordance with applicable policies. Any review and recommendation of the legal review panel shall be conducted under attorney-client privilege and shall not be included in the supporting materials provided to faculty member, made part of the faculty member's personnel file, or otherwise disclosed or shared without the express written permission of the Board of Regents or its authorized designee. The legal review panel may be requested to review other employment actions; however, the legal review panel will not be used for

discipline resulting from sexual harassment proceedings conducted in accordance with BOR Policy 1:17.

~~a~~.b. *Stage One: Pre-Discipline Conference*

If the administration determines that there are reasonable grounds for discipline, the faculty member will be furnished written notice of the allegations supporting the determination, an explanation of the evidence relied upon by the administration, and the intended disciplinary action. The matter will be discussed with the faculty member at a personal conference which will be held at a time not sooner than fourteen (14) calendar days, nor later than twenty-one (21) calendar days from the date of the transmission of the written notice, unless otherwise agreed by the faculty member and the administration. The faculty member may bring to this conference a representative chosen by the faculty member. At the close of the personal conference, or within seven (7) calendar days thereafter, the administration will notify the faculty member whether it will discipline the faculty member, how and the effective date of the discipline.

~~b~~.c. *Stage Two: Post-Discipline Hearing Rights*

Faculty members who have been disciplined after completion of Stage One personal conferences may challenge the action through the grievance procedures established in Board Policy No. 4:7. Any grievance appeal under this section will begin at Step 3 of Board Policy No. 4:7.I.E.

In all cases, the burden to prove the charges will rest with the administration to the extent provided by law; provided that the faculty members will bear the burden to prove affirmative defenses or counterclaims relating to a challenged discipline.

2. **Unprofessional Conduct**

The Board recognizes that academic tradition has established common and accepted standards of acceptable conduct and that academic disciplines may assemble and publish statements applying such standards to the unique circumstances of their respective professions. While the Board expects faculty members to adhere to accepted professional standards, whether published or not, it also recognizes that university lecture halls, laboratories and work environments have become subject to manifold levels of governmental regulations and contractual restrictions that also establish or imply standards of conduct needed to protect the special interests that justify the regulations and restrictions.

Even standards published by professional organizations or conduct expectations grounded in statute, rule, policy or contract may be subject to change over time or may be extended to technological or social contexts that emerge following their original adoption. These

circumstances preclude the establishment of comprehensive policy that catalogs each form of conduct that violates the essential principles recognized by professionals or established in statute, rule, or policy contract. Thus, the Board provides the following instances to illustrate, without limitation, forms of unacceptable conduct that expose faculty members to discipline, but this enumeration is neither intended, nor could be intended, to preclude disciplinary action for other conduct that violates accepted standards or emergent requirements of statute, rule, policy or contract:

- A. Neglect of duty, misconduct, incompetence, abuse of power or other actions that manifest an unfitness to discharge the trust reposed in public university faculty members or to perform assigned duties;
- B. A failure to correct deficiencies in performance ~~in compliance with a constructive plan~~which have been documented, whether in email or print, and communicated to the faculty member;
- C. A breach of recognized published standards of professional ethics;
- D. Conviction of any felony or the conviction of a misdemeanor involving moral turpitude;
- E. Unauthorized absence from duties without prior notification or justifiable cause or excuse for the absence;
- F. The manufacture, distribution, dispensing, possession or use of alcohol or controlled substances shall be cause for discipline where:
 - 1) The conduct is unlawful or unauthorized and occurs while acting within the scope of employment; while on premises owned and controlled by the Board of Regents or used by the Board of Regents for educational, research, service or other official functions; or while participating in any capacity in activities sponsored by the Board; or
 - 2) The conduct has been authorized and is lawful, but the use significantly impairs the faculty member in the performance of his duties; or
 - 3) Other conduct that involves a failure to conform to laws regulating alcohol and controlled substances and that results in injury to the person or the rights of others.
- G. The failure or refusal to follow or comply with Board or institutional policies, regulations or published work rules or with lawful orders or instruction of a superior;
- H. Theft, misuse, abuse or wrongful destruction of state owned or controlled property controlled real, personal or intellectual property, including information systems, databases and similar resources;

- I. Participation in strike activities proscribed by SDCL Chapter 3-18;
- J. Violations of rights assured to students, employees or others under federal or state laws or regulations or Board or institutional policies and regulations;
- K. Use of the powers and prerogatives of a faculty member to coerce or to induce others to engage in unlawful conduct or conduct prohibited under Board or institutional policy;
- L. Failure to comply with health or safety regulations, to require compliance by students or others under a faculty member's supervision or to comply with duly issued emergency orders;
- M. Misrepresentation of authority or other conduct intended to deceive or to assist another to deceive others, irrespective of the motives;
- N. Interference with or disruption of the efficiency or morale of educational, research or service programs, workplaces or organizational units, including actions that violate expectations for civil conduct among professors and when working with students, as provided in Board Policy No. 4:38 (5), or failure at all times to be accurate, to exercise appropriate restraint and to show respect for the opinions of others, as required under Board Policy No. 1.11 (1)(C); or
- O. Any substantial or irremediable impairment of the ability of a faculty member to perform assigned duties.

SOURCE:

1991 Policy Manual 5:4:2 and 5:4:3; BOR April 2009; BOR December 2010; BOR May 2021; BOR December 2021; January 2022 (Clerical).