

IN THE MATTER OF THE RECOMMENDATION FOR
THE DISMISSAL OF JOHN MARDER, PROFESSOR

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE
BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN

PROCEDURAL BACKGROUND

Before the Board of Regents of the University of Wisconsin is the recommendation of University of Wisconsin-Superior Chancellor Julius Erlenbach to terminate the tenured faculty position of Professor John Marder. The procedural history of this matter is as follows.

Following a formal complaint by the Chair of Professor Marder's department, an investigation performed by a UW-Superior Finance Professor, and a meeting with Marder, on May 20, 1999, Chancellor Erlenbach issued a "Statement of Charges" stating, in pertinent part:

. . . [Charge 1:] You have exhibited a pattern of unprofessional behavior towards students and have exploited students for your private advantage, contrary to the expectations UW-Superior has of its faculty, and further in a manner inconsistent with section 3.12(B) of the UW-Superior statement on professional ethics. . . .

[Charge 2:] You have failed to meet the University's expectations concerning effective teaching, scholarship, and service in a manner further inconsistent with section 3.12(D), UW Superior Statement on Professional Ethics.

[Charge 3:] You have abused your fiduciary responsibilities and contravened University regulations by mishandling University funds and accounts, contrary to the expectations UW-Superior has of its faculty and further in a manner inconsistent with section 3.12(D), UW-Superior statement on professional ethics.

[Charge 4:] You have demonstrated a pattern of uncollegial behavior towards your colleagues and staff members that has resulted in negative environment in your department, contrary to the expectations UW-Superior has of its faculty and further in a manner inconsistent with section 3.12(C), UW-Superior Statement on Professional Ethics.

[Charge 5:] You have knowingly disseminated confidential and misleading information about members of the University faculty and staff contrary to the expectations UW-Superior has of its faculty and further in a manner inconsistent with section 3.12(A) and/or 3.12(C), UW-Superior Statement on Professional Ethics. . . .

Together, your actions, as described in Sections I-V above, evince a pattern of behavior that is inconsistent with the expectations this university has of tenured faculty members and which further violate standards of professional conduct, thus constituting just cause to dismiss you from your tenured faculty position at UW-Superior.

(Marder exhibit 104).

Professor Marder was entitled to and requested a hearing before the Faculty Termination Committee. The hearing was held before the University of Wisconsin-Superior Faculty Terminations Committee commencing January 27, 2000. The committee was composed of four members of the UW-Superior faculty and was advised by legal counsel. The faculty committee, in a written report, found that the charges against Professor Marder were not proven, but also found that there had been a “near total breakdown in collegiality in the Department of Communicating Arts” and further noted that “Dr. Marder . . . engaged in a course of conduct that is simply unacceptable on this or any other university campus” (faculty committee decision dated April 12, 2000, p. 13). The committee was unwilling to recommend either serious discipline or dismissal for Professor Marder, but did recommend (1) that Marder be transferred to another department, and (2) that Marder be “forced to undergo professional counseling . . .” (decision, p. 14)

Chancellor Erlenbach reviewed the committee’s report and the record and became convinced that the committee’s report contained errors in law and fact. (Erlenbach letter dated May 17, 2000 to UWS President Katherine Lyall).

As required by UWS 4.07, Chancellor Erlenbach consulted with the chair of the faculty committee and offered the committee the opportunity to respond to his position (Id.). The committee chair declined to make a further response (Id.), but did provide a responsive letter to the Board of Regents.

Chancellor Erlenbach then requested President Lyall to forward to the Board of Regents his recommendation that Professor Marder be dismissed from the faculty (Erlenbach May 17, 2000 letter). Pursuant to Wis. Admin. Code § UWS 4.07(1) on June 1, 2000, President Lyall transmitted the Chancellor's recommendation to the Board of Regents for review as required by § UWS 4.08.

The President of the Board of Regents referred the matter to the Personnel Matters Review Committee in accordance with Chapter III, Section 6 of the Regent Bylaws, directing the Committee to consider the matter and make a recommendation to the full Board. Briefs were filed and other proceedings were conducted by the Committee. Following the Board's April 2001 meeting, the case was referred back to the Committee, to hold a hearing, which was done on May 1, 2001. The Board referred the matter back to the Committee a second time at its May 11, 2001 meeting for purposes of preparing proposed findings of fact. On June 8, 2001, in open session, the Board voted 11 to 3 to accept the recommendation of the Chancellor and dismiss Professor Marder.

FINDINGS OF FACT

1. At all times relevant, John Marder was an associate professor of journalism in the Department of Communicating Arts at the University of Wisconsin-Superior (UW-Superior) (tr. p. 313). He commenced employment with UW-Superior in August, 1987, and was granted tenure in 1994 (Id., and University exhibit 1).

2. A female UW-Superior student accused Professor Marder of inappropriate conduct during a school-related trip to New York City in March 1995. He admitted sharing a hotel room with the student, and admitted that he had consumed so much alcohol that he experienced a "black out" and could not recall whether or not he had, as she alleged, masturbated in front of her (University exhibits 42-45; tr. p. 420).
3. In responding to the allegations regarding the New York incident in 1995, Professor Marder claimed he had not previously had problems with students in out-of-classroom activities or on trips, and his then Department Chair John Munsell relied on these representations and interceded on Marder's behalf with the Chancellor (University exhibits 41 and 43). Following a meeting with then UW-Superior Chancellor Betty Youngblood and Provost Hal Bertilson on April 11, 1995, Professor Marder agreed to several conditions such as not sharing hotel rooms with students in the future, seeking counseling, and apologizing to the student (University exhibits 44-45).
4. Professor Marder pursued a personal relationship with a foreign (French) student commencing in 1994 while she was seeking advice on possible admission and later studying at UW-Superior (tr. pp. 318, 323, 427). He appointed her as editor-in-chief of the campus newspaper, *Promethean*, in the fall of 1995 and chaired her thesis committee (Marder exhibits 9 and 48).
5. The foreign student filed a formal complaint of sexual harassment against Professor Marder with the UW-Superior affirmative action office on July 17, 1996, which included allegations that he masturbated in front of her in shared hotel rooms (University exhibit 46). After a hearing, the affirmative action committee determined

there had been no sexual harassment under the legal definitions applicable, but found that Professor Marder's behavior "was improper and the situation was uncomfortable for the student" (University exhibit 48, p.10). A copy of the report, dated December 9, 1996, was placed in Professor Marder's personnel file (Id.), and Chancellor Julius Erlenbach gave him a letter of reprimand, dated February 12, 1997, indicating that it was "unprofessional behavior for Professor Marder to have entered into such a relationship with a student" (University exhibit 49).

6. Professor Marder received less than satisfactory peer evaluations for academic years 96/97, 97/98, and 98/99 (tr. p. 156; University exhibit 24). He appealed these to the Faculty Personnel Council claiming that they stemmed from personal animosity rather than from an objective review of his performance (Marder exhibit 30, 37 and 47). The appeals are unresolved because of the pending matter.
7. Professor Marder was the faculty advisor to the student newspaper, *Promethean*, from 1987 to 1997 (tr. p. 328).
8. In late December 1996, shortly after Professor Marder was made custodian of the *Promethean's* financial accounts, UW-Superior conducted an audit of those accounts. Professor Marder provided information in a memorandum dated December 23, 1996, to the campus auditor, Robert Waksdahl, which was only tangentially related to the audit. This information included confidential matters related to Professor Marder's treatment of the department secretary Suzanne Bednar-Munsell and inaccurate information about Professor Platner's activities in connection with the *Promethean* (tr. pp. 84-88; University exhibit 2 "narrative example 1", memo from Marder to

Waksdahl). Marder indicated in his transmittal of the confidential information to Waksdahl that he had provided students with copies of the information (Id., p. 5).

9. Professor Marder distributed a packet of information to students at a January 16, 1997, meeting of *Promethean* staff (tr. 52, 327). Most of the documents in the packet (University exhibit 21) were irrelevant to issues that were of concern to *Promethean* staff but instead served to document the various ongoing personal and professional disagreements that Professor Marder had with Ms. Bednar-Munsell. Bonita Martin, a *Promethean* student editor, wrote a memo dated January 21, 1997, to complain about the inappropriateness of Marder's having distributed the material (University exhibit 26).
10. Stewart Platner, Chair of the Department of Communicating Arts, and Gloria Toivola, faculty member, also attended the January 16, 1997 meeting of the *Promethean* staff. Both urged Professor Marder not to distribute the personnel information to the students, but he persisted in the distribution (tr. pp. 51-54).
11. On January 28, 1997, Chairman Platner, pursuant to UW-Superior Rule 6.02, filed a letter with Chancellor Julius Erlenbach, alleging that Professor Marder had engaged in "several forms of misconduct and urging his termination." Chancellor Erlenbach referred the complaint to the Faculty Personnel Council which believed that termination was not appropriate, but which suggested that Chairman Platner revise his statement if he wished to pursue it (University Exhibit 2, p. 1).
12. Professor Marder sent a letter dated February 5, 1997, to the Attorney General complaining of an open meetings law violation which gives the impression that Chairman Platner or Ms. Bednar-Munsell had influenced Mr. Waksdahl's decision

not to permit tape recording of a meeting. The letter seeks to have the Attorney General bring charges for an open meetings violation against Waksdahl, Platner and Bednar-Munsell. The accusation against Platner and Bednar-Munsell was untrue and the letter's recounting of the events was misleading (tr. pp. 86-87; University Exhibit 2, Platner statement dated October 28, 1997, p. 6, and "narrative example 2).

13. Professor Marder was removed as advisor and custodian of the *Promethean* by vote of the Department of Communicating Arts on February 11, 1997, because of his conduct at the January 16 meeting of the *Promethean* staff wherein he distributed department personnel information to students, and because of a subsequent complaint by the editor, Bonita Martin. In addition, there had been complaints about Professor Marder by past student editors, and the Department's attempt to mediate those complaints had been unsuccessful (University exhibit 28 and tr. pp. 56-58).
14. On March 6, 1997, Professor Marder distributed course evaluation forms after playing for his class a tape recording of portions of a department meeting concerning his removal as advisor to the *Promethean*. He also encouraged the students to express their reaction to the tape (tr. pp. 89-92, 332; University exhibit 23). While there was then no department policy prohibiting distribution of evaluations mid-semester, the practice was, as set forth on the evaluation instruction sheet, to distribute the evaluations in the last regular class or during the final exam (University exhibit 22, p. 2; tr. p. 133). Professor Marder provided no compelling pedagogical reason for either playing the tape for the class or for distributing evaluation forms so long before the end of the semester (tr. pp. 333-35).

15. On March 11, 1997, UW Superior administration received an e-mail from Bonita Martin, the female student-editor of the *Promethean*, alleging that Professor Marder had offered to let her spend the night in his trailer (University exhibit 29). Professor Marder denied the allegation (tr. p. 336), and there was no testimony from Ms. Martin or any other evidence supporting the comment.
16. Professor Marder hosted a weekly radio program called *Mark of Excellence* on Wisconsin Public Radio (WPR). According to John Munson, the WPR regional manager, the program was cancelled on May 7, 1998, because it had strayed from its initial theme of courage in journalism, to become a “vanity press” about UW-Superior faculty and because the manager found one interview by Professor Marder to have been “embarrassing” (University Exhibit 50, tr. pp. 272, 275-277).
17. According to Professor Marder, the program was cancelled in retaliation for his having questioned his Department’s use of Mike Simonson, the radio station’s news director, to teach a UW-Superior course because Simonson did not possess a college degree (tr. pp. 351-52). Mr. Simonson, a noted radio journalist, had been teaching, part-time, in the Department for a number of years (tr. p. 441).
18. Suzanne Bednar-Munsell was the secretary of the Department of Communicating Arts for many years. In 1986, she married John Munsell, a faculty member and Chair of the Department of Communicating Arts from 1986 to 1996 (tr. 230). In 1994, when Department Chairs assumed supervisory duties of administrative support personnel, the University arranged to have Professor William Stock provide direct supervision to Ms. Bednar-Munsell in order to avoid having her husband make any decisions on her salary or performance, thus addressing the conflict of interest rule at

Wis. Admin. Code § UWS 8.03(3). Professor Marder attended the Departmental meeting of May 9, 1994 at which this matter was worked out, and at which the Department expressed its “full support of the continuing positions of J. Munsell as chair and S. Bednar-Munsell as clerical” (tr. pp. 120-122; 200-201; University exhibits 53, 57, 57).

19. Professor Marder engaged in persistent, harassing conduct towards Suzanne Bednar-Munsell, the Department’s administrative assistant, by continually accusing her of nepotism despite the fact that he knew she was not in violation of any nepotism rules. At the hearing on this matter, the University submitted numerous documents by Professor Marder in which he persisted in these accusations (see University exhibits, 53, 54, 55, 56; see also Marder exhibit 92 and implicitly, University exhibit 21, pp. 6-7, and exhibit 57). Professor Marder consistently referred to Ms. Bednar-Munsell as Mrs. Munsell, although she had told him that she preferred to be addressed as “Bednar-Munsell.” (tr. pp. 230-233).
20. After Professor Marder concluded that Ms. Bednar-Munsell had befriended the French student with whom he was pursuing a personal relationship, he responded by making a series of unfounded accusations against Bednar-Munsell. He escalated his harassment concerning the alleged nepotism. He challenged her ability to do her job by accusing her of not properly sorting the mail, by calling the financial aide office and questioned her handling of the student payroll, and by arguing with her over the proper job descriptions for *Promethean* positions (tr. pp. 228-230, 235-237; University Exhibits 34, 36, 37, 38 and 39).

21. Professor Marder refused to agree to mediation of the disputes between him and Ms. Bednar-Munsell. Ms. Bednar-Munsell eventually filed a grievance against the Department for not dealing with Professor Marder's alleged harassment of her. The grievance was resolved by the transfer of Ms. Bednar-Munsell to another department in November of 1997. (University exhibits 59 and 60; tr. pp. 107-110; 237-240). Ms. Bednar-Munsell was not eligible to file a complaint against Professor Marder with the UW-Superior Affirmative Action office because hers was not a complaint of sexual harassment (tr. 250).
22. Professor Marder engaged in frequent uncollegial behavior during Department meetings. This behavior included tape recording meetings, threatening colleagues with filing lawsuits (tr., pp. 81-82), accusing them of violating open records or open meetings laws, raising his personnel complaints at inappropriate times, and opposing minor motions in discussion and then abstaining on the vote (tr., p. 79). He refused to participate in the salary evaluation process adopted by his department solely because he had opposed it, even though he had lost the vote (tr. pp. 76, 78-80; see also University exhibits 20 and 31).
23. Professor Marder wrote numerous, lengthy accusatory memoranda to his colleagues on many issues, and filed complaints against them with the administration (University exhibit 2, narrative examples; University exhibits 11, 14, and 21).
24. Professor Marder provided the local print media with information critical of his Department as regards his removal from the *Promethean* and the cancellation of his radio program (University exhibit 31). Some of this information included Department personnel matters (tr. 102).

25. There was no evidence introduced to establish that anyone other than Professor Marder had contributed to the breakdown of collegiality within his department.
26. In the spring of 1997, Provost Hal Bertilson requested Delbert Kangas, Academic Planner, to investigate reports that Professor Marder had engaged in unacceptable behavior (University exhibit 16). In a report dated June 13, 1997, Kangas found a breakdown in collegiality in the Department of Communicating Arts and recommended changing Professor Marder's office to another building (Id., p. 3). As a result, the Department moved Professor Marder to an office in a building away from his colleagues (University exhibit 16 and 18; Marder exhibit 15).
27. On October 28, 1997, Chairman Platner filed a revised statement and formal complaint against Professor Marder pursuant to Wis. Admin. Code UWS § 6.01 and UW-Superior Rule 6.01 (University exhibit 2).
28. Chancellor Erlenbach appointed Patrick J. Quinn, UW-Superior Professor of Finance, to investigate Platner's revised complaint (University exhibit 3).
29. On December 23, 1997, Professor Quinn forwarded his report to Chancellor Erlenbach in which he found (1) that Professor Marder had engaged in making harmful misrepresentations of fact about Department personnel matters in his communications with Mr. Waksdahl which were also shared with students, and (2) that Professor Marder clearly misrepresented the facts in his letter to the Attorney General accusing colleagues of violating the open meetings law (University exhibit 8). Professor Quinn recommended that Chancellor Erlenbach take disciplinary action against Professor Marder (University exhibit 8, p. 1).

30. Chancellor Erlenbach transmitted the Quinn investigation to Marder on January 27, 1998, and requested that Marder provide a response (University exhibit 9).
31. On February 27, 1998, Professor Marder notified Chancellor Erlenbach that there would be a “delay” in his response to the Quinn report because he was “working with faculty counselors and attorneys” (University exhibit 10). Subsequently, on March 5, 1998, Professor Marder and Richard Schauer of The Association of University of Wisconsin Professionals (TAUWP) sent the Chancellor a “comment” on the Quinn report and offered their opinion on how it should be used, but did not provide a substantive response to the report’s conclusions (University exhibit 11).
32. On September 25, 1998, Marder provided Chancellor Erlenbach with a formal response to the Quinn report (University exhibit 14).

CONCLUSIONS OF LAW

1. The Chancellor has complied with all procedural requirements for termination of a tenured faculty member as set forth in Wis. Admin. Code § UWS Chapter 4, among other things, by consulting with Dr. Marder and with the chair of the committee on faculty terminations and offering the committee the opportunity to respond to his position; accordingly, this matter is appropriately before this Board and is now ready for decision.
2. There is just cause for the dismissal of John Marder from his tenured faculty position at the UW-Superior under the applicable standard for such matters set forth in *Safransky v. State Personnel Board*, 62 Wis.2d 464, 474, 215 N.W.2d 379 (1974) (“Just cause” exists where “some deficiency has been demonstrated which can

reasonably be said to have a tendency to impair [the employee's] performance of the duties of his position or the efficiency of the group with which he works") as follows:

- a. The evidence supports the Chancellor's allegations in Section 1 of the Charges. Professor Marder exhibited unprofessional and exploitive behavior towards students by appointing a foreign student, with whom he was pursuing a personal relationship, as editor-in-chief of the student newspaper, chairing the thesis committee of this student, distributing information to students that concerned personnel matters in the department not relevant to the students' concerns, playing a tape of a personnel meeting for his students that was unrelated to students concerns, and distributing course evaluations in the middle of the semester immediately after playing the tape.
- b. The evidence partially supports the Chancellor's allegations in the second section of charges. Professor Marder's less than satisfactory evaluations may have been based upon personal animosity rather than an objective review of his performance, but because his appeal on those matters has been put on hold there is an incomplete record with which to make a conclusion. However, he was removed as advisor to the *Promethean* because of his behavior. In addition, Professor Marder's radio program, while it began as a significant public service, disintegrated, such that it, and its cancellation, reflected poorly on the UW-Superior.
- c. The evidence does not support the Chancellor's allegations in the third section of charges. There was insufficient evidence to establish that Professor Marder violated rules prohibiting student fees from being used to fund academic

programming, or that the problems with the *Promethean* accounts were of his making.

d. The evidence supports the Chancellor's allegations in the fourth section of the charges. Professor Marder demonstrated a pattern of uncollegial behavior towards colleagues and staff members causing an untenable, negative department environment, and the evidence established that he, alone, was responsible for the problems.

e. The evidence supports the Chancellor's allegations in the fifth section of charges. The information Professor Marder provided to the auditor, Robert Waksdahl, was inappropriate and irrelevant to the audit, and it is particularly troubling that he may have copied students on the material. In addition, Professor Marder's letter to the Attorney General, the state's highest law enforcement official, falsely accuses Professor Platner and Ms. Bednar-Munsell of sanctioning an open meetings law violation.

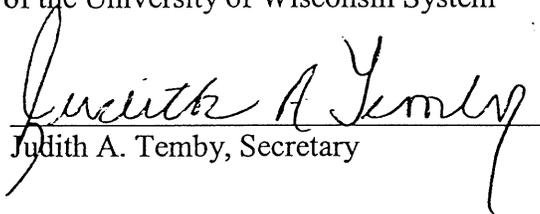
3. The behavior of Professor Marder described above meets the Safransky standard. Exploitation of students, disruptive and uncollegial conduct towards colleagues, and dissemination of misleading and confidential information warrants serious discipline.
4. Moreover, Professor Marder has a record of prior inappropriate behavior with students and of unprofessional conduct. Professor Marder was disciplined in 1997 for improper conduct with a foreign student, and was required to apologize and seek counseling for improper behavior with a different student in 1995. These incidents establish a pattern of misconduct.

5. These prior incidents of misconduct with students need not be proven again as part of this proceeding, but may be taken as established, and may be considered to demonstrate of a pattern of unacceptable behavior and used to enhance the penalty appropriate here.
6. The foregoing findings warrant serious discipline of Professor Marder and the prior incidents of inappropriate behavior with students warrant an enhanced penalty in this matter, accordingly, dismissal of Professor Marder is the appropriate sanction for his conduct.

ORDER

Associate Professor John Marder is hereby terminated from his faculty position at the University of Wisconsin-Superior effective this 28 day of June, 2001.

By the Board of Regents
of the University of Wisconsin System


Judith A. Temby, Secretary

STATEMENT OF RIGHT TO JUDICIAL REVIEW

Final decisions of the Board of Regents of the University of Wisconsin System are subject to judicial review under Wis. Stat. ch. 227. See Wis. Stat. § 36.15(5). Any person who is aggrieved and whose substantial interest are adversely affected by a final decision of the Board is entitled to judicial review of the decision. See Wis. Stat. §§227.52 and 227.53(1).

A judicial review proceeding must be commenced **within 30 days after the service of the Board's decision upon the parties**. See Wis. Stat. § 227.53(1)(a)2. A judicial review proceeding is commenced (1) by serving a petition for review upon the Board, **either personally or by certified mail, and** (2) by filing the petition in the office of the clerk of circuit court for the county where the judicial review proceeding is to be held. See Wis. Stat. § 227.53(1)(a)1. The judicial review proceeding is to be held in the county where the petitioner resides, or, if the petitioner is a nonresident, in Dane County. See Wis. Stat. § 227.53(1)(a)3.

A copy of the petition must be served on every party that appeared in the proceeding before the Board or upon the party's attorney (in this case on the University of Wisconsin-Superior or upon its attorney, Patricia A. Brady). The copy must be served **either personally or by certified mail, or, when service is timely admitted in writing, by first class mail**. The copy must be served **not later than 30 days after the judicial review proceeding is commenced**. See Wis. Stat. § 227.53(1)(c).

The petition for review must state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the Board's decision, and the grounds upon which the petitioner contends that the decision should be reversed or modified. The petition must be entitled in the name of the person serving it as the petitioner and the Board as the respondent. See Wis. Stat. § 227.53(1)(b).

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