

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

IN THE MATTER OF THE RECOMMENDED DISMISSAL OF
DR. XUEBIAO YAO, A PROBATIONARY FACULTY MEMBER

FINAL DECISION

NAMES AND ADDRESSES OF THE PARTIES

Dr. Xuebiao Yao, represented by James A. Olson, Lawton & Cates, S.C., Suite 400, 10 East Doty Street, Madison, WI 53703-2694.

University of Wisconsin-Madison, represented by Professor Frank Tuerkheimer, University of Wisconsin Law School, 975 Bascom Mall, Madison, WI 53706.

STATEMENT OF THE CASE

Any person having a probationary appointment may be dismissed prior to the end of the person's contract term only for just cause and only after due notice and hearing. See Wis. Stat. § 36.13(5); Wis. Adm. Code § UWS 4.01. The decision of the Board of Regents of the University of Wisconsin System (the Board) with respect to such matters is final, subject only to judicial review under Wis. Stat. ch. 227.

Whenever the chancellor of an institution within the University of Wisconsin System receives a complaint against a faculty member which the chancellor deems substantial and which, if true, might lead to dismissal of the faculty member, the chancellor shall within a reasonable time initiate an investigation. See Wis. Adm. Code § UWS 4.02(1).

On December 10, 1998, a formal complaint against University of Wisconsin-Madison (UW-Madison) faculty member Dr. Xuebiao Yao was filed with UW-Madison Chancellor David Ward. The complaint alleged that Dr. Yao had intentionally tampered with the experimental

materials of a colleague, and that Dr. Yao's alleged actions warranted discipline up to and including dismissal for just cause from his faculty position at UW-Madison. Chancellor Ward delegated to UW-Madison Provost John D. Wiley the initial responsibility for determining whether discipline or dismissal was appropriate. Provost Wiley initiated an investigation into the complaint conducted by Professor Frank Tuerkheimer of the UW-Madison Law School.

Provost Wiley met with Dr. Yao and his legal counsel on two occasions to discuss the complaint as provided for in Wis. Adm. Code § UWS 4.02(1). Professor Tuerkheimer reported the results of his investigation to Provost Wiley. Based on Professor Tuerkheimer's investigation and the discussions with Dr. Yao, Provost Wiley concluded that there was just cause to dismiss Dr. Yao, and recommended that Dr. Yao be dismissed from the UW-Madison faculty.

Wis. Adm. Code § UWS 4.02(1) provides that a faculty member may be dismissed only after receipt of a written statement of specific charges from the chancellor as the chief administrative office of the institution. On June 3, 1999, Provost Wiley, acting as Chancellor Ward's designee, sent a formal statement of specific charges for dismissal to Dr. Yao.

Wis. Adm. Code § UWS 4.03 provides that a standing faculty committee at each institution shall hear dismissal cases and shall make recommended findings and a recommended decision. The committee is to conduct the hearing, to make a verbatim record of the hearing, to prepare a summary of the evidence, and to transmit the record and the summary, along with the committee's recommended findings and decision to the chancellor and the faculty member. The committee must afford a fair hearing, including the following due process protections enumerated in Wis. Adm. Code § UWS 4.05.

- (a) Service of a written notice of hearing on the specific charges at least 10 days prior to the hearing;

- (b) A right to the name of witnesses and access to documentary evidence upon the basis of which dismissal is sought;
- (c) A right to be heard in his or her defense;
- (d) A right to counsel and/or other representatives, and to offer witnesses;
- (e) A right to confront and cross-examine adverse witnesses;
- (f) A verbatim record of all hearings... provided at no cost;
- (g) Written findings of fact and decision based on the hearing record;
- (h) Admissibility of evidence governed by s. 227.47, Stats.

On September 10, 1999, Dr. Yao moved to dismiss the complaint filed against him and, in the alternative, moved to suppress certain videotape evidence. On November 10, 1999, the UW-Madison Committee on Faculty Rights and Responsibilities (CFRR) denied Dr. Yao's motions.

On December 1-5, 1999, the CFRR conducted a hearing on the charges against Dr. Yao. Wis. Adm. Code § 4.07(1) provides that the faculty hearing committee shall send to the chancellor and to the faculty member concerned, as soon as practicable after the conclusion of the hearing, a copy of the committee's report, findings, and recommendations. By a letter dated December 7, 1999, the CFRR communicated to Dr. Yao its determination that just cause for Dr. Yao's dismissal was established by a clear preponderance of the evidence. The CFRR submitted its report, findings and recommendations, dated February 8, 2000, to Chancellor Ward and to Dr. Yao. The CFRR unanimously recommended that Dr. Yao be dismissed from UW-Madison faculty.

Wis. Adm. Code § 4.07(1) provides that the chancellor shall prepare a written recommendation within 20 days after meeting with the affected faculty member. If the

recommendation is for dismissal, the recommendation shall be transmitted through the President of the University of Wisconsin System to the Board. A copy of the faculty hearing committee's report and recommendations shall be forwarded through the president to the Board along with the chancellor's recommendation. The recommendation also must be sent to the faculty member concerned and to the faculty hearing committee.

On April 14, 2000, Chancellor Ward met with Dr. Yao and his counsel. On April 25, 2000, Chancellor Ward submitted a written recommendation for dismissal of Dr. Yao to UW System President Katharine C. Lyall, together with the CFRR's report and recommendation. Chancellor Ward's recommendation was sent to Dr. Yao and to the CFRR. On May 16, 2000, President Lyall forwarded Chancellor Ward's recommendation and the report and recommendations of the CFRR to the Board.

Wis. Adm. Code § 4.08(1) provides that if the chancellor recommends dismissal, the Board shall review the record made before the faculty hearing committee and shall provide an opportunity for filing exceptions to the recommendations of the chancellor and the faculty hearing committee. The Board must also provide an opportunity for oral arguments. The Board's Bylaws, ch. III, sec. 6, provide that the Board's Personnel Matters Review Committee may conduct the review under Wis. Adm. Code § 4.08, upon the record made before the faculty hearing committee. The Personnel Matters Review Committee must recommend findings and a decision for final action by the Board.

Board of Regents President Jay Smith referred the CFRR's and Chancellor Ward's recommendations for Dr. Yao's dismissal to the Personnel Matters Review Committee. On September 29, 2000, counsel for Dr. Yao filed written exceptions to the recommendations of the CFRR and Chancellor Ward. On October 27, 2000, counsel for UW-Madison filed a response to

Dr. Yao's written exceptions. On November 3, 2000, counsel for Dr. Yao filed a reply to UW-Madison's response.

Dr. Yao's exceptions to the recommendations of the CFRR and Chancellor Ward were as follows:

1. That Dr. Yao's due process rights were violated by the use of partially erased video tapes as evidence against him.
2. That Dr. Yao's due process rights were violated by UW-Madison's investigation and UW-Madison's failure to follow certain timelines in the procedural rules of the university and of the UW System.
3. That Dr. Yao's due process right to adequate notice of the charges against him was violated.
4. That UW-Madison did not meet its burden of proving just cause for Dr. Yao's dismissal by a clear preponderance of the evidence.

On December 7, 2000, the Personnel Matters Review Committee met in closed session and heard oral arguments from counsel for UW-Madison and counsel for Dr. Yao. After review of the record made before the CFRR, and after consideration of the exceptions filed and the oral arguments presented at the hearing, the Personnel Matters Review Committee voted unanimously to adopt the recommended findings and decision of the CFRR and to recommend that the Board dismiss Dr. Yao.

On December 8, 2000, at a closed session of the Board, the chair of the Personnel Matters Review Committee reported the Committee's findings and recommendation to the Board. The Board then voted to adopt the recommended findings and decision of the CFRR and to dismiss Dr. Yao.

Based upon the record made before the CFRR, the written submissions of counsel for Dr. Yao and counsel for UW-Madison, oral arguments, and the recommendation of the Personnel Matters Review Committee, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

The Findings of Fact of the CFRR, as set forth in Attachment A, are adopted as the Board's Findings of Fact and are incorporated in this decision by reference.

CONCLUSIONS OF LAW

(1) Dr. Yao has been afforded the due process and procedural guarantees required by Wis. Adm. Code §§ UWS 4.05 and 4.06.

(a) Dr. Yao's due process rights were not violated by the use of partially erased videotapes as evidence. The criminal law cases and standards Dr. Yao relies on to support his argument are not applicable in this civil proceeding. Additionally, assuming these criminal law cases and standards applied, the standard for showing a due process violation has not been met because the evidence does not show that the erased portions of the videotapes were "apparently exculpatory," or show that the videotapes were erased in bad faith. *State v. Greenwold*, 181 Wis.2d 881, 512 N.W.2d 237 (Wis. Ct. App. 1994); *State v. Greenwold*, 189 Wis.2d 59, 525 N.W.2d 294 (Wis. Ct. App. 1994). The exclusionary rule also does not require suppression of the videotapes because the purpose of the exclusionary rule is to deter unlawful police conduct by prohibiting the use of illegally obtained evidence, and in this case, the police were not responsible for the partial erasure of the tapes. *United States v. Janis*, 428 U.S. 433 (1976).

(b) Dr. Yao's due process rights were not violated by the UW-Madison's investigation or by the procedures used by the university. Dr. Yao contends that (1) the university, as part of

its investigation, should have conducted a review by an independent scientist of the experimental materials in dispute in this case; (2) the university's investigation took too long; (3) the university did not hold a hearing within twenty days of filing charges against him as required by university rules; and (4) the university faculty committee that conducted the hearing did not send its findings and conclusions to the university's chancellor "as soon as practicable" after the conclusion of the hearing as required by Wis. Adm. Code § UWS 4.07.

Dr. Yao was represented by counsel throughout these proceedings. However, Dr. Yao did not raise the due process concerns expressed in points (1), (2) and (3) above at the hearing before the faculty committee and has waived bringing those concerns before the Board because the Board's review is on the record. Wis. Adm. Code § UWS 4.08. Additionally, Dr. Yao has not shown that the university's actions created a risk that he would be erroneously terminated and that therefore he was prejudiced by the university's actions in a manner sufficient to indicate a due process violation. *Patterson v. Board of Regents of the University of Wisconsin System*, 119 Wis.2d 570, 350 N.W.2d 612 (1984); *Mathews v. Eldridge*, 424 U.S. 319 (1976)

Regarding point (4), the faculty committee was deliberate in issuing its written findings and recommendations, and it is unclear from the record whether or not the committee provided its report as soon as practicable. Regardless, Dr. Yao has not shown that the faculty committee's action created a risk of erroneous termination, and that therefore he has been prejudiced by the faculty committee's action.

(c) Dr Yao's due process right to adequate notice of the charges against him was satisfied in this case. An accused faculty member has the right to receive a written statement of specific charges. Wis. Adm. Code § UWS 4.02(1). Adequate due process requires that a notice of charges reasonably convey information so that the defendant can prepare a defense. *Schramek*

v. Bohren, 145 Wis.2d 695, 429 N.W.2d 501 (Wis. Ct. App. 1988). While the charges against Dr. Yao were not as specific as Dr. Yao might wish, they were sufficient to allow Dr. Yao to prepare his defense. *Head v. Chicago School Reform Board of Trustees*, 225 F.3d 794 (7th Cir. 2000). Furthermore, the faculty committee specifically offered Dr. Yao the opportunity to call additional witnesses to address his concerns in this area and Dr. Yao declined the opportunity.

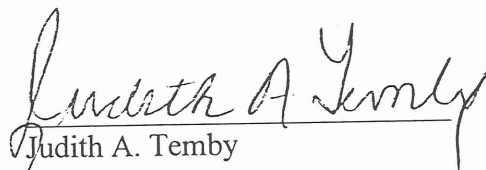
(2) Just cause for the dismissal of Dr. Yao from his position as assistant professor in the UW-Madison Department of Physiology has been established by a clear preponderance of the evidence. *Safransky v. Personnel Board*, 62 Wis. 2d 464, 215 N.W.2d 379 (1974) (“just cause” exists when the individual’s conduct reasonably can be said to have a tendency to impair the individual’s job performance or the efficiency of the group with which he works). The Recommendations of the CFRR, as set forth in Attachment A, are adopted and are incorporated in this decision by reference.

ORDER

Based upon the Board’s Findings of Fact and Conclusions of Law, IT IS ORDERED that Dr. Xuebiao Yao be dismissed from his position as an assistant professor in the UW-Madison Department of Physiology effective of the date of this decision and order.

Dated at Madison, Wisconsin, this 8th day of December, 2000.

BY THE BOARD:


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. § 36.13(5). Any person who is aggrieved and whose substantial interests 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-Madison or upon its attorney, Professor Frank Tuerkheimer). 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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