

A Ruling from the Committee on Faculty Rights and Responsibilities

Appeal by Professor Donald Hindley

November 29, 2007

I. Background and summary of the ruling

On November 1, 2007 Professor Donald Hindley filed an appeal with this Committee challenging a disciplinary decision made by the Provost. Her decision, issued in a letter dated October 30, imposed sanctions based on her acceptance of an administrator's finding that Professor Hindley had violated University policies on discriminatory harassment. The sanctions required him to attend anti-discrimination training, placed a monitor in his classroom, and raised the prospect of termination should she find these measures insufficient.

This Committee accepted the appeal under its authority in Section VII.A. of the Faculty Handbook. Under that section, when an appeal is accepted, an appointed subcommittee "evaluates the facts of the dispute, renders an opinion as to whether a violation of the Handbook has occurred and the nature thereof, and judges the appropriateness of the sanction proposed." The Handbook also stipulates that the Provost's decision shall not go into effect until our deliberations are completed.

Based on our investigation, we conclude that the Provost's decision should now be entirely withdrawn. We find that (1) her decision failed to take proper account of multiple and fatal procedural flaws in the implementation of University harassment policies, a failure that itself violates Professor Hindley's right under the Faculty Handbook to fair and equitable treatment under those policies; (2) the discipline imposed on the basis of those policies was excessive, and should also have been suspended during the period of our review; and (3) her actions to date pose a threat to Professor Hindley's academic freedom and to that of other faculty and students, a matter on which we retain an active interest.

This is an interim ruling with regard to the third point above. Because the circumstances impinging on Professor Hindley's academic freedom and other faculty rights are ongoing, this Committee retains jurisdiction to issue further rulings on relevant factual and procedural matters.

The future procedural path for this ruling requires some clarification, since the decision under appeal comes from the Provost rather than from the Dean, as in most other faculty appeals. Under the Committee's power to modify its procedures as appropriate, we now submit this ruling to the Provost and to the parties in the case. If the Provost rejects our ruling, the Handbook requires her to respond to us in writing, with copies to the parties, in which she addresses our arguments. Professor Hindley would have the right to appeal that rejection to the President, who must then meet separately with Professor Hindley and with this Committee before making a decision.

II. Analysis

The events leading up to this appeal arose under two University policies dealing with discriminatory harassment: one containing basic definitions (*Non-Discrimination and Harassment*, which we will refer to as *ND Definitions*), and one laying out procedures for investigating and resolving concerns and complaints (*Non-Discrimination and Harassment Problem Resolution and Appeal Procedure*, which we will refer to as *ND Procedures*). Under the terms of the *ND Procedures* (p. 3, “Applicability”), “Faculty are covered by the terms of the Faculty Handbook with regard to discipline or termination, but harassment and discrimination concerns are addressed and investigated under this policy.” In other words, the investigation of concerns and complaints against faculty need not follow the initial stages of the Dispute Resolution Process in Section VII.A. of the Faculty Handbook. Instead that investigation is covered by the *ND Procedures*, leading up to action by a “decision maker” (*ND Procedures*, p. 6) to impose discipline, based on findings reached by an investigator from Human Resources (HR). The “decision maker” in this case is the Provost, although we understand that also contributing to the decision were the Dean of Arts and Sciences and the Chair of the Politics Department. The Provost’s disciplinary action brings this case back to the Faculty Handbook, where her decision becomes the object of Professor Hindley’s appeal under Section VII.A. Most of our remarks in this ruling are thus addressed to her actions as the primary “decision maker” under the *ND Procedures*.

This Committee had full access to the materials on which the Provost’s decision was based, which consisted entirely and solely of a report submitted to her by the HR investigator. Having also conducted appropriate interviews, we gained sufficient knowledge of the underlying events to reach the ruling outlined above. We must emphasize that it is not our role to determine whether an act of discriminatory harassment actually occurred. Indeed, on the basis of the record in this case, we believe that no one is in a position now to make that determination. Because of multiple and fatal flaws in applying the *ND Procedures* at various levels and stages, the investigator’s findings provide no credible basis for the Provost’s decision in this case.

(A) Procedural flaws in applying the *ND Procedures*

The HR investigator’s findings are based on a process that departs significantly from the spirit and the letter of the *ND Procedures*. Her failure, and that of the Department Chair and Dean, to attempt any kind of informal “problem resolution,” combined with her failure to return to Professor Hindley after her review was completed are fundamental flaws. Such concerns should have been raised by the academic decision makers who received these findings and deliberated on sanctions. In addition, the underlying investigation lacked the essential “thoroughness” called for by the *ND Procedures*, on the basis of which the Brandeis community could have confidence in the results.

(1) The *ND Procedures* begin by stating a “Problem Resolution Philosophy,” declaring a firm commitment to resolve harassment complaints in an informal manner “whenever possible.” After scrutinizing the HR investigator’s report and speaking to the decision

makers in this case, we found no evidence that anyone made any attempt to carry out this commitment prior to October 30. In particular, no one considered the possibility of having the Department Chair or another respected colleague speak to Professor Hindley informally about the concern that originally came to the Chair's attention. Further opportunities for informal resolution were available throughout the process, and perhaps even after October 30. When we pressed this point in our interviews, what we heard in response was an overriding concern for the confidentiality of the student who complained, and a feeling that informal intervention probably would not have worked in Professor Hindley's case. Neither reason persuades us. Since the alleged offending speech occurred during a classroom session in which all students were present, an informal approach to Professor Hindley several weeks later would likely not have revealed the identity of the student. And from the beginning of this process, it appears that the academic officers who knew him assumed that approaching Professor Hindley informally would be ineffective, and that the matter was entirely in the hands of the HR investigator.

(2) The formal investigation failed to include a mandatory part of the *ND Procedures*, in that the investigator was required to speak to Professor Hindley a second time "when the review process has been completed." The return visit is meant to give him a chance to offer "final comments, clarification, etc." before the findings are passed on to the Provost. It could have provided him with critical information about the investigator's interpretations of his comments made in her single interview with him, comments that she described as a "key factor" in reaching her conclusions. Academic officers reviewing her report apparently concluded that a return visit would have provided no useful information, and that Professor Hindley's reported comments had already confirmed the investigator's conclusions. We find their response seriously misguided. We believe that this specific procedural failure, in itself, makes the investigator's report fatally deficient as a basis for any disciplinary decision. We found it especially disturbing that Professor Hindley was the last person interviewed in this month-long investigation, and that the investigator's report was submitted to the academic administration one day after she had spoken with him.

(3) Although Professor Hindley was not apprised of the entire investigation until the day before its submission, he was entitled under the *NR Procedures* to "bring a member of the Brandeis community with him...for moral support throughout the process." This right is inherently valuable as a way to check whether the investigator fulfilled her duty to show "sensitivity" to Professor Hindley. It would have been especially important in this case, where the investigator's conclusions are based, in part, on "statements made by Professor Hindley himself, in response to my questioning." The only witness present during this interview was her own colleague. We believe it would have made a significant difference to the results if Professor Hindley had been given a meaningful chance to bring a trusted colleague to this interview, both to help him interpret what was being said to him, and in case there was some later dispute about what he had actually said, or how his words were to be interpreted. This additional assistance would have been equally important for the mandatory follow-up interview, had it occurred.

(4) The *ND Procedures* call for a “prompt and thorough” investigation at the stage where the problem solving philosophy has been deemed impossible to pursue. In our view this investigator lacked thoroughness in her failure to meet promptly with Professor Hindley, and also in her failure to consult impartially with other students in the class where the alleged harmful speech occurred. As noted above, Professor Hindley’s views on what he said in class (and on what might have been heard) were sought out only when the investigation was virtually completed—and no one saw any need to check back with him. During this month-long process, the investigator was willing to pursue a third-hand report that two other students were also concerned about Professor Hindley’s comments in class. (These reports were treated as confirming the result, even though the investigator never talked to the students involved nor indicated their particular concerns in her findings.) She was also willing to arrange an interview with one additional student of Professor Hindley’s from a prior semester, who was a friend of the sole complaining student in this case and who appeared in the Department Chair’s office three days after the original complainant had spoken with the HR investigator. The interview with this second student generated “concerns” that were quoted in the investigator’s report but were not treated as a formal “complaint,” and they were not specifically discussed with Professor Hindley. In the Committee’s view, the investigator’s practice of pursuing negative reports that crossed her path was an inadequate way to conduct this inquiry. By the very nature of a harassment claim, especially when the issue for investigation is the impact of speech used by a professor in the classroom, it was essential for someone to inquire objectively how other students reacted to the same speech. The reason given to us for this lack of thoroughness was a concern about confidentiality for the complaining student, and the confidentiality of the inquiry itself. But this student’s identity could have been protected while someone sampled the reactions of other students. And the inquiry itself cannot be kept utterly confidential, in our opinion, at the expense of thoroughness in determining whether classroom speech constitutes discriminatory harassment.

(B) Understanding the definition of discriminatory harassment

At the heart of this appeal is the very concept of harassment as a form of unlawful discrimination, especially when the offense consists entirely of speech presented in a classroom context. The *ND Definitions* describe harassment as more nuanced than the apparent working definition found in the investigator’s report, and different also from the definitions that were in the minds of academic decision makers at the point when they decided to discipline Professor Hindley.

Under what circumstances are controversial words, humor, irony, and other forms of speech potential violations? Many Brandeis faculty have been asking themselves this question in recent weeks. The decision makers in this case focused exclusively on the response of a student complainant—on the sincerity and vehemence of that student’s personal feelings. But that is only one factor to be considered. Under the *ND Definitions*, to qualify as harassment, the speech must “have the purpose or effect of unreasonably interfering with a person’s education...by creating an intimidating, hostile or offensive environment,” with such consequent adverse effects as lower grades or weaker recommendations. This “hostile environment” form of discrimination depends on certain

well-known conditions: that the student's reaction was "reasonable"; that the hostility must be severe, persistent, or pervasive; and that there must be some discernible impact on the student's educational opportunities. To make these judgments, it was essential for academic peers to ask more probing questions after the formal investigation was completed, if not during its course.

A clear statement of the standard comes from the U.S. Department of Education, which is responsible for enforcing applicable federal discrimination laws against universities. In a 2003 letter, the Department's Office for Civil Rights (OCR) wrote:

Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances....

The same letter earlier states that,

in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR. In order to establish a hostile environment, harassment must be sufficiently serious (i.e. severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program. OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.

Although Brandeis, as a private university, may not occupy the same Constitutional status as public universities, the OCR letter states that its "regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR."

This Committee, having been part of the faculty review of the *ND Definitions* and *ND Procedures*, can independently affirm that Brandeis has emphatically *not* chosen to put further limits on speech. Faculty expressed concerns about free expression throughout

the three-year period when these documents were being vetted. The full definition of harassment in our policies thus provides the critical balance expressed by OCR, where protecting students and faculty must be consistent with respecting the rights of students and faculty to exercise their freedom of expression. Speech in the classroom, whether by faculty or students, must be understood within this complex framework.

In our investigation of this case, we found no evidence that the Provost and other academic officers applied the full definition of harassment found in the *ND Definitions*. Nor did they appear to question the working definition of harassment found in the report by the HR investigator, whose investigation lacked thoroughness in exploring the essential elements of a harassment claim. We have no reason to doubt the sincerity of those we interviewed—that their foremost concern was with protecting the student who made the allegation, and then with protecting that student further once the allegation was validated by the HR investigator. But we were dismayed to discover, during our interviews, that these academic officers had difficulty articulating the University's own definitions, especially in relation to free speech concerns that must be factored into the test for discriminatory harassment.

Applying the full definition of harassment is critical at the stage of validating allegations, where that definition becomes a criterion for judging the thoroughness of an investigation. But definitions are equally important at the stage of remedial discipline. If Professor Hindley is being monitored to ensure that he will not continue to violate the standards of harassment, he needs to know how those standards are likely to be interpreted, particularly if future offenses carry a threat of termination. If a monitor is told to attend all class meetings and report back on offensive speech, the standard needs to be clearly understood by the monitor and the Provost. Based on our investigation, we find no clarity on any of these levels. Professor Hindley's knowledge of his apparent offense goes no farther than a single investigatory meeting with an administrator from Human Resources, a meeting in which (it is safe to say) the investigator's assumptions about acceptable speech in the classroom did not match Professor Hindley's. The monitor now sitting in his classroom (a member of the Provost's staff) received no special instructions on what to listen for, and has no particular training as a specialist in detecting harassing classroom speech. Most important, the Provost has a responsibility to apply the definition of harassment contained in the *ND Definitions*. At the disciplinary stage, to apply an overbroad definition of harassment may be to encroach on a professor's rights under the Faculty Handbook, as explained further below.

(C) Procedural issues surrounding the appeal process

The Provost's letter of October 30 did not inform Professor Hindley about his right to appeal the discipline to this Committee. Indeed, in the week following her letter there were indications that she was unfamiliar with the available avenues of appeal, and particularly with the role of this Committee under Section VII.A. of the Faculty Handbook. Her memorandum of November 8, addressed to us but also copied to Professor Hindley, contained ambiguous descriptions of two possible routes for appeal. After additional clarification, however, the Provost now appears to accept the jurisdiction

of this Committee, and we wish to express our appreciation for her complete cooperation and that of other members of the academic administration.

The *ND Procedures* contain their own appeal mechanism, notwithstanding that the same document states that faculty facing disciplinary sanctions are covered by the Faculty Handbook. The appeal process under the *ND Procedures* has important strategic disadvantages for faculty, in that the members of the "advisory committee" conducting the appeal are chosen directly by the Provost from an unpublicized list of faculty pre-selected by the Provost. That advisory committee's deliberations are reported only to the Provost, and not to the accused faculty member. The Provost need not provide written reasons to anyone if she chooses not to follow that committee's advice to modify her disciplinary sanctions, and there is no further appeal from her decision. Contrary to what Professor Hindley was told, the administrative appeal route would not allow him to challenge the actual findings of the HR administrator, but is limited to the questions "whether the policy and/or process was applied fairly in the individual case, [and] if the action taken was appropriate." In making these determinations, however, the advisory committee is not required to consider the general rights of faculty members defined in the Faculty Handbook, including the right of academic freedom.

Given these important differences for faculty facing a choice of appeal procedures, we find it unacceptable that Professor Hindley was not immediately advised of his right to appeal the discipline to this Committee under Section VII.A. of the Faculty Handbook. In disciplinary letters generally, basic fairness requires a clear statement of avenues for appeal. We believe that the Provost was genuinely confused about the nature and availability of both methods of appeal, but her confusion was compounded when she attempted to clarify Professor Hindley's options on November 8. During this period there was a suggestion that Professor Hindley might sacrifice important strategic interests if he chose not to appeal under the *ND Procedures* by the fixed deadline. Although we were assured that any pressure on him was not intended, Professor Hindley seems to have interpreted the Provost's November 8 note as some kind of ultimatum. By now, however, everyone seems to have overcome that confusion, and the jurisdiction of this Committee has been acknowledged by all parties.

There remains, however, the significant problem that the Provost's letter of October 30 was not suspended, despite her being notified early on November 2 that Professor Hindley had filed an appeal with this Committee. When we again pressed the matter in a note of November 5, we were told that unspecified legal restrictions tied the hands of the administration in suspending sanctions for cases of discriminatory harassment. In another note of November 7, this Committee rejected that explanation, absent a fuller statement of the legal issues, and informed the Provost that her failure to suspend sanctions was a prima facie violation of this Committee's rules, and also of Professor Hindley's faculty rights.

(D) Appropriateness of disciplinary actions

A central point of our ruling is that serious procedural defects in this case undermine the justification for sanctions of any kind. But we are also required by our mandate to address the appropriateness of sanctions outlined in the Provost's October 30 letter, assuming there had been an adequate basis for taking corrective action. On this matter the Committee starts from the principle that disciplinary sanctions for discriminatory harassment, at least for cases based solely on speech in the classroom, should be drawn as narrowly as possible. Given the risk of encroaching on the academic freedom of both professors and students, it is difficult for us to imagine a case where it would be appropriate to place speech monitors in a classroom. We would expect far less intrusive methods to be employed, starting with attempts at peer communication as a remedy, assuming that a justifiable finding of discriminatory harassment had been made. If a classroom environment is so pervasively hostile as to meet the definition of harassment, specific and explicit intervention with the faculty member is more likely to be effective than introducing a monitor into the classroom environment. Other steps that could be considered, in extreme cases, might include reassigning a student to another class, without academic penalty. We need go no further into this mode of speculation. Our point is that speech monitors should virtually never be used in harassment cases, and certainly not as the first attempted remedy, nor as a means of chilling the instructor pending further measures. In this instance we understand that the Provost and others considered no immediate intervention that might have been less intrusive. Indeed, in her view the monitor was self-evidently the least intrusive way to meet federal mandates to provide "prompt and effective" correction. Of course, once the University has taken the position that a monitor is necessary in a particular case, it becomes difficult to back down and try some different approach. But it seems plain to us that far less intrusive steps were available in this case—assuming there had been an adequate basis for the investigator's findings.

(E) Professor Hindley's faculty rights

In addition to the various points raised above, the Committee is compelled to maintain an ongoing concern for the apparent violations of Professor Hindley's rights as defined in the Faculty Handbook. In particular, Section III.C.1. lists among those rights "academic freedom" and "the right to fair and equitable treatment in the application of university policies and decisions." Because the Provost's October 30 decision was based on her acceptance of a deeply flawed process, we believe that she has violated Professor Hindley's right to fair and equitable treatment. We have also indicated that her subsequent actions violate his right to have his discipline suspended pending the outcome of this appeal. Additionally, the Faculty Senate has expressed concern that it was not consulted prior to the Provost's reference to termination in her October 30 letter. And, finally, we are deeply troubled by the impact of this case on Professor Hindley's academic freedom—and by extension its impact on other faculty and also on students, all of whom deserve to have the opportunity to speak freely in classes without fear of having their comments monitored. Because the outcome of this case is still uncertain, we reserve our authority to make a fuller ruling on issues of faculty rights and academic freedom at a

later date. The ruling on this aspect of the case is thus an interim one, to be further elaborated in light of future factual and procedural developments.

III. Further campus discussion

The Brandeis community has been deeply stirred by this case, amidst great confusion about the underlying facts and the applicable rules. The Faculty Senate has expressed concerns about procedural matters, and it has already forecast the inevitable process of reviewing the University's discrimination policies. This Committee has a unique adjudicatory function within the system of faculty governance, but we too are concerned to safeguard faculty rights and to uphold faculty responsibilities. Members of this Committee were involved in earlier discussions surrounding the *ND Definitions* and the *ND Procedures*, over a space of several years. We obviously recognize that Brandeis University must comply with applicable federal and state discrimination laws, and we strongly support the University's commitment to address discrimination in all its forms. But we emphasize that, for all future complaints, including the one still standing against Professor Hindley, it is in everyone's interest that investigations should follow the written procedures with great care. Any Dean or Provost reviewing that investigation has a responsibility to ask probing questions about the underlying process.

We know from prior discussions that faculty strongly endorsed the University's commitment to the "problem resolution philosophy," as described in both documents. Faculty also supported the due process safeguard of reviewing disciplinary actions under the Faculty Handbook appeal procedure. At the time these policies were adopted in 2006, many of us concluded that they were the best we could achieve, given the delicate balance embodied in complex definitions of harassment. We understood, all the more, that complex policies must be implemented with sensitivity and practical wisdom, along with respect for the contractual faculty right to academic freedom. Based on our examination of the facts and procedures used in this case, it seems clear that faculty committees must now review those policies. In the coming months, we look forward to working with the Faculty Senate, and with the academic administration, department chairs, and others, to correct the problems that have emerged in this troubling case.

This ruling is reached unanimously by the appointed subcommittee.

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