Opinion of the Faculty Board of Review

Grievance filed by Heather Akou, Marco Arnaudo, Maria Bucur-Deckard, Deborah Cohn, Lara Kriegel, Alex Lichtenstein, David A. McDonald, Amrita Myers, Sarah Phillips, Benjamin Robinson, Eric Sandweiss, Massimo Scalabrini, and Cynthia Wu

Deans Faimon and Van Kooten, respondents

April 16, 2025

I. Introduction

Thirteen members of the faculty have brought similar grievances concerning misconduct sanctions imposed on them for participating in candlelight vigils to express their objections to the newly enacted university policy UA-10, Expressive Activity. Twelve grievances are against Dean Van Kooten of the College of Arts and Sciences and one is against Dean Faimon of the Eskenazi School of Art, Architecture + Design, a subunit of the College. Deans Van Kooten and Faimon have submitted a joint response. All thirteen faculty have agreed to join in a single grievance and have waived confidentiality. The vigils took place from August 25-September 8, 2024. The sanctions were letters of reprimand.

The version of UA-10 in effect at the time of the vigils prohibited any expressive activity between 11:00 pm - 6:00 am. The grievants raise three related matters:

(1) A grievance against Deans Van Kooten and Faimon that the act of imposing sanctions violated their rights to academic freedom (ACA-32) and the First Amendment (UA-14).
(2) An appeal from the findings of responsibility for personal misconduct under ACA-33 on the grounds that UA-10 was not a lawful and legitimate policy.
(3) A grievance that the letters of reprimand should be purged from their files because the section of UA-10 they were charged with violating has been replaced by a new policy.

Under policy BL-ACA-D22 governing faculty board of review, grievances are covered by part C under which we may conduct our own investigation. Appeals of sanctions are covered by part D under which we review the record.

We have reviewed the grievances, the relevant policies, the letters of reprimand, and the responses by Deans Van Kooten and Faimon. We have requested and received additional information from General Counsel Tony Prather, Chief Policy Officer Mike Jenson, and faculty president Danielle DeSawal about the process by which UA-10 was adopted and the reasons therefor, and we appreciate their cooperation. We also have reviewed the minutes of the July 29, 2024, Board of Trustees meeting where UA-10 was approved, a statement by Superintendent for

Public Safety Benjamin Hunter about the justification for the policy, and sections of the Indiana Code specifying how campuses may regulate expressive activity. Pursuant to ACA-17, Faculty Boards of Review Uniform Standards Part D, we have consulted three members of the faculty at the Maurer School of Law with expertise in the First Amendment. Their background memo is included in the attached Appendix.

Two policies that are important to this grievance have since been amended -- UA-10, Expressive Activity, and UA-08, Establishing University Policies. References in this report are to the versions of those policies in effect from April-October, 2024. We thank Mike Jensen for locating and supplying correct copies of those policies, which are included in the attached Appendix.

II. Finding and recommendation

We find the grievances and appeals to be valid. For reasons explained below, the initial imposition of sanctions was improper, the findings of misconduct were not justified by the record before us, and imposing continuing sanctions (reprimands) after the policy was amended is not justified. We recommend that the reprimand letters be removed from their files.

III. Discussion

University policies give the faculty the rights to academic freedom and free expression and also impose on them the responsibility to comply with legitimate university policies. We discuss each in turn.

A. The respondents violated the grievants' academic freedom and freedom of expression

Academic freedom for faculty is defined in and protected by university policy ACA-32, which has been endorsed by the Trustees. Section D provides that "[a]cademic freedom includes the freedom to express views on matters having to do with the university and its policies." The grievants make clear, and the university does not dispute that this is precisely what they were doing. Therefore, there is no question that the respondents violated the grievants' academic freedom when they disciplined them for engaging in a candlelight vigil to express their objections to the newly enacted policy UA-10.

The faculty's right to free expression is guaranteed by the U.S. Constitution, which applies to the university because it is a state institution. It is also guaranteed by the Indiana Code § 21-39-8-10(a), which says that "an individual may, on any outdoor area of campus, freely engage in noncommercial protected expressive activity that: (1) is lawful; and (2) does not materially and substantially disrupt the functioning of the state educational institution." It is also guaranteed by university policy UA-14, The First Amendment at IU, which "protect[s] the rights of ... academic appointees ... to free speech and expressive activity." The grievants have demonstrated,

and the university concedes, that they were engaging in peaceful expressive activity, they were not engaging in disorderly conduct, property damage, or any other unlawful activity, and that they did not disrupt the functioning of the institution.

The right to free expression is not absolute. Under Supreme Court precedents and Indiana Code § 21-39-8-9(b), the university "may enforce reasonable time, place, and manner restrictions on campus [if] the restrictions are narrowly tailored in service of a significant state educational institution's interest." The only interest asserted by the university (through Benjamin Hunter) was sometimes having an inadequate number of law enforcement officers on the night shift to handle disruption, noise, and large crowds. Even if that were a significant *educational* interest, the blanket prohibition of all expressive activity after 11:00 without any distinction between disruptive and non-disruptive expression, is obviously not narrowly tailored. The "reasonable time, place and manner" exception does not apply. Therefore, there is no question that the respondents violated the grievants' right to free expression when they disciplined them for engaging in the vigil.

B. The imposition of sanctions under ACA-33 for violating UA-10 was improper

That brings us to the second part of this grievance -- the appeal of the finding that the grievants violated UA-10 and the imposition of sanctions (letters of reprimand). UA-10, as it existed at the time, prohibited all expressive activity after 11:00 pm. There is no dispute that the grievants' protest took place after 11:00 pm in violation of this provision. That was the whole purpose of the vigil. There is also no dispute that the university may discipline a faculty member for violation of a university policy under ACA-33 § E.2. However, this does not resolve the appeal. A policy is not an edict. To be a legitimate university policy, the nighttime ban on all expressive activity must both be lawful and have been properly created under university policy procedures. The blanket prohibition against faculty engaging in expressive activity after 11:00 pm meets neither criterion.

First, UA-10 is not lawful. Although the Trustees have broad power to govern the university (see ACA-01), that power is constrained by constitutional and statutory law. As explained above, the unconditional prohibition of all expressive activity and communication between 11:00 pm and 6:00 am violates the U.S. Constitution under well-established principles and case law of the First Amendment. It is overly broad and prohibits everything from disruptive demonstrations to peaceful protests to walking across campus wearing a political T-shirt. See memo from Maurer Law School faculty in the attached Appendix.

UA-10 also violates the Indiana Code. Section 21-39-8-9(b) provides that "a state educational institution may enforce reasonable time, place, and manner restrictions on campus" only if they "are narrowly tailored in service of a significant state educational institution's interest," and "allow members of the campus community to spontaneously and contemporaneously assemble and distribute literature." The unconditional prohibition of all expressive activity and communication between 11:00 pm and 6:00 am is obviously not narrowly tailored to any significant educational interest. It is sweepingly broad and the only interest asserted by the

university was having an inadequate number of law enforcement officers on the night shift to handle disruption, noise, and large crowds. Even if that were a significant educational interest, the provision is not narrowly tailored to apply only to such activities. Nor did the policy allow spontaneous assembly to express views on events occurring after 11:00, such as the results of Presidential elections.

Second, UA-10 as applied to faculty, is not a legitimate university policy. The definition of a university policy is found in UA-08 (Establishing University Policies). "Only those policies approved in accordance with this policy [UA-08] will have the force of university policy." With respect to faculty, UA-10 was not adopted in accordance with UA-08 and therefore cannot be used as a basis for finding faculty responsible for an act of misconduct. (We take no position about its application to other members of the university community).

Under UA-08 § B, "[a]cademic policies shall be adopted and posted in accordance with the principles of shared governance of Indiana University." The right to criticize the administration is part of academic freedom in ACA-32, so taking away that right is an academic policy. Under the Constitution of the Indiana University Faculty § 2.2(L), the primary legislative responsibility for developing "[s]tandards and procedures for faculty ... conduct and discipline" lies with the faculty, not the General Counsel or any other administrator. The statement of General Counsel Prather and the minutes of the July 29 Trustees meeting show that UA-10 as applied to faculty was drafted entirely by the General Counsel's office, not the faculty, and was never presented to or voted on by the University Faculty Council. It is therefore not binding on the faculty.

Even if UA-10 were not an academic policy, its enactment would still violate UA-08. The Constitution § 2.3(E) provides that the administration must consult with the faculty about "[a]ny other aspect of University operations having an impact on the academic mission." Such consultation "shall be through representatives authorized by faculty governance institutions [and] occur sufficiently in advance of action to permit faculty deliberation." The Constitution § 2.5(A) specifies that the faculty exercise their consultative authority through the UFC. UA-08 § C(3) also specifies that the faculty are represented by the UFC. The General Counsel did not do so. He sought informal feedback from some faculty, at least in the early stages, but his statement and that of Danielle DeSawal indicate that the final draft was not sent to, discussed, or voted on by the UFC.

The distinction between informal feedback from some faculty and a formal discussion and vote by the UFC is not mere semantics. According to the minutes of the July 29 Trustees meeting, the General Counsel misleadingly assured the Trustees that UA-10 had been vetted by faculty, that the faculty had provided feedback resulting in some revisions, and implied that the faculty had approved the final result. The Trustees know that the UFC speaks for the faculty and had every right to assume based on the General Counsel's remarks that the UFC had approved the policy despite its restriction on academic freedom and freedom of expression. Had it actually been discussed by the UFC, it is likely the UFC would have voted against it. Knowledge of such a vote might very well have caused the Trustees to exempt faculty or adopt the amendment

proposed by Trustee Siebert to modify the strict 11:00-6:00 prohibition.

The General Counsel's decision to bypass the UFC is not cured because some members of the UFC Executive Committee were asked for feedback. The UFC Bylaws do not allow the Executive Committee or its co-chairs to speak for it. The Executive Committee (as a whole) may act on behalf of the UFC only if three criteria are met:

(1) Notice of the action is given to Council members at least seven days before the Executive Committee acts.
(2) A super-majority (2/3) of all members of the Executive Committee approves.
(3) The Executive Committee's action is communicated to the full Council and fewer than four members object.

The record shows that no notice was given to the full UFC, no vote was taken by the Executive Committee at which 2/3 approved UA-10, and no notice of any such action was given to the full UFC giving them an opportunity to object.

Finally, UA-08 § C(5) requires that proposed policies be posted on the university policy website for thirty days for public comment prior to final approval. It was not. The only exception is when a more expedited process is necessary because of a change in law, a financial opportunity, or a major institutional risk. Chief Policy Officer Jensen asserts that the Trustees were addressing a major institutional risk, but the record does not bear this out. The creation of this policy had been in the works since May 2024 and there was no sudden emergency requiring fast action. In the minutes of the July 29 Trustees meeting, neither General Counsel Prather nor any member of the Board mentions any imminent major institutional risk justifying skipping the 30-day posting requirement. Posting is not just a pro forma step. Had it been posted, the faculty would have had an opportunity to see it and bring their concerns to the UFC, which could then have been communicated to the Trustees.

A faculty member may not be sanctioned under ACA-33 for violating UA-10 when UA-10 was not a lawful and legitimate policy under the university's own definition. We sustain the grievants' appeal of their sanctions.

C. Imposing an ongoing sanction by keeping the reprimand in their files after the policy has been changed is an excessive sanction

Even if the initial imposition of a sanction had been valid, it would be an excessive sanction to keep letters of reprimand in the grievants' files now that the policy has been amended. The blanket prohibition against all expressive activity between 11:00 pm - 6:00 am has been replaced with one that freely allows spontaneous activity and allows more organized protests with approval from the Vice-Provost of Faculty and Academic Affairs. The respondents make no claim that if the grievants held the vigil today, it would violate the revised UA-10, and we do not believe it would.

ACA-33 §5(b) provides that sanctions are "intended as proportional ... responses to discrete policy violations ... .to disincentivize future violations of it." Because there cannot be any future violations of the discrete provision of former UA-10 under which the grievants were charged with misconduct, continuing to maintain the letters of reprimand in their files (which could be misinterpreted as based on a violation of current UA-10) is not a proportion or appropriate sanction. We recommend that the letters be removed from the grievants' files.

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