

LEGAL & POLICY ISSUES

Academic Leadership Training

July 27, 2022





System Policies & Procedures

Congratulations on your ascension into administration...now for all the things they didn't tell you during the recruitment and hiring process.

Remediation & Grievance Processes

- [BOR Policy 4:14](#) – Faculty Remediation
- [BOR Policy 4:7](#) – Faculty Grievance
- [BOR Policy 4:4](#) - NFE Remediation/Grievance
- [ARSD Chapter 55:10:07](#) – CSA Disciplinary Actions
- [BOR Policy 4:9](#) - CSA Grievance

Non-Renewals, Terminations and RIFs

- [BOR Policy 4:1](#) – General Terms & Appointments
- [BOR Policy 4:10](#) – Tenure & Continuing Appointments (Non-renewals)
- [BOR Policy 4:23](#) – Faculty RIFs
- [BOR Policy 4:24](#) – CSA RIFs
- [BOR Policy 4:4](#) - NFE RIFs

Conflicts of Interest/Commitment and Consulting Time

- [BOR Policy 4:35](#) – Conflict of Interest
- [BOR Policy 4:32](#) – Investigator Financial Disclosure
- [BOR Policy 4:32:1](#) – Public Health Service Investigator Financial Disclosure
- [BOR Policy 4:19](#) – Private Practice, Consultation, or Outside Employment
- [SDCL 5-18A-17 to 5-18A-17.6](#) – State Employee Conflicts of Interest



Remediation and Grievance Processes

So...what do I need to know?

Before

- Provide constructive feedback to individuals under your supervision on an ongoing basis – don't wait for their annual evaluation
- Conduct honest and meaningful evaluations
- Document performance issues ASAP
- COMMUNICATE
- DOCUMENT
- COMMUNICATE
- DOCUMENT

During

Corrective Action (non-discipline)

- Corrective action may be imposed immediately, upon communication to the employee

Disciplinary Procedures

- Written notice of allegations supporting the determination and intended discipline
- Personal conference 14-21 days after notice
- Notice of discipline (or not) within 7 days of conference

After

Grievance Process

- Grievant has 14 days to grieve at the initial step...7 days at each level thereafter
- Campus administration has 14 days to respond
- Step 4 – Appeal to the Board
 - ✓ Corrective action is a discretionary review per BOR Policy 1:6.C.5
 - ✓ All other matters proceed to a hearing examiner unless informally resolved



Termination, Non-Renewals and RIFs

The nuts and bolts of parting ways...

Termination

- Does the conduct warrant termination?
- Is the conduct documented?
- If there are concerns/issues, what are your alternatives?
- Considerations (in addition to following the prescribed remediation process applicable to the employee's classification):
 - ✓ Effective date of termination
 - ✓ Status in the interim
 - ✓ Access in the interim
 - ✓ Impact on the mission

Non-Renewals

Tenure Track Notice

- $X < 1$ academic year, then prior to March 15th
- $1 < X < 4$ academic years, then prior to December 15th (unless they are on a work improvement plan, then March 1st)
- $X \geq 4$ academic years, then before April 1st, plus an additional 1-year term contract
- If the faculty member has completed at least one academic year:
 - ✓ 10 working days to request reconsideration
 - ✓ 10 working days for the president to respond
 - ✓ Final recommendation goes to the Board

RIFs

Faculty RIFs

- Retention Priority:
 - ✓ Permanently funded over temporarily funded
 - ✓ Full-time over part-time
 - ✓ Tenure over tenure-track
- If equal priority, then seniority
- If on a constructive plan, priority is forfeited (i.e., can be RIF'd first)
- If tenured position is RIF'd, the position can't be filled for 2 years, unless offered first to RIF'd faculty member
- During 4 calendar years after RIF, RIF'd faculty members will be recalled based on seniority, if qualified for vacant position(s)



Conflicts of Interest / Commitment

...the basics

- Persons employed full-time by the SDBOR in professional capacities should devote their best professional efforts to the service of the institution to which they are assigned.
- Outside interests are not to influence decisions and actions made within the course and scope of employment.
- Professional employees should avoid entering into outside endeavors that may reasonably be thought to influence, whether directly or indirectly, institutional business, research or other decisions they make as system employees.
- Employees may not use institutional supplies, equipment or staff for outside activities unless properly authorized, to include agreed upon reimbursement.
- Interests that may be “**reasonably thought to influence...**” Remember it’s not just “real” conflicts but also potential and perceived conflicts.
- Don’t forget to consider the implications of immediate family members.



Conflict Thresholds

- State law - If you or someone you supervise has a role in approving, awarding or administering a contract/grant, you or an immediate family member cannot (unless properly disclosed and approved in advance):
 - ✓ Have more than a 5% ownership or other interest in an entity that is a party to the contract/grant;
 - ✓ Derive income, compensation, or commission directly from the contract or from the entity that is a party to the contract;
 - ✓ Acquire property under the contract; or
 - ✓ Serve on the board of directors of a for-profit entity that derives income or commission directly from the contract or acquires property under the contract.
- Federal funding – “Significant Financial Interests” are those in excess of \$10,000 (\$5,000 for Public Health Services) or having more than 5% ownership interest in a single entity. Monetary amounts are aggregated over a 12-month period.



Private Practice, Consulting or Outside Employment

- Faculty members may not devote more than 4 days in any given month on outside consulting during the contract period if the activities require absence from duties. Such consultation time is cumulative to a maximum of 6 days, with all accumulated time terminating at the end of the contract period.
- Outside consulting must be substantially and significantly related to assigned duties and must (1) promote state and local economic development or (2) benefit the professional discipline and development of the individual.
- Faculty member must:
 - ✓ Apply in writing to President or designee;
 - ✓ Report to the President the activity, duration and number of hours devoted;
 - ✓ Limit and restrict activity so it doesn't interfere with assigned duties; and
 - ✓ Reimburse the institution for any institutional space, equipment, personnel and materials used.



Not all conflicts are bad...but they must be handled properly

Disclosure

- Must annually certify compliance with BOR Policy 4:35 and disclose outside activities that create real or perceived conflicts
- Must update annual disclosures within 30 days of a change in circumstances
- Must cooperate with inquiries regarding conflicts
- Must comply with Investigator Financial Disclosure requirements

Assessing Conflicts

Potential pitfalls:

- Compromises the integrity of the institution, department, project, etc.
- Causes harm
- Inappropriate use of institutional resources or facilities
- Exploitation or coercion of students, post-docs or faculty
- Compromises academic freedom
- Appearance of undue personal gain from public funds or position of trust

Managing Conflicts

- Conflict management plan must be in writing and signed by the appropriate parties
- Key elements:
 - ✓ Description of activities, interest or relationship creating conflict
 - ✓ Role and duties of conflicted individual
 - ✓ Conditions of the management plan (i.e., how are you going to mitigate the conflict?)
 - ✓ Oversight
 - ✓ Confirmation of acceptance of the plan by conflicted individual



Remind me why I care again?

YOU will likely be responsible for:

- Educating junior faculty
- Communication/implementing remediation, non-renewals and RIFs
- Identifying conflicts
- Tracking outside consulting
- Making recommendations to leadership
- Implementation and oversight

Burying one's head in the sand is not a viable option.



QUESTIONS?



Divisive Concepts, Academic Freedom, Free Speech & Intellectual Diversity

But I'm just the...

Legislative Action

- [HB1012](#) – 2022 Legislative Session (SDCL [13-1-67](#) to [13-1-71](#))
- [HB1254](#) – 2020 Legislative Session (SDCL [13-49-14](#))
- [HB1087](#) – 2019 Legislative Session (SDCL [13-53-49](#) to [13-53-53](#))
- LOIs/etc.

Board Action

- [Board's August Statement](#)
- [BOR Policy 1:11](#) – Academic Freedom and Responsibility
- [BOR Policy 1:32](#) – Commitment to Freedom of Expression
- [BOR Policy 2:9](#) – Student Appeals for Academic Affairs
- [BOR Policy 6:13:1](#) – Use of Facilities and Grounds for Expressive Activity...



Instruction and Course Curriculum

- HB 1012 does not pertain to the content or conduct of any course of academic instruction or unit of instruction, nor does it infringe upon academic freedom.
- The appropriateness of the content or conduct of courses of academic instruction are governed by the Board of Regents and Institutional Policy, to include [BOR Policy 1:11](#) – Academic Freedom and Responsibility.
- BOR’s institutions will offer curriculum based upon widely-held and accepted knowledge and thought. BOR’s institutions will respect academic freedom, and will expect faculty to exercise that freedom in a way that respects this expectation. As our students expand their understanding in a field of study, we encourage that students be exposed to a variety of viewpoints, ideas, and theories, so that they can be debated and critiqued. This could include discredited or controversial ideas, because understanding the weaknesses of failed ideas is as important as understanding the strengths of successful ones. Students must be prepared to identify the good and bad in new or controversial areas of thought.
- Students must be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.



What “divisive concepts” are restricted in HB 10 12

- That any race, color, religion, sex, ethnicity, or national origin is inherently superior or inferior;
- That individuals should be discriminated against or adversely treated because of their race, color, religion, sex, ethnicity, or national origin;
- That an individual’s moral character is inherently determined by their race, color, religion, sex, ethnicity, or national origin;
- That an individual, by virtue of their race, color, religion, sex, ethnicity, or national origin is inherently racist, sexist, or oppressive, whether consciously or subconsciously;
- That individuals, by virtue of race, color, religion, sex, ethnicity, or national origin, are inherently responsible for actions committed in the past by other members of the same race, color, religion, sex, ethnicity, or national origin;
- An individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of the individual’s race, color, religion, ethnicity, or national origin; or
- Meritocracy or traits such as a strong work ethic are racist or sexist or were created by members of a particular race or sex to oppress members of another race or sex.



What is prohibited by HB1012?

The BOR, or any institution under its control, may not direct or compel a student to personally affirm, adopt, or adhere to any of the divisive concepts.

- ✓ This does not restrict or prohibit the discussion or exploration of divisive concepts when relevant to a given course and course objectives, but students cannot be compelled or directed to personally affirm, adopt, or adhere to any of the divisive concepts.
- ✓ This restriction applies to any verbal, physical, or electronic act required of a student that results in their personal affirmation, adoption, or adherence to any divisive concepts.

The BOR, or any institutions under its control, may not require their students or employees to attend or participate in mandatory training or orientation that teaches, advocates, acts upon, or promotes divisive concepts.

- ✓ This restriction applies only to required or mandatory training or orientation outside of academic instruction (i.e., not for credit). For avoidance of doubt, if there are consequences for an employee or student not attending a training or orientation, it is considered mandatory or required.
- ✓ This restriction is consistent with the BOR's rejection of the idea that any individual person is responsible for the action taken by other people, and the BOR, or any of its institutions, will not promote any suggestion that one group of people is inherently superior or inferior to another group, or is inherently oppressive or immoral.
- ✓ This restriction does not limit or otherwise impede the ability to explore, debate, critique or discuss divisive concepts in lectures or seminars on campus in which attendance or participation is voluntary.

The BOR, or any institution under its control, may not condition enrollment or attendance in a class, training, or orientation on the basis of race or color.

- ✓ The BOR and its institutions do not (and will not) discriminate on the basis of race or color, or for that matter, ethnicity, religion, disability, veteran status, economic status, or sexual preference. We treat each person as an individual, not as a member of group, and we will offer services and supports for each person's individual situation.



Can faculty determine the content of their teaching?

- Faculty are guaranteed the right of academic freedom in their teaching, scholarly or creative work, or research pursuits, subject only to the accepted standards of professional responsibility, including, but not limited to, those set forth in [BOR Policy 1:11](#).
- Faculty are entitled to freedom in the classroom in the discussion of their subject and in the presentation of various scholarly views, including controversial matter, which is relevant to a given course and course objectives.
- Faculty may not use their classroom as a platform to advance any political, sectarian, or ideological agenda(s).
- While controversy is at the heart of free academic inquiry, faculty should avoid persistently including material that does not relate to a given course or course objectives, or that otherwise detracts from the underlying course objectives.
- In the many instances where there are differing and even controversial scholarly views, divergent viewpoints and materials should be presented, studied, analyzed, and debated to challenge and support students in developing their ability to think critically, form opinions, and draw conclusions.



What rights do students have in the classroom?

- Students must be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.
- Student performance shall be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.
- Students may appeal any academic evaluation which they believe to be tainted by prejudice or capricious consideration of student opinions or conduct unrelated to academic standards in accordance with BOR Policy 2:9.
- Each institution also maintains a method by which students can submit complaints regarding allegations of instruction conducted in a manner inconsistent with BOR Policy 1:11.



What about free speech?

- Nothing in HB 1012 may be construed to inhibit or violate the First Amendment rights of any student or employee.
- The South Dakota Legislature, by way of SDCL 13-53-50, has stated neither the BOR nor any of its institutions may attempt to shield individuals from constitutionally protected speech, including ideas and opinions they find offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed.
- The Board's commitment to the principles of expression protected by the First Amendment is solidified in BOR Policy 1:32.
- Controversial speech and robust debate are expected and valued at our institutions. The BOR and its institutions have a responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it. While members of the institutional communities are free to criticize and contest the views expressed on campus, they may not obstruct or otherwise interfere with the conduct of the institutions or the freedom of others to express views they may reject or even loathe.
- Faculty and staff can speak or write as private citizens on matters of public concern, free from institutional censorship or discipline, but in doing so, they should make every effort to indicate they are not speaking for the institution.
- Student organizations, students, employees, and their guests continue to enjoy the protections and ability to use institutional facilities and grounds for expressive activity as prescribed in BOR Policy 6:13:1.



QUESTIONS?