



*North Dakota University System
Office of Compliance and Ethics*

CASE INVESTIGATION REPORT

April 25, 2022

DICKINSON STATE UNIVERSITY
Dickinson, ND

Combined Report Including Summary Case Investigations of Concerns
Submitted to the NDUS Office of Compliance and Ethics

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April 25, 2022

North Dakota State Board of Higher Education – Audit Committee
Dr. Steven Easton, President, Dickinson State University

The NDUS Office of Compliance and Ethics has received a large number of reported concerns regarding DSU over the last 18 months. The concerns were reported through the Eide Bailly Fraud Hotline, through the ndus.edu compliance webpage and through various direct reporting methods. Investigation and reporting on these concerns have been in process for over a year, because of the volume of cases and because the Chief Compliance Officer was diverted to system-wide Covid-19 activities during most of this time. Some concerns were either duplicates or similar to others in process; these were combined where appropriate. The following compilation addresses specific concerns and topics combined into 22 summary investigation reports.

Inquiries or comments relating to this engagement may be directed to me at (701) 224-2504. I wish to thank President Easton and numerous members of the DSU administration, faculty and staff for their assistance with this project

Respectfully submitted,

Karol K Riedman, CPA, CIA
NDUS Chief Compliance Officer

CC: Dr. Mark Hagerott, Chancellor, NDUS
Eric D Olson, AAG, NDUS and SBHE
Christopher Pieske, AAG, DSU

Executive Summary

The NDUS Office of Compliance and Ethics received a large number of reported concerns regarding DSU over the last 18 months. The concerns were reported through the Eide Bailly Fraud Hotline, through the ndus.edu compliance webpage and through various direct reporting methods. Investigation and reporting on these concerns have been in process for over a year, because of the volume of cases and because the Chief Compliance Officer was diverted to system-wide Covid-19 activities during most of this time. Some concerns were either duplicates or similar to others under investigation; these were combined where appropriate. The following compilation addresses specific concerns and topics combined into 22 summary investigation reports.

In several of the reports, the Office concluded that there either was no violation, the investigation did not support the allegations, or there was inadequate information to investigate the allegations, however some of these reports did include generalized process recommendations. For the remaining reports, the allegations are supported by the investigation and recommendations are made to correct and prevent similar issues. Frequently the investigations have highlighted a need for improved communication, as well as to improve relationships and culture among administration, faculty and staff. These topics are outside the Office's investigatory scope but are noted here because improving communication, culture and relationships would have a significant positive effect on the workplace environment and may also decrease the frequency of hotline complaints filed with the Office.

While many different topics and themes are presented in the following reports, there are three themes that occurred regularly, regardless of the specific topic of the report:

1. DSU should make better use of its resources including the Director of Human Resources and Legal Counsel. Consulting these or other experts at the start of a potential action will reduce the likelihood of potential problems in the execution of the action as well as avoiding potential legal liability.
2. Policies, procedures, regulations and laws exist to make actions defensible. It should always be our goal to do the right thing in every situation, but if guidelines are followed in every action, there is a defensible position if needed to manage challenges. If guidelines are not followed, institutions lose the presumption of validity of actions, which then leads to increased risk and lowered defensibility.
3. DSU and all NDUS institutions need to follow SBHE Policy 306.1(4) in complying with requests from the Office. Providing vague, minimal or unhelpful responses weakens the position of the respondent and may lead to prolonged investigations and incomplete conclusions, including those which may have supported the institution's actions.

I appreciate the cooperation of DSU administration, faculty, and staff, along with others consulted related to these matters, including but not limited to those in the NDUS Office.

CASE INVESTIGATION REPORTS



Office of Compliance and Ethics

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Summary Investigative Report Inaccurate Press Release April 25, 2022

Source of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date of Complaint	01/09/2021
Topic of Allegation	Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous reporter categorized the concern as an ethics violation. The reporter referred to a January 8, 2021 press release regarding a national business exam where the Chair of the School of Business and Entrepreneurship said the students spend hours studying for the exam. The reporter stated that there are no preparation materials for this exam and provided links to an article and another PSA in support of that statement. The reporter was concerned about ethics, honesty and imprecise talking points with the media.

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct states in part:

In all matters involving communication with NDUS students, customers, suppliers, government authorities, the public and others, SBHE members, officers and employees shall endeavor to make complete, accurate, and timely communications and respond promptly and courteously to all proper requests for information and complaints.

Investigation and Findings

Reviewing the press release revealed that the story centered around the DSU students' achievement on the national test. A fair reading of the press release reveals that the comment the reporter focused on regarding student preparation was not the main point of the press release. Press releases are not intended to provide complete details and contextual references but should be free of material errors or intentional misstatements.

Additional details were not provided, and because the source of the report was anonymous, it was not possible to gather additional information to determine if there was specific evidence of a materially inaccurate statement intended to mislead the public through the media. However, even assuming the press release in question was inaccurate, the Office did not substantiate the allegation that the inaccuracy was material or intended to mislead the public.

Conclusion

The investigation was limited by lack of specific details and the anonymity of the reporter. An inaccurate statement regarding test preparation, whether intentional or not, does not materially affect or invalidate the purpose of the press release in question: to announce DSU students' success on a national test. Thus, the results of the investigation cannot support the allegation of a code of conduct policy or ethics violation.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



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Summary Investigative Report Course Delivery Requirements April 25, 2022

Source of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics) and other direct sources
Date of Complaint	04/16/2021 and others
Topic of Allegation	Administrative and Academic Authority, Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 305.1 Institution President Authority and Responsibilities; Contract Terms Policy 308.1 Code of Conduct
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received numerous reports through the Compliance and Ethics webpage reporting link on the ndus.edu website and via direct email regarding a change in DSU faculty contracts which addresses multiple modalities. The reporters objected to faculty being required to teach using additional/online-based delivery modalities and to actively recruit students, and that merit-based pay raises would be unfairly based on those two requirements.

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct (summary):

The Code of Conduct in general requires all NDUS officer and employees to uphold the highest ethical and professional standards, conduct themselves in a businesslike manner, and to perform their duties conscientiously, honestly, and in accordance with the best interests of the NDUS.

SBHE Policy 305.1 Institutional President Authority and Responsibilities; Contract Terms (summary and relevant excerpts):

The SBHE delegates to the president of each institution full authority and responsibility to administer the affairs of the institution in accordance with SBHE policies, plans, budgets, and standards, including the management and expenditure of all institutional funds, within budgetary

and other limitations imposed by law or by the SBHE. Subject to SBHE policies, NDUS procedures, and SBHE and Chancellor directives, presidents:

- *Have primary responsibility for the internal organization of the institution's administration, including academic, administrative, and student affairs.*
- *Are responsible for consensus building; facilitation of quality scholarship; careful management of resources; recruitment and retention of outstanding faculty, staff, and students; problem solving; and promoting the intellectual, physical, and fiscal health of the institution.*
- *Ensure excellence in the institution's teaching, research, and service missions while maintaining the strength of the institution's academic and co-curricular programs and furthering the recruitment and retention of outstanding teachers, scholars, staff, and students.*
- *Maintain a productive relationship with faculty, students, staff, and alumni.*

Investigation and Findings

The report alleged that, for the upcoming 2021-2022 faculty contracts, DSU would require all instructors to use online/internet delivery methods and would base merit pay increases on this requirement. Various complainants questioned the wisdom of requiring online modalities for certain types of courses, which they stated were more effective with face-to-face delivery. On April 16, 2021, a document was sent to DSU faculty by DSU Administration providing FAQ communications about the proposed changes in faculty contracts addressing multiple modalities. The additional/revised statement in the contract was as follows:

Teaching assignments may involve teaching from all university sites (i.e., Bismarck, Williston, Dickinson), via interactive video conferencing classrooms, online, DSUlive™, or other modality classifications.

The FAQ document addressed the question of merit-based raises as follows:

Faculty should not expect a merit-based raise unless they are engaged in increasing access via dual mode delivery and/or other activities that they can demonstrate have resulted in 1) retaining current students at, or 2) recruiting new students to, Dickinson State University.

The above items represent the chief complaints among the various reporters, as well as the authority or reasonableness of the administration to make these decisions without input and guidance from the faculty affected by the contract change.

After reviewing the reports and requesting information from the DSU Administration, the Office concludes that the reports do not allege a violation within the scope of the Office to investigate. The reports assert disagreement with the DSU Administration's proposed contract change, and question the wisdom of those changes. However, the Office is not equipped to second-guess decisions committed to campus administration, including the President, by SBHE Policy, unless the exercise of that authority violates a policy or procedure that the Office has authority to review.

Conclusion

Notwithstanding the requirements of Policy 305.1 regarding consensus building and productive relationships, the president has primary responsibility for the programs and activities of the institution. While the president may delegate certain decisions to members of Cabinet, all decisions, including the use of alternate teaching delivery methods/modalities and the basis on which institutions award merit-based raises (unless patently in violation of SBHE policy or NDUS or institution policy) is ultimately the decision of the president. In this case there is no violation of policy or law. Concerns regarding relationships and other culture aspects are not within the scope of this report.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive style.

Karol K Riedman
NDUS Chief Compliance Officer



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Summary Investigative Report Failure to Investigate, Move of Tenure Line April 25, 2022

Sources of Complaint	Eide Bailly Fraud Hotline Numerous Direct Reports
Date(s) of Complaint	First Report 5/5/2021, most recent received 4/12/2022
Allegation	Failure to Investigate; Move of tenured faculty; Improper decision
Institution	Dickinson State University
Policy referenced	SBHE Policy 308.1(3), (13) Officer and Employee Code of Conduct SBHE Policy 605.1(3) Academic Freedom and Tenure SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty SBHE Policy 605.4(11)-(12) Hearings and Appeals SBHE Policy 612 Faculty Grievances
Conclusion	Results of investigation support the allegations.
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received multiple direct reports of an alleged improper process of moving Faculty Member A’s tenured faculty line from the department of social science to the school of business and entrepreneurship and retaliation. Additionally, a related report was received regarding an alleged informal harassment complaint filed by Faculty Member A against Dean B, that was, according to the reporter, never investigated or resolved. These reports were received from anonymous sources, or the person reporting the concern requested anonymity. Subsequently, the Office received a direct report via the concern reporting form on the Compliance website, located at ndus.edu, asserting that the resolution of the Standing Committee on Faculty Rights (SCoFR) process related to the tenured faculty line did not comply with SBHE Policy.

Policies Referenced:

SBHE Policy 308.1(3), (13) Officer and Employee Code of Conduct (in relevant part):

3. The SBHE supports an environment that is free of discrimination and harassment. [. . .] Likewise, sexual or other harassment (including actions contributing to a hostile work environment) in violation of federal or state law or SBHE Policy 603.1 is prohibited[.]

13. Alleged violations of this code involving NDUS officers or employees shall be investigated by the appropriate NDUS officer. All officers and employees shall cooperate in investigations of alleged violations. A violation of this code is cause for dismissal or other disciplinary action, in addition to any criminal or other civil sanctions that apply.

SBHE Policy 605.1(3) Academic Freedom and Tenure; Academic Appointments (in relevant part):

3. Tenure is awarded by the SBHE upon recommendation of the Chancellor, following review and recommendations made pursuant to the procedures at the institution and a recommendation by the institution's president to the Chancellor. [. . .] Tenure is limited to the academic unit or program area in the institution in which tenure is granted and shall not extend to an administrative or coaching position.

SBHE Policy 612 Faculty Grievances (in relevant part):

1. Each institution, in consultation with its faculty governance structure, shall establish policies and procedures to attempt mediation or resolution of faculty grievances and to define the procedures for filing a grievance in accordance with principles of shared governance.

2. "Grievance" means an allegation of a violation of a specific SBHE or institutional policy, procedure or practice pertaining to the employment relationship, including the terms of the grievant's employment contract[.]

SBHE Policy 605.4(11)-(12) Hearings and Appeals (in relevant part):

11. The committee shall provide written findings of fact, conclusions, and recommendations, with supporting reasons, to the institution's president and the faculty member or the faculty member's representative. If the institution's action was a notice of dismissal and if the committee concludes that adequate cause for dismissal has been established, but that a lesser penalty would be more appropriate, it may so recommend with supporting reasons. The president shall decide and provide written notice of the decision, including findings of fact and reasons or conclusions based on the hearing record, to the committee and the faculty member within twenty calendar days of receiving the report, unless the president determines that more time is required due to unforeseen circumstances, in which case the president may extend the period by 10 calendar days on notice to the parties and committee. The faculty member or committee may, within ten calendar days of the decision, submit a written response to the decision, to which the president may, but is not required to, reply.

12. The decision of the president is final.

Investigation and Findings

The following statement of facts is based on the Office's review of documentary evidence and interviews regarding the foregoing reports, along with the record of the SCoFR hearing related to this matter. This report is not intended to address the underlying merits of the administrative actions in question; instead, the investigation and report are intended to examine the process used and determine whether applicable policies and procedures were followed.

In late 2019 or early 2020, Faculty Member A was a tenured professor of Political Science and Economics, and their faculty line was located in the Department of Social Sciences. Despite having received tenure as a professor of Political Science, Faculty Member A taught primarily economics courses. Economics was at the time located in the Department of Social Sciences. DSU was in the process of restructuring its economics department to change certain requirements, and this change would have resulted in a change to the courses taught by Faculty Member A. During this time, Faculty Member A was experiencing health-related challenges, and objected to the change to the courses, resulting in Faculty Member A filing first an informal email harassment complaint against the then-chair of the School of Business and Entrepreneurship ("SoBE"), followed by a formal harassment complaint.

The DSU administration assigned the complaint to a department Chair (Chair B) for investigation and review. However, prior to Chair B's completion of the investigation, Chair B left DSU. The complaints were then re-assigned to a different department chair, who also failed to investigate the complaints before leaving the institution. DSU administration did not reassign the complaints to a new investigator; based on the information obtained during the Office's investigation, it appears this failure was inadvertent due to the onset of the Covid-19 pandemic and the institution's shift to remote course delivery.

Subsequently, the DSU administration determined that economics would be moved from the Department of Social Sciences to SoBE, where it had previously been located. The former chair of SoBE had since been promoted to Dean of the College of Education, Business, and Applied Sciences (Dean C). Initially, it appears that the discussion regarded moving the economics courses back to SoBE was not focused on Faculty Member A's tenured faculty line, but at some point during early 2021, the decision was made that, because Faculty Member A taught primarily economics courses, Faculty Member A's faculty line should move to SoBE as well. Faculty Member A vehemently objected to moving their faculty line, and at one point the Dean of the College of Arts and Sciences (Dean D) offered Faculty Member A the option to retain their position in the Department of Social Sciences but stated that the option would not be tenured.

Based on testimony at the subsequent SCoFR hearing, when DSU administration began considering moving the faculty line, neither the Provost nor Dean C was aware of the existence of the uninvestigated harassment complaints. However, it appears that during the discussion regarding moving Faculty Member A's faculty line, both the Provost and Dean C became aware of the complaints, but both asserted they had never reviewed the contents of the complaints, and no contrary testimony or evidence was introduced. The asserted primary reason for the move was to make coordinating scheduling easier for business majors, although all witnesses at the

subsequent SCoFR hearing agreed, under questioning, that schedule coordination would not require the faculty line to move.

Notwithstanding, DSU administration continued with the intended move of Faculty Member A's faculty line to SoBE, and Faculty Member A filed a grievance against the move, asserting that it violated SBHE Policy 605.1(3) and constituted retaliation for the prior complaints; while the grievance was pending, Faculty Member A's contract was renewed, and the renewal reflected the department change, but noted that a grievance was pending. Mediation of the grievance failed, and the grievance moved to a full SCoFR hearing pursuant to DSU policy and SBHE Policy 605.4 on February 25, 2022. After a roughly five-and-a-half hour hearing, the SCoFR determined that moving the faculty line violated SBHE Policy 605.1(3), that the decision to place Faculty Member A in the reporting chain of Dean C constituted retaliation, and that the communication from Dean D offering Faculty Member A a non-tenured position if they wanted to remain in the Department of Social Sciences also constituted retaliation. The majority of the SCoFR (as one member did not join the recommendations) recommended that the unresolved complaints be resolved and that the faculty line be restored to the Department of Social Sciences. On March 21, 2022, this recommendation was forwarded to the President of DSU, as set out in SBHE Policy 605.4(11).

Ten days later, the President of DSU issued his final decision, rejecting the SCoFR's conclusions and upholding the decision to move Faculty Member A's faculty line to SoBE. The decision also determined that there was no retaliation pursuant to SBHE Policy. On April 8 and 9, 2022, Faculty Member A and the SCoFR responded to the President's decision, as permitted by SBHE Policy 605.4 (11).

The purpose of this investigation and report is to evaluate whether Faculty Member A's rights were violated by the failure to investigate their formal complaint, by the decision to move the faculty line, by Dean D's email offering Faculty Member A a non-tenured position, or the allegations of retaliation. Additionally, the Office has been asked to review whether the President's decision violated SBHE Policy 605.4(11). The investigation revealed the following areas of potential risk and improvement. These findings or recommendations should not be viewed as taking a position of the substance of the reasons for the actions taken in this matter, and instead a review of the process that led to the actions.

1. Faculty Member A filed first an informal, then a formal harassment complaint against Dean C in late 2019 or early 2020. After both Chair B and the second investigator assigned by DSU failed to investigate the complaints, DSU administration failed to assign the complaint to a new investigator, and the complaints remain unresolved. Pursuant to SBHE Policy 308.1(13), all complaints, including those for harassment must be investigated by the appropriate NDUS officer.

Recommendation: The Office has learned that DSU's administration has assigned Faculty Member A's complaints to a new investigator, so the Office does not make a recommendation on that point. DSU should also consider evaluating the training provided to its designated investigators to ensure that complaints are effectively and timely investigated.

2. The language of SBHE Policy 605.1(3) related to tenure is vague at best. The most that can be clearly and unequivocally determined from the language of the policy is that the SBHE is responsible for awarding tenure “limited to the academic unit or program area in the institution in which tenure is granted[.]” The section does not include any delegation of authority to reorganize or relocate tenured faculty lines from the “academic unit or program area” where the tenure was granted to the president of an institution, but it also does not explicitly prohibit relocating a tenured faculty line. Based on the language of the section, the context, and the asserted purpose of tenure in SBHE Policy 605.1(2)—“to assure academic freedom”—the Office cannot find with full certainty that the actions of DSU relocating the tenured faculty line violated any rights held by Faculty Member A.

Notwithstanding, the Office believes that the best reading of the Policy, in consultation with legal counsel, is that because the SBHE grants tenure in an “academic unit or program area”, the institution likely lacks authority to change that academic unit or program area, at least without the tenured faculty member’s consent to the change and without making a request that is approved by the SBHE, the entity responsible for granting tenure. However, the DSU administration’s interpretation that such authority does exist is also not implausible. As a result, the Office does not issue a recommendation to DSU on this point.

Recommendation: The Chancellor, in consultation with the Vice Chancellor of Academic and Student Affairs and the institutions, should propose a revision to the language of SBHE Policy 605.1(3) to make clear where the authority to move, transfer, surrender, and/or revoke tenure resides: with the SBHE or with the institutions, with or without the consent of the tenured faculty member.

3. In response to Faculty Member A’s objections to the transfer of her faculty line, Dean D offered, it appears as an informal compromise, Faculty Member A an untenured position in the Department of Social Sciences. Faculty Member A interpreted this offer as an instance of retaliation. At the SCoFR hearing, Dean D admitted at the time that they did not realize that tenure was a personal grant and could not be removed or transferred. This testimony was not meaningfully challenged. As a result, the Office cannot substantiate the required retaliatory intent in Dean D’s email to create a violation of SBHE Policy 308.2. However, DSU administration should consider providing education to both administration and faculty about the role and requirements of tenure, along with the process by which it is awarded and the rules governing its treatment by the institution.

Recommendation: DSU should provide additional information on the role, requirements, and process of tenure to its administration, including that the institution does not have the authority to separate a faculty member from their tenure, as tenure is personal to an individual.

4. The Reports to the Office also asserted that the decision to move Faculty Member A’s faculty line to SoBE constituted retaliation for Faculty Member A’s filing of the complaints. The SCoFR agreed that, while the particular decisionmakers may not have been aware of the existence or substance of those complaints for some or all of the process, DSU as a whole was culpable for retaliation, as the decision to move the faculty line would have placed

Faculty Member A under the indirect supervision of Dean C. However, Policy 308.2(4) requires that the allegedly retaliatory act must be “motivated by, in response to, or because of” an employee’s good faith report of a violation or suspected violation. This intent requirement is crucial because institutions could not function if filing a formal complaint functionally immunized an employee or faculty member from future potentially adverse or unfavorable personnel actions. Here, the Office’s review of the documents and the testimony during the SCoFR hearing did not substantiate the presence of the necessary retaliatory intent to create a violation of SBHE Policy 308.2.

Notwithstanding, DSU should continue to avoid actions which create the appearance of retaliation. Here, the unresolved complaints potentially give rise to an appearance of retaliation even where the decisionmakers were unaware of the complaints until after the process had begun. To avoid unnecessary litigation risk, involving decisionmakers who were not involved in the unresolved complaints would have been advisable.

Recommendation: DSU should avoid unnecessary litigation risk by avoiding the appearance of retaliation, such as by involving decisionmakers who were not involved in the underlying complaints or reports.

5. On April 12, 2022, the Office received an additional report related to the final decision of the President rejecting the findings of the SCoFR, which largely paralleled several of the arguments raised in the responses from Faculty Member A and the SCoFR itself.

First, the report alleged that the President’s final decision violated SBHE Policy 605.4(11)’s requirement that “[t]he president shall decide and provide written notice of the decision, including findings of fact and reasons or conclusions based on the hearing record[. . .]” The report is arguably substantiated by the Office’s investigation. The President’s report indirectly refers to the record, but arguably does not provide specific findings of fact or reasons or conclusions based on that record.

Second, the report functionally alleged that the President’s final decision was predetermined (i.e. the decision would have been to move the faculty line and to find no retaliation regardless of the grievance/appeal process). The Office has no practical way to substantiate this allegation, though it is plausible that the final decision’s lack of engagement with the hearing record gives observers the impression that the outcome of the hearing did not factor into the final decision.

Recommendation: The Office recommends that, even if the ultimate decisionmaker in a grievance or appeals process determines to take the action proposed before the process began, the decisionmaker engage with the arguments made by the faculty member or employee and respond to the recommendations of the SCoFR (or Staff Personnel Board, for an employee). Additionally, the Office recommends that DSU’s administration ensure that any final decisions on an appeal or grievance follow the requirements of Policy 605.1(11), including specific findings of fact and conclusions based on the hearing record. While this can be a time-intensive process, it will build cross-campus trust and demonstrate respect for considerations of shared governance.

Conclusion

The purpose of this investigation and report was to evaluate the process related to Faculty Member A's complaints, the moving of the faculty line, the grievance process, and the reports regarding the final decision. The Office did not consider whether the actions taken were the correct ones or whether the substantive basis for actions were sufficient.

The allegations of failing to investigate Faculty Member A's complaints and deficiencies related to the final decision were substantiated. While the remaining reports were not substantiated, DSU administrators should be aware of the potential for an appearance of retaliation and should provide additional training on how to avoid such an appearance. The Office also recommends that the Chancellor and SBHE clarify SBHE Policy 605.1(3) to make clear where the authority to move, transfer, surrender, and/or revoke tenure resides.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Proposing to Lower Graduation Standards April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline Report
Date of Complaint	10/23/2021
Topic of Allegation	Proposing to Lower Standards to Improve Graduation Rates
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 401.1
Conclusion	No Violation.
Investigator	Karol Riedman

Background Information

The Office of Compliance and Ethics received an anonymous Eide Bailly Fraud Hotline report on October 23, 2021. The report alleged that Dr. Joan Aus, Chair of the DSU School of Teacher Education, sought to lower graduation standards and waive the 2.75 cumulative GPA requirement for graduation in violation of standards.

Policy References

SBHE Policy 401.1(2) provides in relevant part:

Academic freedom is the freedom, without institutional, political, or other outside pressure or restraint, to explore any avenues of scholarship, research, and creative expression, and to speak or write on matters of public concern, as well as on matters related to professional duties and the functioning of the NDUS and the institution.

Investigation and Findings

Upon receiving the report referenced above, the Office of Compliance and Ethics referred the matter to President Steve Easton, as the compliance contact for DSU. President Easton assigned the Dean of the College of Education, Business, and Applied Sciences, Dr. Holly Gruhlke, to

conduct an investigation on October 25, 2021. Dr. Gruhlke investigated the hotline report and issued a comprehensive three-page report finding no violation, which was then shared with the Office of Compliance and Ethics as required by SBHE Policy 306.1.

Conclusion

After reviewing the investigation and report issued by Dr. Gruhlke, the Office concluded that there was no violation of applicable SBHE or DSU policy or procedure and has adopted Dr. Gruhlke's finding of no violation. Dr. Aus does not have sole discretion to change admission or graduation standards or to grant provisional admission to the program. Instead, such actions are governed by policy and processes in place at DSU. To the extent that the complaint asserted that Dr. Aus's advocacy for one position or another during Teacher Education Council meetings, such advocacy for institutional change falls within Dr. Aus's job duties and is protected by core academic freedom pursuant to SBHE policy 401.1(2).

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Faculty Group Negative/Bullying April 25, 2022

Sources of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date(s) of Complaint	10/29/2021
Allegation	Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous reporter categorized the concern as a Code of Conduct violation, stating that a group of faculty members was making negative comments about DSU administration and faculty department chairs and seeking to get the reporter to agree with their comments. When the reporter did not do so, the group made comments about the reporter’s department being part of the problem and that the reporter’s position was vulnerable. The reporter stated they felt bullied.

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct states:

The SBHE supports an environment that is free of discrimination or harassment. All SBHE members, officers and employees are expected to conduct themselves in a businesslike manner.

SBHE Policy 401.1(2) Academic Freedom, in part:

Academic freedom is the freedom, without institutional, political, or other outside pressure or restraint, to explore, any avenues of scholarship, research, and creative expression, and to speak

or write on matters of public concern, as well as on matters related to professional duties and the functioning of the NDUS and the institution.

Investigation and Findings

Because the source of the report was anonymous, it was not possible to gather additional information to determine if there was specific evidence of a policy violation. However, the following general statements apply:

- It is not a violation of policy for faculty members to assemble and discuss topics that may be negative or offensive to others, particularly those topics which may be negative or offensive to the institution.
- Personal attacks and bullying may be a violation of policy in certain circumstances, but the allegations set forth in the report do not meet any reasonable definition of bullying, and further evidence could not be collected to support this or any related allegation.

Based on the foregoing, the Office does not find a violation of policy or procedure, and no recommendations are issued.

Conclusion

The investigation was limited by the anonymity of the reporter. The results of the investigation did not substantiate the allegation of a code of conduct policy violation.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

Karol Riedman MPA CPA CIA CCEP
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Summary Investigative Report Faculty Assisting with Student Petition April 25, 2022

Sources of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date(s) of Complaint	10/29/2021
Allegation	Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct Policy 308.3 Political Activities Policy 503.1 Student Free Speech and Expression Policy 503.3 Student Political Rights
Conclusion	No Violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous reporter categorized the concern as an Inappropriate Relationship, although the details of the concern allude to additional concerns regarding political activities and/or free speech. The reporter expressed concern that a faculty member assisted a student in writing a petition regarding removing DSU administrators and that some students were feeling pressured to sign the petition.

Policy References

SBHE Policy 308.1(3) Officer and Employee Code of Conduct (in relevant part):

SBHE members, officers and employees may not unlawfully use their position, or the knowledge gained because of their position for private or personal advantage.

SBHE Policy 308.3 Political Activities:

Policy 308.3 encourages NDUS employees' participation in off-duty political activities and prohibits discipline or retaliation of any kind due to participation in any activities which comply with the terms of the policy. The policy prohibits use of NDUS resources for political purposes

or for any representation that might give the appearance of representing the views of NDUS or any institution.

SBHE Policy 401.1(2) Academic Freedom, in part:

Academic freedom is the freedom, without institutional, political, or other outside pressure or restraint, to explore, any avenues of scholarship, research, and creative expression, and to speak or write on matters of public concern, as well as on matters related to professional duties and the functioning of the NDUS and the institution.

SBHE Policy 503.1(1) Student Free Speech and Expression:

The SBHE recognizes that students have a fundamental right to free speech and expression, and as a result the SBHE and institutions under its control shall ensure that students have the freedom to speak, write, listen, challenge, learn and discuss any issue, subject to reasonable and constitutionally recognized limitations. The SBHE and its institution shall not engage in viewpoint- or content-based discrimination or suppression of speech and shall permit and facilitate the open discussion and debate of ideas and issues, regardless of the content of those issues.

SBHE Policy 503.3(1) Student Political Rights

The SBHE supports the rights of students to participate in political activities and as above, prohibits use of NDUS resources for political purposes or for any representation that might give the appearance of representing the view of the NDUS or any institution.

Investigation and Findings

Because the source of the report was anonymous, it was not possible to gather additional information to determine if there was specific evidence of a policy violation. However, as general principles:

- It is not a violation of policy for a faculty member to advise or assist a student in the preparation of a petition or for a faculty member to engage in speech or conduct critical of the institution.
- The political activities, academic freedom, and free speech policies protect the petition activity and the content of the petition.
- There was no evidence presented that the petition or petition sponsors used institutional resources or presented themselves as representing the views of DSU or NDUS.
- There is no evidence that the faculty member coerced or used their position to influence the student in preparing the petition, nor is there documentary evidence that students were coerced or bullied into signing the petition by a faculty member or a student.

Conclusion

The investigation was limited by the anonymity of the reporter. The results of the investigation do not support the allegation of an inappropriate relationship, or any related political activity or free speech policy violations.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive style.

Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Research Database Cancelled Without Notice April 25, 2022

Source of Complaint	Direct Complaint
Date of Complaint	03/10/2022
Topic of Allegation	Administrative and Academic Authority, Code of Conduct
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 308.1 Officer and Employee Code of Conduct
Conclusion	No violation, recommendation made
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a direct report (phone call) alleging that one or more data bases used by students for science research had been cancelled without notice, after the academic term had started. The anonymous reporter expressed concern that abruptly losing access to the data base(s) would negatively impact the students’ research already in progress using those sources.

Policy References

SBHE Policy 308.1(10):

In all matters involving communication with NDUS students, customers, suppliers, government authorities, the public and others, SBHE members, officers and employees shall endeavor to make complete, accurate, and timely communications and respond promptly and courteously to all proper requests for information and complaints.

Investigation and Findings

The Office of Compliance and Ethics investigated the direct complaint in this matter because the anonymous reporter alleged that the purported decision to cancel the database was made by senior DSU administration. While the Office acknowledges the importance of access to data bases for student research, cancelling or not renewing a data base subscription is an institutional budget decision. However, given the myriad accounts received by the Office during the

investigation, it appears that communication regarding these budgetary decisions could be communicated more clearly to the campus community and the database users.

In addition to the original reporter, the Office interviewed several DSU personnel, all of whom provided somewhat different accounts of the situation:

- A former science department chair said his understanding was that DSU administration attempted to cancel the SciFinder database but the controller stopped the cancellation.
- The former controller did not recall the situation but said that a request to cancel a subscription or a pending payment would have been executed unless the payment had already been made.
- The former Head of Library Operations said DSU administration attempted to cancel the SciFinder database without warning and referred to this situation as an example of DSU administration's inadequate communications of considerations and decisions that directly affect students and faculty.
- The current interim Head of Library Operations confirmed that no science databases had been cancelled; both SciFinder and AccessScience databases are currently active but shared that it was possible that one of them would not be renewed at the end of its subscription after the Spring 2022 academic semester.
- DSU administration stated that reviews of database subscriptions are routinely done to determine usage and benefit to students and firmly stated that the cancellation of a science database subscription did not occur.

While it is difficult to parse the different accounts received by the Office, it appears that the database remains available to students, so the reporter's concerns were not substantiated.

Conclusion:

While we acknowledge the importance of access to data bases for student research, continuing or cancelling a data base subscription is an institutional budget decision and generally out of scope of this Office. Each person interviewed had a different understanding of the situation, so it appears whatever discussions or communications were attempted did not produce broad understanding. Whatever decision is made on database subscriptions, clear communication of the decision (ideally after consulting with the database users and/or discussing potential changes in advance) would be helpful in reducing concerns, especially from stakeholders primarily affected by the decision.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



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Summary Investigative Report Invalid Student Grade Appeal Process April 25, 2022

Sources of Complaint	Direct Complaint
Date(s) of Complaint	3/10/2022
Allegation	Invalid grade appeal process/faculty interference
Institution	Dickinson State University
Policy referenced/related	DSU Grade Appeal Procedure
Conclusion	Investigation results support the allegation
Investigator	Karol Riedman

Background Information

On March 10, 2022, the NDUS Office of Compliance and Ethics (“Office”) received a direct report regarding a student grade appeal for the Fall 2021 academic period. An additional direct report was received on March 11, 2022. The student, an education major, was appealing a grade received in a science course which was part of course requirements for elementary education majors. The reporter alleged the DSU Procedure was not followed, and that unreasonable exceptions were granted at the request of the Education Department Chair (“Chair A”) which did not follow procedure.

On March 28, the Office received a direct report from Chair A through the NDUS website alleging that the student’s grade appeal was unreasonably delayed and thus was mistreated by a faculty member and the administration.

Ordinarily, issues regarding student grading would be outside the scope of the Office. However, as the investigation regards whether a campus procedure was followed, not the merits of an assigned grade, the Office has authority to investigate.

Policy References

The Dickinson State University Grade Grievance Procedure states (in relevant part, emphasis added):

Students have the opportunity to resolve any academic grading concern through an informal resolution process and if that fails to resolve the concern, a formal resolution process.

Informal Resolution Process

*A. Instructor level ...the student should first contact the instructor and arrange for a conference. The academic appeal (either oral or written) must be filed with the instructor within ten University business days after the incident or, **when the appeal involves final course grades, within ten University business days after the start of the next semester.***

B. Chair Level - If the student is not satisfied with the clarification or action resulting from the instructor conference, the student then has the option to carry the appeal to the department chair. The student must notify the department chair either verbally or in writing within ten University business days after the instructor conference. After reviewing pertinent documents and interviewing the student and instructor, the chair must issue a recommendation within ten University business days after receiving a request for review of the action from the student. The recommendation is not binding; the instructor still has the authority to change the grade or allow it to stand, but the weight of the recommendation would indicate one course of action over the other.

If the student is not satisfied, the student may carry the appeal to the formal level through a written appeal to the Dean of the college in which the academic department is located. The “Formal Grade Appeal Application Form” must include specific reasons why the initial appeal was submitted and refer to previous attempts at the instructor and chair level to resolve the issue informally. The Dean will determine whether the request for formal resolution is valid or not. If determined that the appeal is not valid, the Dean will inform the students and cite specific reasons. The appeal will not go forward to the formal phase and the decision will be considered final.

Formal Resolution Process

If the Dean approves the appeal to enter the formal resolution process, the Dean will convene a review committee, examine the pertinent evidence and render a written opinion to the Provost/VPAA for concurrence and implementation within ten University business days of receiving the written appeal requesting formal resolution. This ten-day timeline may be extended by the Provost/VPAA because of extenuating circumstances.

Within ten University business days of receiving the written opinion from the Dean and review committee, the Provost/VPAA will provide a written rationale for concurrence or non-concurrence. If the Provost/VPAA does not concur with the committee’s opinion where the procedure is perceived as being flawed, the Provost/VPAA may order the appeal reviewed again by another review committee with the chair designated by the Provost/VPAA.

The decision of the review committee with concurrence by the Provost/VPAA is binding on both parties and is final. The President of DSU does not serve as a “Court of Final Appeals” in academic matters; the Provost/VPAA has final authority.

Investigation and Findings

A review of relevant emails and documents revealed that in early November, Professor B asked for guidance from Dean C regarding a possible upcoming grade appeal. Dean C advised Professor B that the process begins informally between the instructor and the student. On December 10, 2021, Chair A sent an email to Dean C and Chair A's Dean ("Dean D") stating that the student (one of Chair A's advisees) intended to dispute their grade in the course. A written statement from the student was attached. The grade being appealed was the final grade of the Fall 2021 semester, which had not yet been completed. Per procedure, the appeal cannot be submitted until the final grade is recorded at semester's end, and the deadline for requesting an informal appeal to the instructor was ten business days after the start of the Spring 2022 semester (January 10, 2022). Therefore, January 21, 2022 was the deadline for requesting an informal appeal.

Neither the instructor nor the department chair received a request for an informal appeal from the student within the ten-day period that expired on January 21, 2022. As there is no extension provision under the grade grievance procedure, the grade should have been final at that point. There is no indication in the procedure that its provisions are not binding on campus officials and students.

On Friday, January 28, 2022, Chair A sent a completed "Formal Grade Application Form" to Dean D, who sent it on to Dean C, stating that the student sought to file a formal appeal. Per procedure, a formal appeal may only be requested after the informal appeal process has been completed. Even though the deadline had passed a full week earlier, Dean C allowed the student ten additional days to seek informal resolution, by February 11, 2022. Again, the student did not contact the instructor or the department chair during that time.

On or about March 4, 2022, Chair A informed Dean C again that the student wanted to pursue the formal appeal. There had still been no attempt to follow the required informal appeal process. Despite this, pursuant to Chair A's request, Dean C advised the student that they had one week—until March 11, 2022—to contact either the instructor or the department chair (or the chair's designee) for an informal appeal meeting. This time, a meeting was arranged with the department chair's designee, Faculty E, and the student requested that Chair A be allowed to attend. The DSU Grade Grievance Procedure does not allow for another faculty member or advisor to attend, represent or advocate for the student during this phase of the informal process, so the request was denied. The student told Faculty E that they were comfortable meeting with him alone.

Faculty E met with the student on March 10, 2022. Professor F also arrived, representing the School of Education on behalf of the student. As there is no provision in the informal process for additional faculty or representatives to be present during the informal review meeting, Faculty E requested that Professor F leave the meeting. Faculty E had previously talked to Professor A, who stated that they were unwilling to change the student's grade unless there was a grading mistake. The student stated they were not objecting to any individual homework or exam grade but thought the overall course grade did not reflect the effort they had put into the course. Faculty E asked the student if they would accept an informal resolution that did not involve a

grade change, which the student declined. As a result, Faculty E determined that an informal resolution was not possible.

Dean C accepted Faculty E's recommendation and started the formal grade appeal process. The procedure requires the student to file the request for a formal appeal with the Dean after the conclusion of the informal phase; upon Chair A's inquiry, DSU Administration stated that the original formal request could be used, rather than re-submitting the information. Dean C appointed a grade appeal committee, which had 10 business days from the date of the start of the formal appeal—March 11, 2022 for the purpose of this report—making the deadline April 1, 2022 (accounting for DSU's March 14-18, 2022 spring break).¹ The deadline was communicated to the student and Chair A.

The grade appeal committee was chaired by Dean C. The committee recommended that the student's final grade should not be adjusted on March 31, 2022. Per procedure, the DSU Provost had ten days to provide a written report of concurrence or non-concurrence with the committee's recommendation. The Provost submitted a letter of concurrence with the committee decision on April 1, 2022. The decision of the provost is final.

Conclusion

The results of the investigation support the allegation that the DSU Grade Grievance Procedure was not followed in this particular case, by extending required deadlines for informal appeals by seven weeks, by not completing the first required step of the informal review procedures (appeal to the instructor) at all, and by filing a formal appeal before the informal process was completed. The student's grade appeal was not in compliance with the mandatory deadlines of the procedure and should not have been accepted.

Similarly, Chair A's allegation that the student's grade appeal was unreasonably delayed by the formal review committee is technically plausible, provided that the days of spring break are considered "University business days" under the procedure. Based on that interpretation, the formal review committee's ten-day deadline could have been extended by the Provost, but that does not appear to have occurred.

However, no part of the original filing of the appeal was in compliance with the procedure, and without a provision for exceptions or extensions during the informal phase of the procedure, there was no basis to accept the appeal. As a result, despite the foregoing, the allegation that due to delays the student was mistreated by a faculty member and the administration is not supported. The grade appeal procedure outlines a student-led process; it is the student's responsibility to initiate the informal process before the deadline, to participate in that process, and to complete all steps within the procedure's deadlines and structure.

¹ For the purposes of this report, the Office will assume (without deciding) that spring break is not comprised of "University business days," as faculty members are generally not on campus during spring break.

Recommendation:

All Dickinson State University published procedures should be followed consistently, including the DSU Grade Grievance Procedure. Here, the mandatory informal phase of the procedure was largely ignored. Faculty and faculty advisors should become familiar with these procedures, so students are aware of their options under the procedure, particularly since the informal phase does not include provisions for deadline extensions. If such extensions are an appropriate part of the process, the procedure should be revised to reflect that flexibility and how such flexibility is to be exercised.

Informal Suggestion:

Faculty members, in their role as advisors and instructors, should advocate for their students and ensure that they are aware of any possible options. All errors in this process were for the student's benefit. However, care should be taken to ensure that the process remains student-led, without the potential appearance of a faculty member influencing the process or those involved in it. Students at NDUS institutions are largely adults, and advisors should support students as they advocate for themselves without taking over the process on the student's behalf. Situations where faculty members act on behalf of a student in such a process should be infrequent and due to unusual circumstances.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Academic Freedom/Instructional Interference April 25, 2022

Sources of Complaint	Direct Report to the Office of Compliance and Ethics
Date(s) of Complaint	3/10/2022
Allegation	Violations of Academic Freedom, Data Privacy and FERPA
Institution	Dickinson State University
Policy referenced/related	DSU Student Handbook - Class Attendance Policy DSU Student Code of Conduct SBHE Policy 401.1 Academic Freedom DSU Policy 401.1 Faculty Rights and Responsibilities/Academic Freedom and Community Welfare NDUS Procedure 1912.2 Student Records – Directory Information
Conclusion	Investigation results support the allegations
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics (“Office”) received a direct report regarding a faculty member (Professor A) who was replaced with another instructor (Instructor B) to teach a course without due process and in violation of Academic Freedom. The initial report was not made by Professor A. The report alleged that a Department Chair (Chair C) who advised some or all of the students in the class encouraged students to drop the course and take a summer online course, and also pushed for DSU Administration to replace Professor A as instructor of the class. Chair C’s department is located in a different college from Professor A and the course in question but is the “home” department for the students enrolled in the class.

Professor A’s course fulfills a requirement for elementary education majors. All students enrolled in the course for Spring 2022 were elementary education majors. Midway through the semester, some of the students were struggling in the class. Tutoring was available to all students and Professor A was willing to meet with students individually for extra help. Poor attendance and failure to turn in assignments contributed to the situation.

Chair C believed the poor grades were due to Professor A’s failure to teach the course effectively. Education majors have GPA requirements for student teaching so a low grade in

Professor A's class could delay their progress toward student teaching and graduation and could impact retention in Chair C's department. To avoid these negative outcomes, Chair C allegedly encouraged students to withdraw from the class and take a similar online class from another NDUS institution and ultimately sought to have Professor A removed from teaching the class. In the process, Chair C allegedly violated policies relating to Academic Freedom and FERPA and caused students to violate the DSU Student Code of Conduct and Class Attendance Policy. Students did withdraw from the class and, following a meeting with DSU administration and college deans, Professor A was replaced as instructor of the course by Instructor B, a DSU administrative employee who possessed appropriate credentials to teach the class, but who had not recently taught courses at DSU.

Policy References

DSU Student Handbook - Class Attendance Policy (in relevant part):

Students are expected to attend scheduled classes and labs as published in the official class schedule. Deviation from this general policy must be approved by the instructor and respective dean.

DSU Student Code of Conduct 2.2 Academic Freedoms and Responsibilities (in relevant part):

Students have the right to be informed of the content and objectives of a course, the methods and types of evaluations, and the relative importance of each test, paper, and assignment, comprising the total evaluation. Students are responsible for meeting the requirements of a course of study according to the standards of performance established by the instructor. This includes regular class attendance when established as an essential element of course content.

SBHE Policy 401.1(2) (and DSU Policy, substantially similarly) states, in part:

2. Academic Freedom. [. . .] *Faculty are entitled [to] freedom in designing and teaching their assigned courses.*

NDUS Procedure 503.2 Student Records – Directory Information

SBHE Policies 311 and 503.2 require that each institution adopt a policy as required by the Family Educational Rights and Privacy Act (FERPA). Such policies must include a definition of "directory information." All or a portion of directory information may be released publicly in printed, electronic, or other forms at the discretion of the colleges or universities on a case-by-case basis.

Investigation and Findings

The objectives of the investigation were to determine whether it was a reasonable conclusion that Professor A's teaching was primarily responsible for the students' grades, whether replacing Professor A with Instructor B followed due process and/or stated policies and procedures and

whether Chair C's involvement in Professor A's class and students was reasonable and appropriate.

Please note that many details in this report are provided at a high level of generality as a result of privacy obligations related to FERPA.

1. Professor A was aware that the students in this class were elementary education majors and were not pursuing degrees in the department of the course. To increase accessibility the teaching methods were modified as follows:
 - a. Lecture and presentation of the topic using PowerPoint slides for examples.
 - b. In-class exercise using identical examples as in the PowerPoint, with slightly different numbers.
 - c. Homework assignment identical to PowerPoint and in-class exercise, using slightly different numbers.
 - d. Exam questions identical to the PowerPoint, in-class exercise, and homework, using slightly different numbers.

Professor A provided the Office with materials for one topic, and the Office's review of these materials supported the above description of the teaching method for this class. Professor A also noted that they had also curved student grades in the past and was considering doing the same for this semester.

Department Chair D (Professor A's supervisor) observed the class in response to the concerns related by Chair C and reported that they found no deficits in Professor A's teaching. Chair D also noted that historically the students have earned lower grades during the first half of the semester in this class, but by the end of the semester the grade distribution is "fairly typical." Instructor B also observed Professor A's class and reported to the Office that the class was "structurally set up for student success." In addition, Instructor B reported that the strategies planned for teaching the class after the transition were not significantly different than the methods used by Professor A. Noting the low attendance in the class, Instructor B did mention that it is typically difficult for students to succeed if they don't attend class.

A review of attendance records and scores for the first part of the semester showed a clear correlation between student success in the course and attendance and homework completion rates. Those students who had regularly attended class generally had much higher overall grades than those students who did not attend, did not turn in homework, or who did neither.

In response to questions from the Office, DSU Administration suggested that once the students got to mid-semester, if their grades were so low it appeared they may not pass, they may give up and quit coming to class. However, many of the students who were not experiencing success missed class frequently from the onset of the term. Only one of the students not experiencing success attended more than half of the classes. Of note, both the DSU Student Handbook and DSU Student Code of Conduct support and/or require regular attendance and meeting the requirements (such as completing assigned homework) of a course that are established by the instructor.

Instructor B reported that after about four weeks teaching the class after replacing Professor A, there had not been a significant improvement in grades, even after dedicating three class periods for review before a recent exam. Instructor B also did not observe an increased use of tutoring services and felt the students' apathy toward homework was disappointing.

Recommendation

The comments from Chair D and Instructor B, as well as the attendance records that correlate with the grades indicate that it is not a reasonable conclusion that Professor A's teaching was primarily responsible for the students' low grades. Because there was no significant improvement seen after Instructor B began teaching the class, the Office recommends pursuing a collaborative solution between the Departments to determine joint reasonable expectations for the course and to strategize additional student supports if needed. Motivating students to attend class, submit graded homework, and use tutoring services could be re-emphasized by the students' advisors, or creative study solutions might be organized. However, DSU Administration and faculty should remember that students are adults and should take the lead in ensuring their own success in their educational program. Under the circumstances, the solution to the lagging student success was not to change the instructor of the course.

2. Chair C, as an advisor to education majors, became aware that some students were not having academic success in Professor A's class. On February 23, 2022, Chair C expressed concerns to Dean E (Chair C's supervising Dean), who then communicated with Dean F (Professor A's supervising Dean). Dean F said he would discuss with Chair D and Professor A and report back to Dean E. Within the department, various strategies were said to have been considered, including arranging for a teaching assistant, increasing tutoring opportunities and providing additional study materials. Chair C rejected these considerations, responding that in order to preserve the retention of Chair C's department's majors, a pathway would need to be created through which they could be successful. Chair C stated that they intended to encourage students to withdraw from Professor A's class and enroll in a similar class offered online during the summer by another NDUS institution.

In the meantime, Chair C sent a group email to all students enrolled in Professor A's class. The email identified them all as elementary education majors enrolled in Professor A's class and said that Chair C had met with students who were struggling, and that she understood that they were also struggling. Various exchanges occurred where Chair C suggested the students could drop the class and take a similar online class (from a different university) over the summer. Some of these emails occurred in side emails without other students copied; others copied other students on the chains. Chair C at various points encouraged students to attend class so that poor attendance could not be blamed for some students' lack of success.

On or about March 3, 2022 Chair C met with Dean E and DSU Administration to request a teaching replacement for Professor A in that class. On March 4, Instructor B was asked to take over teaching the class. The same day, Chair C sent another group email to all enrolled students stating that Chair C was assured by DSU administration that changes will be made which will allow them to succeed in the class with a passing grade that won't make them ineligible for teacher education.

On Monday March 7, Instructor B observed Professor A's class and did not identify any deficits in teaching methods. Instructor B was uncomfortable with the request but agreed to take over teaching the class for the remainder of the semester because they felt they had no choice or viable alternative based on discussions with DSU Administration.

Chair C emailed the students in the class, informing them that the instructor would be changed and not to attend Professor A's class anymore. The following day, March 8, no students attended class. Professor A contacted Chair D and Dean F to complain about Chair C's interference. Chair D and Dean F shared that DSU administration had determined that Instructor B would teach the rest of the semester. Chair D and Dean F also indicated they were not necessarily in agreement with the decision. Under the circumstances, Professor A felt he had no choice but to step back from the class.

It is highly unusual that Chair C, who was from a different college and department from Professor A, would have standing to request that Professor A be replaced in the middle of a semester without regard to any internal review or discussion within the department. Chair D and Instructor B both observed Professor A's teaching and supported the strategy and methods used. That the students were not regularly attending class (or attending class at all) and were not turning in homework apparently was not considered by DSU Administration or Chair C. Professor A and the department were not provided an opportunity to try additional support strategies; less than two weeks after Chair C reached out to Dean E with the grade concerns, Professor A had been replaced by Instructor B.

Recommendation:

DSU Administration should either reinstate Professor A as instructor of the course or ensure that they suffer no consequences for the removal of the course, as they were not provided any measure of due process prior to the DSU Administration acting. Moreover, where student success is a concern, DSU Administration should carefully employ strategies that do not infringe on faculty academic freedom. Here, Professor A was entitled to freedom to design and teach the course pursuant to SBHE Policy 401.1. The decision to remove the instructor from the class, rather than engage in mitigation or other support strategies was likely made in derogation of academic freedom, particularly where both Chair D and Instructor B did not find fault with the manner in which the course was taught.

Moreover, as a matter of shared governance, DSU Administration should be careful to include relevant stakeholders in this type of decision-making process. Here, the discussions were largely between DSU Administration, Dean E, and Chair C, without meaningful participation by Dean F, Chair D, or Professor A. As a result, Professor A learned that the course had been effectively taken away after students told them that Chair C told the elementary education majors to stop attending (and when no students were in attendance). The department was not given the opportunity to attempt its own faculty- and student-focused solutions, or to work with Professor A to develop additional strategies, and the decision was made without consideration of any cause for the lack of student success other than alleged inadequate teaching. Instead, DSU Administration gave the students a new instructor and a promise from Chair C that they would

succeed, rather than allowing the students to be accountable to the requirements of the class and take advantage of the resources provided. As a result, four weeks later few students have improved their success level.

3. The Office also received several complaints regarding Chair C's interference with Professor A's course. These included numerous allegations that Chair C encouraged the students to withdraw from this class, to stop attending class, and take an online course over the summer from a different NDUS institution. A review of documents showed numerous instances of Chair C encouraging students to drop Professor A's class, and several times recommended taking the online class, as well as informing Dean F of those intentions.

Moreover, the Office also has significant concerns about Chair C writing group emails (with all students clearly identified) which revealed to each of them that they were struggling in the class. There is no indication that the students had provided a written waiver of their FERPA rights to permit Chair C to discuss their success in Professor A's course with their classmates. Moreover, the information that was shared was not designated as student directory information and so may not be released without student consent pursuant to NDUS Procedure 1912.2 (currently pending renumbering to NDUS Procedure 502.1). This may also be a violation of FERPA regulations, which prohibit releasing student educational information without a signed release from the student. However, violations of FERPA are delegated to the Student Privacy Protection Office at the United States Department of Education, and this Office is not equipped to make such a finding.

During the process of requesting an instructor change, Chair C told the students in Professor A's class to continue attending class so it wouldn't seem like attendance was the problem rather than the instruction. Chair C also shared with the students their hope that Professor A wouldn't be teaching the class in the future. Chair C encouraged students to drop the class because Chair C didn't want there to be a D or F on the students' transcripts, but recommended they continue attending the class until they drop it so that Chair C could make the case to DSU Administration that the students were trying hard, but instruction was the problem.

Further, Chair C promised students that based on the DSU Administration's changes, they would receive a passing grade that would make them eligible for teacher education, without regard for student effort. Chair C also told the students that Instructor B wanted them to know they would begin with a clean slate so it would still be possible to do well in the class, while Instructor B stated this was incorrect and there was no intention to entirely disregard the existing grades.

The communications reviewed by the Office demonstrate that Chair C acted to directly undermine the teaching of her colleague, Professor A, which had met the approval of Professor A's own department. Instead, Chair C repeatedly suggested that students drop the class, encouraged students to take an alternate online class from another institution (without informing students that they would have to become collaboratively enrolled), made disparaging comments about Professor A, and seemed to be attempting to ensure that students in Professor A's course would receive a grade of C or higher, even though many students had not been attending class, turning in graded homework, or using tutors or other resources to assist in learning the concepts.

With these comments and actions, Chair C intentionally interfered with Professor A's class. This, along with successfully seeking to remove Professor A from his assigned class constitutes a potential violation of SBHE Policy 401.1 and creates a chilling effect on principles of academic freedom. It sends a message that faculty may not be allowed to teach their courses with the methods and strategies deemed effective by their department because DSU Administration may allow faculty from outside the department to interfere with the class up to and including removing them from teaching the course, with all the attendant personal and professional consequences that may bring.

Recommendation

Good faculty advisors can be valuable resources for the students. However, their role is to advise students on options and resources to help them succeed, without becoming so invested in the student that professional judgement and perspective may become clouded. Under DSU Student Code of Conduct Section 2.2, students are responsible for meeting the requirements of a course of study according to the standards of performance established by the instructor, not the chair of a different department. Appropriate avenues to improve student success include encouraging students to attend class, completing assignments, being aware of resources such as tutoring, study groups, working with their professor, or requesting additional help and support. This does not include interfering with the professor's teaching or seeking to remove them from the class. Performance issues or instructional disagreements should be addressed within the department's supervisory chain, not by seeking to overrule the processes in place.

Conclusion

Student success is crucially important and DSU is known for going the extra mile to assist students in achieving their goals. While retaining students and successful graduation rates are an important institutional goal, interfering with the rights and academic freedom of the faculty is not the right path to reach that goal. DSU Administration should consider educating its leadership, along with that of the departments and colleges, on the importance and role of academic freedom, along with the resources available to department chairs and advisors to help their students reach the expected level of success.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Hiring Process Irregularities/Violations April 25, 2022

Source of Complaint	Eide Bailly hotline, various sources of Direct Reports
Date of Complaint	12/14/2020, 5/2/2021, 6/5/2021 and others
Topic of Allegation	Violations of policy, procedure and law relative to employee hiring processes
Institution	Dickinson State University
Policy referenced/related	NDUS Procedure 601.0 Veterans' Preference N.D.C.C. 44-04-18.27 Applications for Public Employment
Conclusion	Investigation supports the majority of allegations, recommendations given
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received multiple reports through the Eide Bailly Fraud Hotline and through various direct venues regarding irregularities or violations in hiring practices. Some of the reports were anonymous and did not provide sufficient details to investigate. The Office did investigate five specific examples that had similar issues in process, so those are included in this collective report. When hiring processes are not followed, the search and hire can come under scrutiny and result in legal risk to the institution.

The investigations and recommendations in the following report are focused on policy, procedure and process, not as an analysis of the wisdom of the final hiring decisions themselves.

Policy References

NDUS Procedure 601.0 Veterans' Preference

*1. **Employment Requirements** North Dakota Century Code chapter 37-19.1 requires that qualifying veterans and spouses of qualifying veterans be granted preference in any state institution authorized to employ individuals either temporarily or permanently when hiring through an external recruitment process. Veterans' preference does not apply to internal recruitment and selection provided the candidate was originally hired through a competitive search process.*

[...]

3. Vacancy Announcements: *Vacancy announcements for externally recruited positions which are eligible for preference must state veterans claiming preference must submit all proof of eligibility by the closing date. Proof of eligibility includes a DD-214 and if claiming disabled status, a current letter of disability. If an exempt position is advertised, the advertisement must state that veterans' preference does not apply to the position being advertised.*

N.D.C.C. 44-04-18.27 Applications for Public Employment

If a public entity or any person delegated authority by a public entity to review applications or make hiring decisions receives applications from three or more applicants who meet the minimum qualifications for a vacant position, the public entity or other person shall designate three or more of the qualified applicants as finalists for further consideration before the public entity or other person may issue an offer of employment to fill the position.

Investigation and Findings

Staff Position hired January 2021

One direct report was received regarding the search for a staff position. The report alleged bias and favoritism toward a certain applicant (Applicant A) who was not qualified for the position, by the search committee chairman (Member B). Per the position announcement, the sole minimum qualification was a Bachelor's degree, with required competencies including MS Office Suite, and strong organization, time management, communication skills and student service. Preferred qualifications included experience in a Higher Education setting and knowledge of/familiarity with various student-related services. Five applications were received during the initial period, while a sixth was received after the first five had already been sent to the search committee and had been ranked. The ranking sheets were updated to include the sixth applicant. All six applicants were deemed to be qualified and were ranked by the search committee.

Three of the six applicants that were deemed "qualified" (including Applicant A) did not have a Bachelor's degree, thus did not meet the required minimum qualification as stated in the position description. Applicants received 5-10 points on a scale of 10 for qualifications and competencies such as time management and organizational skills, with no objective way to evaluate these attributes. Some of the applicants referred to these "required competencies" in their application materials but offered no evidence to assist in accurate evaluation. Applicant A included a Member B as a personal reference in the application materials.

The three members of the search committee ranked the applicants' materials, and the scores were combined to create the totals used to select finalists to be interviewed. Scoring was done using standard Excel spreadsheets for most search committee members, but one committee member apparently added scores manually (and incorrectly) and entered the total as a value, rather than using provided formulas for the computation. This resulted in addition errors which could have changed the outcome of the search. Fortunately, the Director of Human Resources corrected

these incorrect scores while compiling the final ranking. The final candidates to be interviewed were initially not selected strictly based on rank order, but the Director of Human Resources recognized the potential concern and brought it to the attention of the search committee chair, who adjusted the interview selection decision. Due to the withdrawal of two applicants during the search process, two candidates were interviewed and Applicant A was the successful candidate.

Recommendations:

- DSU must designate finalists where more than three qualified applicants submit applications. Pursuant to N.D.C.C. § 44-04-18.27, “[i]f a public entity [. . .] receives applications from three or more applicants who meet the minimum qualifications for a vacant position, the public entity *shall* designate three or more of the qualified applicants as finalists for further consideration before the public entity [. . .] may issue an offer of employment to fill the position.” Here, only two applicants were interviewed, and three finalists were not designated prior to an offer of employment. DSU search committees and hiring authorities should ensure that three finalists are designated prior to making an offer of employment.
- Applicants who lack a minimum required qualification should not advance in the process. In this case, if a Bachelor’s degree was a minimum qualification, but could be excused in favor of having a degree in process or relevant experience, this should be included in the position announcement to provide notice to potential applicants. As written, with no exception language, three applicants should not have been in consideration. Moreover, other potential applicants may have applied if the exceptions made to the required qualification would have been stated. While position postings may be revised, an offer of employment should not be made to an applicant who does not meet minimum qualifications as set forth in the position description.
- Generally, applicants should be ranked based on objective criteria that is apparent from a resume, curricula vitae, or other application materials. If applicants are to be ranked based on subjective criteria or “competencies” such as organization, time management, communication, etc., evidence of these competencies should be required, either by inclusion in application materials or by other means. These competencies are difficult to impossible to fairly determine based only on a resume, unless the cover letter explains how the applicant meets the required competency.
- Ranking sheet scores on an excel spreadsheet should be calculated via formula rather than added manually and entered in the spreadsheet as a value to avoid potentially significant errors. The Director of Human Resources should continue to check formulas and totals in the compilation and verification process.
- Final candidates for interview should be selected in rank order starting at the highest rank. Any exceptions should be documented. For example, best practices would not support selecting the applicants ranked 1, 2, and 4 instead of 1, 2, and 3 without documented extenuating circumstances.
- Members of the search committee who are also listed as a reference for an applicant should not participate as a member of the committee. Agreeing to provide a reference for an applicant while serving on the search committee creates an appearance of or actual

bias which is not appropriate for a search committee member, especially the chair of the committee.

Faculty position hired May 2021

Three Eide Bailly hotline reports and several additional direct reports were received regarding a hiring process for a faculty member. The allegations, summarized from all reports, were that “Applicant C” was recruited for the position before it was opened, that the position was opened while the incumbent’s separation was still under appeal, and that Applicant C was allegedly the neighbor or friend of a search committee member (“Member D”) and bias was alleged.

Faculty Member E was in the midst of a complicated separation process beginning about March 8, 2021 which was not fully resolved until after this hire was complete. When the Office questioned Member D about the propriety of hiring for a position whose vacancy was under appeal, Member D responded that there were two potentially similar open positions, and they were not interviewing for Faculty Member E’s position. However, notes from a March 10, 2021 meeting revealed that even though there was an additional unfilled faculty position in the department, “we will only be moving forward with replacing [Faculty E’s] position at this time,” and the other position would no longer be needed. The position was posted March 15, 2021.

The required minimum qualifications for this position listed in the job posting included the appropriate ND license, either holding or in the process of completing a Master’s degree in a related field, two years of experience in practice and specific knowledge and experience. Required competencies included excellent computer/internet skills, ability to safely operate relevant supplies and equipment, ability to organize/prioritize, strong interpersonal/oral/written communication skills and detail oriented. Preferred qualifications included holding a doctoral degree, knowledge and experience in specific areas and experience teaching undergraduate courses.

Four applications were received for the position and routed to the search committee for scoring and ranking. Subsequently, a fifth application was received from Applicant C, and Applicant C was added to the bottom of the scoring sheets. All five applicants were deemed to have met the required qualifications. However, three of the five search committee members scored one or more applicants as not meeting the Master’s degree requirement, affecting three applicants including Applicant C.

The final compiled ranking showed that all five met the Master’s degree requirement despite committee members’ individual scores. The required competencies were scored, though evaluating the five skills would be difficult or impossible based on written application materials. Moreover, a sixth competency, “strong customer service skills,” was included in the ranking sheets and scored despite not being part of the job posting.

The five members of the search committee ranked the applicants, and the scores were combined for the totals used to select finalists to be interviewed. Rankings were done using standard Excel spreadsheets, but two committee members apparently added scores manually and entered the total as a value, rather than using formulas for this computation. This resulted in addition errors

which could have changed the outcome of the ranking and overall search. Fortunately, the Director of Human Resources corrected these scores while compiling the final ranking. All five candidates were selected to be interviewed, while three participated in a second interview. No finalists were formally designated.

Moreover, the Office received reports alleging that Applicant C was a neighbor or friend of Member D. Member D confirmed that they knew Applicant C as a community member but also noted that they were acquainted with or knew all but one of the candidates. Another hotline report alleged that when Applicant C's interview began, Member D greeted the candidate by saying "Hi Neighbor!" This was corroborated by another search committee member.

Recommendation:

- DSU Administration should provide additional training or instructions to its administrators and employees regarding providing full, frank, and non-misleading responses to the Office's requests for information. Here, Member D misled the Office, intentionally or not, by informing the Office that the position to be filled was not Faculty Member E's position. *See* SBHE Policy 306.1(4); SBHE Policy 308.1(13).
- As noted above, DSU must designate finalists where more than three qualified applicants submit applications. Here, while all five applicants were interviewed, and three received a second interview, DSU did not formally designate finalists. DSU search committees and hiring authorities should ensure that three finalists are designated prior to making an offer of employment.
- Applicants who lack a minimum required qualification should not advance in the process. In this case, if three committee members noted that one or more applicants did not meet the Master's degree earned or in process, there should be notes or explanation clarifying why the applicants were moved forward in the process, whether there was a misunderstanding, an error or an exception. If there is a basis for an exception for a minimum qualification, it must be included in the job posting.
- Generally, applicants should be ranked based on objective criteria that is apparent from a resume, curricula vitae, or other application materials. If applicants are to be ranked based on competencies such as ability to organize/prioritize, strong communication skills, and being detail oriented, evidence of these competencies should be required, either by inclusion in application materials or by other means. These competencies are difficult to impossible to fairly determine based only on a resume, unless the cover letter explains how the applicant meets the required competency.
- Committee members rank applicants based only on application materials and whether they meet the requirements of the job posting, therefore adding scored competencies or qualifications that were not included in the job posting is prohibited. Applicants cannot be scored on a qualification or competency which they were not required to substantiate by the job posting.
- Ranking sheet scores on an excel spreadsheet should be calculated via formula rather than added manually and entered in the spreadsheet as a value to avoid potentially significant errors. The Director of Human Resources should continue to check formulas and totals in the compilation and verification process.

- Individuals who are members of the search committee and are acquainted with applicants should disclose that relationship and should recuse themselves if a personal bias is unavoidable. While it is likely that search committee members may know applicants, particularly in a smaller community like Dickinson, search committee members must endeavor to avoid the appearance of bias in hiring. For example, greeting Applicant C with “Hi, Neighbor!” while greeting other applicants professionally creates an appearance of bias. In every case, interviewees should be treated in an identical manner to the extent possible, regardless of any pre-existing relationships.
- Faculty Member E’s separation process was more complex than the typical situation and is not addressed in this document. However, where possible, care should be taken to ensure open positions are not posted until after the position to be filled is open to avoid a situation where DSU may have to terminate a newly hired employee to make space for a successful appellant.

Dean Positions hired August 2020

On July 10, 2020, DSU Administration announced new Dean positions for both the College of Arts and Sciences (CAS) and College of Education, Business & Applied Sciences (CEBAS). It was noted that the positions would be filled internally and that application materials would be accepted until July 24, 2020, with a start date of August 1, 2020. The position announcements were substantially identical. The minimum qualifications included a terminal degree, five years of higher education teaching experience, prior higher education supervisory experience, and demonstrated superior communication skills. Preferred qualifications included tenure and experience as Department Chair or other leadership experience within the College.

Direct reports received by the Office alleged incomplete and biased hiring processes. The Office’s investigation revealed that both searches were conducted by a single DSU administrator without a search committee. According to the DSU Administration, two reviewers assisted with the process, but no records were provided to the Office documenting their duties or results of their reviews. DSU Administration declined to provide additional or contemporaneous information regarding the role of these reviewers. According to the DSU Administration, there were three internal applicants for one dean position, and a single internal applicant for the other.

After the applications were received, the sole DSU Administrator conducting the search selected Dean F and Dean G without conducting interviews or other ordinary vetting procedures. Dean F and Dean G allegedly met all the listed qualifications at the time of their hire.

Recommendations:

- DSU Administration should provide additional training or instructions to its administrators and employees regarding the requirement to respond to all reasonable requests for information and documents from the Office, as set forth in SBHE Policy 306.1(4).
- DSU should follow all applicable hiring practices for leadership roles, such as these Dean positions, including a search committee and interviews, to avoid the appearance of bias.
- Though employees who have been through a competitive search at the institution may be internally promoted by appointment, after announcing a formal position opportunity and

application process a full search and hiring process should be completed. Generally, competitive internal hiring processes (as opposed to promotion or appointment) should be limited, as if a search is to be conducted, permitting outside applicants does not add to the requirements.

- DSU Administration should ensure that search committees or hiring committees are appointed for the hiring of administrators, rather than limiting the review of applications and hiring decision to a single administrator. This is particularly true where a single administrator would be supervising the position and conducting the hiring process, which opens the door to allegations of favoritism and bias, which would be difficult to defend against without a committee.

Dean position hired November 2020

One Eide Bailly hotline report and several direct reports made numerous allegations regarding improper hiring processes related to filling an open Dean position in November 2020. These allegations included that:

1. The search committee did not follow prescribed procedures, such as failing to designate or interview finalists.
2. Ranking sheets were falsified, or committee members were persuaded to change their rankings to agree with the majority opinion.
3. Applicants considered for the position, potentially including the eventual hire, did not meet the minimum qualifications.
4. Search committee members were biased for and against applicants due to non-academic and personal factors including an applicant's past disagreement with administration actions and decisions.

The search for an open Dean position was announced October 27, 2020. It was noted that the position would be filled internally and that application materials would be accepted until November 3, 2020, with a start date of January 1, 2021. The minimum qualifications were a terminal degree, five years of higher education teaching experience, prior supervisory experience of faculty and/or staff in higher education and demonstrated superior communication skills. Preferred qualifications included tenure and experience as Department Chair or other leadership experience within the College. Four applicants were screened and determined to have met the required qualifications. These four were brought forward to be ranked by the search committee.

The search committee members ranked the applicants, and a meeting was convened to consider the results. The recommendation to hire Applicant H came directly from that meeting; there were no interviews. Per N.D.C.C. 44-04-18.27, since there were three or more applicants who met minimum qualifications, three or more applicants were required to be designated finalists for further consideration before issuing an offer of employment. No finalists were designated.

Reports also alleged that ranking sheets were changed, revised, or falsified to favor the recommended Applicant. Search committee Member I confirmed that the original ranking sheets at the beginning of the meeting were revised by the end of the meeting to show consensus and no longer reflected the original scoring by the members. Committee Member J stated that the search

committee was not really a search committee, but more of a “review team,” and since the previous Dean search (see August 2020 above) did not include interviews, it would be inconsistent if they interviewed for the position when it was reopened. In response to questions from the Office, Committee Member K provided decision factors not included in the position opportunity or ranking sheets (including references to prior experience and interactions between applicants and DSU administration) to explain how the decision was made without interviewing.

The ranking sheets included the four minimum qualifications and preferred qualifications listed above. The job posting indicated that the third requirement was prior **supervisory experience** of faculty and/or staff in higher education, and that was reflected on the ranking sheets. However, the scores provided on the ranking sheets by Committee Member J and Committee Member K cannot be squared with the written requirement. Instead, the recommendation for hire and all related communication only referred to “potential for leadership” and “leadership” in other areas. These two concepts are not equivalent. If the desire was for applicants to show “potential leadership” and “leadership” in other areas, the job posting should have been revised to reflect the true qualifications for the position.

Allegations of bias or favoritism of committee members toward and against applicants could not be reliably investigated, as are other intent-based allegations. However, one Committee Member told the Office that it felt like the decision had been made prior to the meeting to evaluate the ranking sheets filled out by the search committee. The inconsistencies pointed out above do not assist in dispelling concerns regarding bias or favoritism.

Recommendations:

- DSU should follow a standard hiring process that includes finalists being selected for interviews after completing ranking sheets. DSU should defer to HR best practices, which include interviews when there are multiple qualified applicants ranked by the search committee.
- Though it is allowable for an employee who has been through a competitive search at the institution to be internally promoted by appointment, after announcing a formal position opportunity and application process, the full search and hiring process should be completed. Generally, competitive internal hiring processes (as opposed to promotion or appointment) should be limited, as if a search is to be conducted, permitting outside applicants does not add to the requirements.
- Once applications have been submitted, DSU should be careful not to change the advertised qualifications for any reason without re-posting the job position, as changes to the qualifications may encourage additional qualified applicants to apply.
- Because there were three or more qualified applicants, making an offer of employment without designating finalists violates N.D.C.C. 44-04-18.27.

Conclusion

The search and hiring process at DSU is clearly set out in the hiring checklist and instructions provided by the Director of Human Resources in each of these examples, yet in none of these situations were these instructions followed. Deviating from this process can make the institution

vulnerable to reviews, appeals and legal action. The errors and inconsistencies identified above could have been avoided or mitigated by involving the Director of Human Resources at each step, following their instructions and relying on their recommendations. Instead, the records reviewed by the office indicated that the Director of Human Resources was either not consulted at all, consulted too late in the process to address shortcomings, or the Director's recommendations were ignored. Similar issues were present in other hiring processes which were not the subject of reports to the Office. Additional training and certification are available if DSU Administration seeks to further enhance the Director of Human Resources' credentials. Additionally, resources such as HR professionals at other NDUS institutions and assigned legal counsel should be consulted and relied on for complex issues.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive, flowing style.

Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Improper Demotion/ PIP/Separation April 25, 2022

Sources of Complaint	Direct Complaints
Date(s) of Complaint	3/12/2021, 7/9/2021
Allegation	Unsupported Demotion and Inappropriate PIP
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 306.1 Compliance Charter SBHE Policy 308.1 Officer and Employee Code of Conduct SBHE HR Policy 25 Job Discipline/Dismissal
Conclusion	Investigation results support the allegation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received an anonymous direct report through the ndus.edu compliance website alleging that an employee (“Employee A”) was terminated from employment due to his involvement in a prior procurement that was found to have multiple irregularities and violations of process. A second direct report alleged that the employee was unjustly blamed for the irregularities and was subsequently demoted. The report further alleged that three months later, Employee A was further demoted, took a substantial reduction in salary without just cause, and placed on a performance improvement plan that violated HR Policy 25, which led to his resignation.

Policy References

SBHE Policy 306.1(4) provides, in part:

The Office shall be afforded unrestricted access to any and all NDUS and its institutions’ records, physical properties, and personnel pertinent to carrying out any engagement, subject to the requirements of state and federal privacy laws such as FERPA and HIPAA. All NDUS employees shall assist the Office in fulfilling its roles and responsibilities by complying with the Office’s reasonable requests.

SBHE Policy 308.1(13) provides, in part:

All officers and employees shall cooperate in investigations of alleged violations.

SBHE HR Policy 25 states (in relevant part):

1. A regular staff employee may be dismissed from employment, suspended without pay, or changed to a lower pay rate for just cause. Just cause includes conduct related to the employee's job duties, job performance, job abandonment, or working relationships which is detrimental to the discipline or efficiency of the institution or office in which the employee is or was engaged.

2. The employing department or office shall notify the employee and the appropriate campus official of the proposed action in writing. The written notice must include:

- a. a statement that the supervision intends to dismiss, suspend, or demote the employee;*
- b. a statement identifying any policies violated by the employee;*
- c. a statement of the specific charges against the employee; citing the employee's behavior, dates and/or occurrences, witnesses, and other evidence against the employee;*
- d. notice that the employee may provide the supervisor with evidence, explanation, or other information in writing which contradicts the allegations and evidence; and*
- e. notice of the employee's status until the final decision is made (i.e. whether the employee is to continue working or be placed on leave of absence with pay).*

3. A regular staff employee who is being suspended without pay, dismissed, or changed to lower pay rate for disciplinary reasons shall be entitled to a pre-action review. This review may be limited to the written record including the employee's written response to the allegations, or at the option of the institution or office, may be conducted in person. The pre-action review shall be held no sooner than three working days from the time notice was provided to the employee.

Investigation and Findings

The following recitation of findings is based on the Office's review of documentary evidence and interviews regarding the reports referenced above. This report is not intended to address the merits of the decisions in question; instead, the investigation and report are intended to examine the process used and determine whether applicable policies and procedures were followed.

Employee A was a 16-year employee of DSU and the Director of the TREC office, which supported distance learning and instructional design, reporting to the VPAA's office. Their performance reviews were extremely positive; the Office's review did not reveal any areas where Employee A was rated as "does not meet expectations" or a similar rating for at least the past five performance evaluations. In or around December 2020, DSU's administration reorganized

the institution's information technology resources, resulting in the TREC office moving under Supervisor B, the institution's CIO, who reported to the VPFA. As a result, Employee A's job title changed from Director of TREC to "Distance Learning Specialist." However, Employee A continued to supervise two employees within the former TREC team, and their salary remained the same (\$69,800).

Three months later, on March 1, 2021, Employee A was called into Supervisor B's office for a meeting, at which Employee A was presented with a document titled "Notice of job responsibility and subsequent pay rate change and performance issues" (the "Notice"). Attached to the document was a revised job description with the same title, "Distance Learning Specialist." The primary change in the job description was the removal of supervisory duties, though there were also some reductions in other task areas. The Notice stated that these changes would result in the reduction of Employee A's salary. The notice indicates that Employee A would be entitled to appeal the reduction.

Notably, a few days earlier, the Director of Human Resources had been asked to look into the salary rate for a "Course Designer" position, and recommended a range of \$50,000-\$64,000, depending on experience. Both prior and subsequent emails in the same chain made clear that this request was for Employee A's position. Despite this range, the Notice set Employee A's new salary at \$40,000 per year, a 42% reduction, which resulted in Employee A being paid less than one of the employees they had supervised until the March 1, 2021 meeting and only marginally more than the other, despite having more experience and a Master's Degree.

The Notice also included a number of critiques of Employee A's job performance and placed him on a Performance Improvement Plan ("PIP"). Two of the specific concerns raised in that letter were that Employee A had been late to a Dual Mission meeting on February 14, 2021 and that prompt responses were not received to an instant message and two emails over the prior three months. Records provided to the Office indicated that Employee A signed into the 1:00 pm meeting at 12:57 pm, but it was not possible to determine exactly which instant message and emails were referred to in the letter. The Notice also stated that Supervisor B had received "passing" complaints regarding Employee A "remaining in meetings as an observer" and not showing up, or showing up late, to IVN classes. No examples were provided of the latter two issues. The Notice also included a few other "general observations," including that "[a]rrival to work is after 7:45 am," "Progress is not being made or reported on Remote Course Delivery or Microsoft Teams," "Ability to multitask is a skill that needs significant improvement," and "[a]n inability to leave personal emotions or beliefs out of situations. No concrete examples were provided of these "general observations."

The Notice concluded: "If you are unable to fill this position, then I will need to search to fill it as it is a crucial position for our unit. Because time is of the essence, if I do not see rapid improvement in the next couple of weeks, this position will end on 3/12/2021. If progress is being made, then it may continue longer."

The attached PIP stated, as the sole criteria for improvement, that Employee A "must exhibit initiative, drive, motivation, and feeling that you want this position. Requesting assistance and resources to help you perform the duties required of this position when necessary." The PIP

further indicated that Employee A would meet with either Supervisor B or another employee every other weekday at 7:45 am. However, these meetings were never scheduled or conducted, though the record is unclear as to whether it was Employee A or Supervisor B's responsibility.

Prior to the imposition of this PIP, Employee A had never received a written warning, or been made aware of the performance issues set out in the PIP. On March 8, 2021, Employee A appealed the reduction in salary pursuant to SBHE HR Policy. In their appeal, they noted that the new salary level would be far less than those performing similar roles with similar education or experience. Employee A also responded to the specific job performance allegations in the Notice.

The DSU president responded to the appeal after close of business on March 10, 2021, stating that due to other obligations, he would not be able to appoint a Staff Personnel Board to hear the appeal until the week of March 15, 2021.

Similarly, on March 10, 2021, Employee A asked Supervisor B if there was even any point in trying to meet the requirements of the PIP, or if the decision had already been made to terminate his employment. Supervisor B indicated that the decision had been made. The next day at 12:36 p.m., Employee A sent a farewell email to DSU employees, stating that DSU had made the decision to terminate his employment, and letting them know how to contact him if they wanted to stay in touch.²

Approximately an hour later, Supervisor B determined to move forward with the termination of Employee A; according to some accounts, the decision was made due to the farewell email, and/or at the direction of DSU Administration. At the request of DSU Administration, Supervisor B terminated access to Employee A's DSU accounts at approximately 1:45 pm, to become effective at 3:30 p.m.; and the notice of intent to terminate was provided to Employee A at his home at 4:32 pm. The Notice of Intent to Terminate indicated that DSU "ha[d] made the decision to either accept your resignation or terminate your employment with Dickinson State University." The Notice of Intent indicated that if Employee A resigned he would receive retirement benefits, while if Employee A was terminated he would receive payment for two weeks. The Notice of Intent included notice of Employee A's right to a pre-action review.

In light of the Notice of Intent, the appointment of a Staff Personnel Board to hear Employee A's appeal was suspended.

Over the next two weeks, Employee A and DSU Administration negotiated a separation agreement, by which Employee A's children would be permitted to receive tuition waivers as severance, in exchange for a resignation, waiver of rights, and non-disparagement provision. The

² The accounts vary on this point. DSU administration officials asserted that the email was sent to a broad listserv, possibly all employees. Employee A stated, when asked, that he had only sent it to certain DSU employees who he had worked with over his career at DSU. The Office was able to confirm that three "farewell" emails were sent by Employee A, each to specific individual recipients. The emails were not sent to a listserv or an "All Employee" group email.

agreement was reached on March 25, 2021, and Employee A's resignation letter was dated the same day.

The Office of Compliance and Ethics received two reports regarding this series of events: one on March 12, 2021, and a second complaint on July 9, 2021. Neither of these reports were made by Employee A.

1. One of the reports asserted that the reduction in pay, removal of duties, and constructive termination was the result of (or retaliation for) Employee A's involvement in a prior DSU procurement violation. The Office's investigation did not obtain any documents or other evidence to substantiate this allegation as a part of this investigation, though it appears that this opinion may continue to be held within the DSU administration.
2. When DSU presented Employee A with the Notice on March 1, 2021, the notice included a revised job description, a 42% reduction in pay, and a Performance Improvement Plan. As a result, it is unclear from the record to what extent the revised job description and the pay reduction are tied to the Performance Improvement Plan, and there is no explanation for the inclusion of all three items in the same document. Similarly, the documents received by the Office indicate that the reason for the revised position description may have had elements of both job performance and the continuing reorganization.

Pay reductions due to changes in job description are appealable pursuant to SBHE HR Policy 5 and 27. However, if a pay reduction is imposed as a disciplinary measure based on poor job performance or discipline, the employee is entitled to not only an appeal, but also a pre-action review. *See* SBHE HR Policy 25(1). Due to the lack of clarity around the specific reasons for the change (as relevant decisionmakers either refused to discuss this situation with the Office or were reluctant to provide details), the Office was unable to substantiate whether the reduction in pay was due solely to reorganization or was at least partially the result of disciplinary action or poor performance, which would have entitled Employee A to a pre-action review.

Recommendation: DSU should separate personnel actions based on performance issues and disciplinary action from those related to reorganization or changes in job title or duties to make clear what rights the employee has related to each personnel action.

3. One of the reports submitted to the Office implied that the reduction in pay was intended to force Employee A to resign, rather than taking the revised position. This allegation is plausible but could not be wholly substantiated due to the relevant decisionmaker(s) refusing to discuss this matter with the Office.

Employee A was provided with a 42% pay cut from his prior pay rate as the result of a changed position description. This would have reduced his pay below that of one of his supervisees and others in the institution with similar experience and education.

Recommendation: When an employee's job description and responsibilities change, resulting in a pay reduction, DSU should ensure that the new pay rate is reasonable and

commensurate with the position, the employee's experience and education, and similar employee pay in the department or at the institution.

4. The second report to the Office effectively asserted that Employee A was constructively terminated due to two position changes, a substantial pay cut, and the threat that Employee A would lose their retirement benefits if they did not resign. In North Dakota, a constructive discharge occurs when "an employer deliberately makes or allows an employee's working conditions to become so intolerable that the employee has no other choice but to quit." *Hummel v. Mid Dakota Clinic, P.C.*, 526 N.W.2d 704, 710 (N.D. 1995). A party asserting constructive discharge "must show that a reasonable person in that party's position would not have returned to work."

As a result of the pay cut, the PIP, and the Notice of Intent, it is plausible that Employee A was constructively discharged by DSU, even though he signed a letter of resignation and separation agreement. However, as Employee A agreed to waive any rights related to his separation from DSU, any question regarding this issue is moot at this time.

Recommendation: NDUS entities should be careful to follow applicable procedures related to termination and pay reductions to ensure that the proper procedures are followed for each type of personnel action.

5. The March 2021 Notice listed several alleged specific performance deficiencies as a basis for imposing the PIP. However, other examples given to support the PIP were complaints made "in passing" or "general observations." When Employee A asked the source of the complaints and observations, Supervisor B would rather not say. When Employee A asked the Director of Human Resources, who was present at the meeting, whether they were entitled to ask, the response was in the affirmative. However, when asked a second time, Employee A's supervisor again repeated that they would "rather not say" and was "not comfortable sharing that information."

The refusal to reveal the basis of the PIP constitutes a potential violation of SBHE HR Policy 27(4)(h) and constitutional and statutory due process requirements. State employees are entitled to due process in discipline, and state entities should not base employee disciplinary action on anonymous complaints unless those complaints have been corroborated by available witnesses or documentary or other evidence which may be made available to the employee. Had Employee A appealed or grieved the imposition of the PIP, he would not have known what documents to request or what witnesses to seek to interview, depriving him of his rights under HR Policy 27(4)(h).

Recommendation: DSU should avoid basing disciplinary action on anonymous complaints or concerns absent documentary evidence or other witnesses who are not anonymous.

6. The Notice listed various concerns and new expectations for Employee A's position and stated that if rapid improvement was not seen "in the next couple of weeks" the position would end on March 12, 2021. This deadline was ten working days from the date of the

notice. However, the written Performance Improvement Plan required only that “[y]ou must exhibit initiative, drive, motivation and feeling that you want this position. Requesting assistance and resources to help you perform the duties required of the position when necessary,” as well as requiring a meeting every other weekday. The requirements of the PIP are entirely subjective, rather than concrete, achievable, and measurable, and a 10-day window of time is unreasonably short to demonstrate “rapid improvement” in such general areas without an objective basis for measurement.

Recommendation: DSU should ensure that PIPs are based on “SMART” goals: **S**pecific and **M**easurable objectives that are **A**chievable, **R**elevant, and **T**ime-bound. SMART goals, as identified by SHRM, help to ensure that PIPs are used only when there is a commitment to help an employee improve, to give the employee fair notice of what improvements are required, and to provide sufficient time for the employee to bring their conduct and/or performance into alignment with institutional expectations. NDUS institutions should not utilize PIPs solely to establish a document trail that can later be used to justify a personnel action.

DSU should not issue PIPs except in a genuine attempt to assist an employee to bring their conduct or behavior into alignment with SBHE or DSU policies or procedures and workplace expectations.

7. Despite the Notice indicating that Employee A would have until March 12, 2021 to complete his PIP, Employee A was hand delivered the Notice of Intent to Terminate on March 11, 2021. While there is little specific documentary evidence on this point, it appears that the decision to terminate early (and to terminate Employee A’s access to his DSU accounts) was catalyzed by the farewell email sent by Employee A, as several witnesses told the Office that the DSU administration was upset or angered by the farewell email.

However, the Notice of Intent to Terminate did not identify the farewell email as the basis for termination prior to the deadline set forth in the Notice. In fact, the Notice of Intent to Terminate does not identify *any* actions taken (or not taken) by Employee A after the Notice to support the determination to issue the Notice of Intent to Terminate: it does not state that Employee A did not meet the requirements of the PIP or violated any other DSU or SBHE Policy and does not identify the witnesses or evidence against Employee A, among other missing information.

This violates SBHE Policy 25(2)(b)-(c), which provide that the written notice must include “a statement identifying any policies violated by the employee” and “a statement of the specific charges against the employee, citing the employee’s behavior, dates and/or occurrences, witnesses, and other evidence against the employee[.]” Instead, the Notice of Intent to Terminate only repeats the contents of the PIP, without giving the required information regarding the events in question.

Recommendation: Notices of Intent to Terminate should clearly set forth all elements of SBHE HR Policy 25(2).

8. After Employee A indicated that they would resign rather than face termination, Employee A and the President of DSU negotiated a separation agreement. The separation agreement includes the following provision:

Employee agrees [they] will not act in any manner that might damage Dickinson State University, the State, or the North Dakota University System. Employee agrees that [they] will not counsel or assist any attorneys or their clients in the presentation or prosecution of any disputes, differences, grievances, claims, charges, or complaints by any third party against Dickinson State University, the State, the North Dakota University System, or any other released person or entity, unless under a subpoena or other court order to do so. Employee agrees to refrain from any defamation, libel, or slander of Dickinson State University, the State, or the North Dakota University System or any other released person or entity or their respective officers, directors, employees, investors, shareholders, administrators, administrators, affiliates, divisions, subsidiaries, predecessor and successor entities and assigns.

This provision of the separation agreement likely violates the First Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment, Article I, Section 4 of the North Dakota Constitution, and SBHE Policies 306.1(4) and 308.1(13).

This clause constitutes the sort of “government-defined and government-enforced restriction on government-critical speech”³ which are generally prohibited by the First Amendment as against the public’s well-established First Amendment interest in “uninhibited, robust, and wide-open debate on public issues.”⁴ As a Federal Appeals Court recently noted, “[i]t is well-established that ‘vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials’ can play a valuable role in civic life, and thereby enjoy the protections of the First Amendment.” *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 226 (4th Cir 2019) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). As in *Overbey*, the non-disparagement clause here is likely “contrary to the citizenry’s First Amendment interest in limiting the government’s ability to target and remove speech critical of the government from the public discourse.” *Id.*, at 224-225.

Additionally, the Supreme Court has repeatedly held that it is not possible to commit defamation, libel, or slander against a government entity or a government official by

³ *E.g. Overbey v. Mayor of Baltimore*, 930 F.3d 215, 224 (4th Cir. 2019) (determining that the city’s interests in enforcing a waiver of First Amendment rights in a settlement agreement are outweighed by strong policy interests rooted in the First Amendment).

⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. [. . .] Premised on mistrust of government power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”)

criticizing their official acts. *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (“The Constitution does not tolerate in any form . . . prosecutions for libel on government.”) “[S]uch a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.” *Id.* (quoting *N.Y. Times Co.*, 376 U.S. at 292) (cleaned up). As such, it is difficult to see this clause as anything other than an impermissible attempt to limit criticism of DSU—a government entity.

Moreover, as written, this clause would even prohibit Employee A from participating in this Office’s investigation into complaints regarding Employee A’s separation or from providing information to the Office related to this investigation. This is contrary to the language and intent of Policy 306.1(4) – particularly where, as here, Employee A was hired by another NDUS entity shortly after their resignation from DSU. This contractual restriction would force Employee A to make the Hobson’s choice between violating the settlement agreement or violating Policy 308.1(13) (“[a]ll officers and employees shall cooperate in investigations of alleged violations”) and Policy 306.1 (“[a]ll NDUS employees shall assist the Office in fulfilling its roles and responsibilities by complying with the Office’s reasonable requests”). DSU lacks the authority to so constrain this Office.

Notwithstanding, it is important to note that Employee A did not file a hotline or direct complaint resulting in this investigation. In fact, the Office would be remiss not to note that, when contacted as part of this investigation, Employee A was reluctant to provide information or respond to requests, stating that they were happy with their current position and didn’t want to revisit the past.

Recommendation: NDUS entities should not include non-disparagement clauses in separation agreements which function as a prior restraint under the First Amendment or which would impair the ability of the Office to conduct investigations within the scope of its authority. DSU should release Employee A from this portion of the separation agreement.

9. During the investigation, the Office made or sent requests for information or records to DSU employees and officers that were necessary for the investigation. However, one key individual, Employee A’s supervisor at the time of the separation, refused to meet with or provide information to the Office and other members of DSU’s administration provided minimal, vague, or unhelpful responses. The Office also experienced reluctance or refusal to provide information without an attorney present related to this and other investigations. The purpose of the Office’s investigations is not disciplinary, it is to determine the facts surrounding the allegations in a report, and determine whether the actions in question were in compliance with law, regulation, and policy. The refusal of DSU’s officials to provide their view of these facts means that the investigation not only took substantially longer, but that this report may be missing the point of view of DSU’s administration. Finally, this refusal to participate violates both SBHE Policy 306.1(4) and SBHE Policy 308.1(13).

Recommendation: DSU should provide its administration and employees with additional training or information regarding their obligation to participate in the Office's investigations as reasonably requested and to provide requested information to the Office. Further, DSU should enforce SBHE Policy 306.1(4) and 308.1(13) and ensure that its employees comply at all times with requests for information and assistance from the Office.

Conclusion

This investigation revealed numerous potentially significant violations in the process by which DSU managed Employee A's demotion, change in responsibilities, reduction in salary, PIP, and separation. These violations could have exposed DSU, the NDUS, and the SBHE to legal or reputational risk had the employee sought legal recourse. I suggest that DSU evaluate its disciplinary process to ensure that employees receive the due process to which they are entitled to under applicable SBHE policy, DSU policy, and applicable constitutional and statutory requirements.

The DSU Director of Human Resources is the authority and resource for the process involved in all employee actions, including demotions and salary reductions. The Director should receive advanced education, training or certifications, if needed, to become highly knowledgeable on these topics and processes. DSU supervisors should consult the Director and follow any applicable instructions before taking any such HR actions. Additional HR resources are available at the other NDUS institutions and/or the NDUS System Office.

Additionally, this matter is one of several examples where the DSU administration officials contacted during the course of an investigation were unwilling or reluctant to cooperate with the investigation by either refusing to provide information or providing minimal, vague, or unhelpful responses.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Improper Separation Process April 25, 2022

Sources of Complaint	Direct Reports Eide Bailly Fraud Hotline
Date(s) of Complaint	Direct - 5/4/2021, 5/5/2021, others EBFH - 6/7/2021
Allegation	Improper termination, administrative leave, separation
Institution	Dickinson State University
Policy referenced	SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty
Conclusion	Results of investigation support the allegation.
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics (“Office”) received multiple reports of an alleged improper process of non-renewal or termination of a faculty member, referred to in this report as Faculty Member A. These reports were received from anonymous sources, or the person reporting the concern requested anonymity. The reports asserted that the DSU administration had forced Faculty Member A to resign, reduced their duties and placed them in a terminal contract contrary to policy, inappropriately terminated Faculty Member A’s contract and employment without complying with SBHE Policy, and ultimately placed Faculty Member A on administrative leave through the end of the terminal contract.

Policies Referenced:

SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty (relevant excerpts):

1. A probationary appointment may be terminated, without cause, with notice to the faculty member that the appointment will not be renewed.

(a) Notice shall be given:

i. at least 90 days prior to termination during the first year of probationary employment at the institution.

8. A faculty member may be dismissed at any time for adequate cause. Adequate cause means: (a) demonstrated incompetence or dishonesty in teaching, research, or other professional activity related to institutional responsibilities, (b) continued or repeated unsatisfactory performance evaluations and failure to respond in a satisfactory manner to a recommended plan for improvement; (c) substantial and manifest neglect of duty, (d) conduct which substantially impairs the individual's fulfillment of his or her institutional responsibilities or the institutional responsibilities of others, (e) a physical or mental inability to perform assigned duties, provided that such action is consistent with laws prohibiting discrimination based upon disability, or (f) significant or continued violations of Board policy or institutional policy, provided that for violations of institutional policy the institution must notify the faculty member in advance in writing that violation would constitute grounds for dismissal, or the institutional policy must provide specifically for dismissal as a sanction.

a. An authorized institution officer shall give written notice of intent to dismiss and specify the reasons for the action. The notice shall state that the officer will forward to the institution president a recommendation to dismiss **unless the faculty member, within twenty calendar days of receipt of the notice, requests a hearing before the Standing Committee on Faculty Rights.** If the faculty member does not make a timely request for a hearing, the president, upon receipt of a recommendation to dismiss, shall make a decision and provide written notice and reasons for the action to the faculty member within ten business days of receipt of the recommendation.

Investigation and Findings

The following statement of facts is based on the Office's review of documentary evidence and interviews regarding the foregoing reports. This report is not intended to address the underlying merits of the personnel actions in question; instead, the investigation and report are intended to examine the process used and determine whether applicable policies and procedures were followed.

Faculty Member A was a first-year tenure track nursing faculty member at DSU, teaching junior-level nursing students in classroom and clinical courses relating to critical care. Faculty Member A did not have a history of poor performance evaluations, did not have any formal complaints filed against them, and had never been subject to prior disciplinary action. Interviews with Faculty Member A's team teacher (Faculty Member B) and the Nursing Department Chair (Chair D) revealed that Faculty Member A had similar weaknesses to other first-year professors (i.e. difficulty with the didactic (classroom teaching) aspects of the position), but had strong performance in the clinical portion of instruction.

However, on March 5, 2021, Faculty Member A was called into a meeting with Chair D and the Dean of the College of Education, Business, and Applied Sciences (Dean C). At that meeting, Faculty Member A was told that a number of her students (as many as 10 out of 14) had come to Dean C and reported that they were going to transfer out of the department because of Faculty Member A's teaching. Faculty Member A was informed that they would not be permitted to continue teaching the didactic portion of her courses. Faculty Member A commented that they would resign effective immediately. However, the meeting continued, and Faculty Member A asked for information about which students had complained. Dean C refused to share that

information. After further discussion, Faculty Member A agreed to continue teaching the clinical portion of the course.

Notes obtained from Chair D indicated that Chair D and Dean C had agreed prior to the meeting that Faculty Member A would not be permitted to continue teaching the didactic portion of the course regardless of the outcome of the meeting. Despite this, Faculty Member A was not informed in writing of their rights to appeal the changes to their role during or after the meeting, as required by SBHE Policy 605.3(9).

After the meeting, Chair D contacted Faculty Member A to request their resignation in writing. During their interview with the Office, Faculty Member A reported that they felt they had no choice but to resign or they would be terminated, based on the tenor of the meeting on March 5 and the follow-up email from Chair D. Subsequently, a terminal contract was prepared and executed limiting Faculty Member A's teaching assignment to the clinical portion of the courses.

On April 15, 2021, Dean C sent Faculty Member A Notice of Intent to Terminate by email indicating that DSU intended to terminate Faculty member A's employment for cause, effective immediately. Faculty Member A's access to Campus Connection, Blackboard LMS, DSU buildings, office space, and email were discontinued at that time. The Notice of Intent to Terminate listed the "adequate cause" for the termination as "a persistent behavior of job abandonment by consistently ignoring the prompts to complete [their] accreditation reporting requirements. Additionally, actions within [their] clinical rotations have resulted in extreme dissatisfaction of the students [they have] served." The letter did not advise Faculty Member A of their right to appeal within twenty days of the receipt of the letter.

Faculty Member A responded to the letter by disputing and requesting clarification of the reasons for termination. The DSU Administration did not respond to Faculty Member A's dispute in any way; Dean C stated in an email that "I am not responding to [their] list of inaccuracies. I believe we can leave it alone unless I am prompted otherwise by [Provost] or [President]." Subsequently, when DSU's Director of Human Resources became aware of the letter, she informed DSU's administration that they could not sustain the Notice of Intent to Terminate, as it lacked the required notice of appeal rights, based on legal review.

On April 21, 2021, DSU's President sent a Notice of Administrative Leave to Faculty Member A advising them that they would be placed on administrative leave with pay and benefits until May 15, 2021, at which time their previous resignation would take effect. This notice included Faculty Member A's right to appeal within twenty days of receipt of the notice. Faculty Member A appealed by requesting a hearing by the Standing Committee on Faculty Rights (SCoFR).

Subsequently, the SCoFR determined that Faculty Member A's resignation letter, the fact that Faculty Member A did not appeal the terminal contract, and that Faculty Member A's appeal of administration leave was ineffective (as their contract had since concluded), deprived the SCoFR of jurisdiction.

The purpose of this investigation and report is to evaluate the process that resulted in the separation of Faculty Member A from their employment at DSU. The investigation revealed the

following areas of potential risk and improvement. As Faculty Member A is no longer employed by DSU and this office has no authority to recommend reinstating an employee, the following recommendations should be viewed as forward-looking, rather than as recommending changes to the process involving Faculty Member A.

6. Pursuant to SBHE Policy 605.3(a), a probationary (i.e. non-tenured) appointment may be terminated, without cause, with notice to the faculty member that the appointment will not be renewed. Based on the reasons set forth in the documents reviewed by the Office, the most appropriate method of separating Faculty Member A from their employment would have been through a termination without cause. However, to impose a termination without cause, DSU would have been required to provide notice at least 90 days prior to the termination date. As Faculty Member A's original appointment went through May 15, 2021, the last date to provide notice of termination or non-renewal without cause was February 15, 2021 during the first term – and the notice period would have extended to 180 days the following year.

Recommendation: DSU's administration should ensure that decisions to terminate or non-renew probationary faculty members are taken under the correct section of the applicable SBHE Policy, and that all applicable processes and procedures are completed within the timetable set by the Policy.

7. As Chair D and Dean C had determined to remove Faculty Member A's didactic teaching responsibilities prior to the March 5, 2021 meeting, they should have provided Faculty Member A with written notice of intent pursuant to SBHE Policy 605.3(9), including notice of appeal rights. While Faculty Member A tendered their resignation after the meeting, resolving some issues related to the required notices, following applicable policies and procedures would have provided a clearer process and procedure to the events that would follow.

Recommendation: Where an NDUS institution determines that the conduct of a faculty member provides reasonable cause for imposition of a sanction, such as the removal of certain obligations or privileges, the NDUS institution should follow applicable policies and procedures regardless of the reaction of the faculty member.

8. On April 15, 2021, the DSU Administration served Notice of Intent to Dismiss Faculty Member A for adequate cause. Pursuant to SBHE Policy 605.3(8), a faculty member may be dismissed at any time for adequate cause as set forth in the policy. An authorized institution officer shall give written notice of intent to dismiss and specify the reasons for the action.

Dean C's April 15, 2021 letter informing Faculty Member A of her intent to recommend dismissal for adequate cause gave the following cognizable reasons for dismissal:

- a. You have displayed a persistent behavior of job abandonment by consistently ignoring the prompts to complete your accreditation reporting requirements; and
- b. Your actions within your clinical rotations have resulted in extreme dissatisfaction of the students you have served.

The term “job abandonment” is not defined in SBHE Policy 603. While it does not apply to non-broadbanded positions per Policy 607.0, SBHE HR Policy 25(1)(a) defines “job abandonment” as “when an employee has not reported to their scheduled work shift for three consecutive working days without approval or contacting the employer.” This definition, while not binding, is persuasive here, and it is impossible to conclude from the record that Faculty Member A committed “job abandonment.” Failure to complete reporting requirements, while potentially a disciplinary issue, is not job abandonment. While failure to complete reporting requirements may fall under another of the elements of SBHE Policy 605.3(8), the Notice of Intent to Dismiss needs to make clear which option the DSU Administration seeks to exercise.

Similarly, actionable student dissatisfaction is typically communicated via course evaluations or through formal complaints. DSU was unable to provide any formal student complaints, nor any formal steps taken to respond to informal student complaints or to bring issues to the attention of Faculty Member A prior to the issuance of the Notice of Intent to Terminate. Relying on this basis would typically implicate SBHE Policy 605.3(8)(a) or (b): “(a) demonstrated incompetence . . . in teaching, research, or other professional activity related to institutional responsibilities, [or] (b) continued or repeated unsatisfactory performance evaluations and failure to respond in a satisfactory manner to a recommended plan for improvement.” However, neither were named in the Notice of Intent to Terminate.

Recommendation: To the extent that the DSU seeks to dismiss a faculty member for adequate cause, it should be clear that the adequacy of the stated cause meets one or more of the requirements of SBHE Policy 605.3(8), and that the requirement is stated in the Notice of Intent to Dismiss.

9. When the DSU Administration provided the Notice of Intent to Dismiss to Faculty Member A, it stated that student dissatisfaction or complaints were one of the bases for the termination. A similar reason was given for removing Faculty Member A’s responsibilities for the didactic portion of her course. However, both in the March 5, 2021 meeting and under query from this office, neither Dean C nor any other member of the DSU administration could provide specific, non-anonymous examples of student complaints to support the actions against Faculty Member A. SBHE Policy 605.4(10) provides that the “faculty member shall be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. [. . .] The faculty member and the institution shall have the right to confront and cross-examine all witnesses.” As a result, DSU may not rely on anonymous witnesses or reports to support disciplinary action against a faculty member.

Recommendation: DSU should not base disciplinary action on anonymous complaints or concerns absent documentary evidence or other non-anonymous witnesses in order to avoid violating SBHE Policy or due process requirements.

10. When giving written notice of intent to dismiss pursuant to SBHE Policy 605.3(8), the notice “shall state that the officer will forward to the institution president a recommendation to dismiss unless the faculty member, within twenty calendar days of receipt of the notice, requests a hearing before the Standing Committee on Faculty Rights.” Without this notice of

appeal rights, a notice of intent to dismiss is not effective, even if all other required elements of such a notice are present. This notice of appeal rights was absent in Dean C's April 15, 2021 letter to Faculty Member A.

Recommendation: DSU should ensure that all notices of intent to dismiss or terminate include required notices of appeal rights. In order to assist with the process and to avoid, DSU should require such notices be prepared on standard forms prepared by Human Resources which include all required appeals language.

11. On April 21, 2021, after DSU's Director of Human Resources raised concerns about the absence of the notice of appeal rights in the Notice of Intent to Dismiss, DSU's President issued the Notice of Administrative Leave, relieving Faculty Member A of their duties through the end of their terminal contract. While Administrative Leave is authorized by SBHE HR Policy 20(8), it should be sparingly used, as administrative leave is not authorized by North Dakota Century Code except pending the resolution of the investigation of a disciplinary action, complaint, or allegation. Using administrative leave more broadly creates potential conflicts with the North Dakota Constitution's anti-gifting clause (Article 10, Section 18), as it functionally results in the paying of an employee or faculty member while the employee or faculty member is not performing their job duties.

Recommendation: Removal of job duties of a faculty member during the term of their contract should either be taken under SBHE Policy 605.3(9) or through the suspension/reassignment provisions of SBHE Policy 605.3(8)(c) while an appeal of dismissal for adequate cause is pending. Here, rather than placing Faculty Member A on administrative leave, DSU Administration could have re-issued the Notice of Intent to Dismiss for adequate cause, then suspended Faculty Member A pursuant to Policy 605.3(8)(c).

Conclusion

The purpose of this investigation and report was to evaluate the process that resulted in the separation of Faculty Member A from her employment at DSU. This investigation did not consider the validity or necessity for the separation.

The allegations of an improper process of non-renewal or termination of Faculty Member A's employment were substantiated by the investigation. DSU administrators should be aware of separation requirements under SBHE and institution policies and should consult the Director of Human Resources before taking termination actions to ensure all policies are followed. Legal counsel may also be consulted in these instances.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
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Summary Investigative Report Inappropriate Performance Improvement Plan April 25, 2022

Source of Complaint	Direct Report
Date of Complaint	02/07/2022
Topic of Allegation	Inappropriate Performance Improvement Plan (Report Withdrawn)
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 605.4(10)
Conclusion	Potential violations found.
Investigator	Karol Riedman

Background Information

A faculty member at DSU submitted a direct report to the Office of Compliance and Ethics (OCE) alleging myriad policy and due process violations. However, before an investigation could be completed, the faculty member accepted an early retirement package and withdrew their report. As a result, the substance of the faculty member’s report is no longer before the OCE. However, the investigation prior to the withdrawal of the report revealed significant weaknesses in DSU’s processes which would have led to a policy violation had the faculty member not taken early retirement.

Policy References

SBHE Policy 605.4(10) provides, in relevant part:

The faculty member shall be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. The institution shall cooperate with the committee in securing witnesses and making available documentary and other evidence. The faculty member and the institution shall have the right to confront and cross-examine all witnesses.

Investigation and Findings

The Office of Compliance and Ethics received a direct report from a faculty member at DSU and began an investigation. While the investigation was not completed due to the withdrawal of the report, the following potential violations were revealed and should be addressed by DSU:

1. The faculty member was issued a Performance Improvement Plan (“PIP”) based in large part on reports from students which alleged a number of purported concerns regarding the faculty member’s advising style, classroom interactions, and communications with students. When the faculty member sought information regarding the students who had raised concerns and asked to see the complaints, the faculty member was advised by DSU Administration that the students had come to the Dean of the College of Education, Business, and Applied Sciences in confidence, and there were no signed complaints and that the names of the students who made the reports were not documented (or would not be made available to the faculty member).

While the faculty member did not file a SCoFR appeal due to their acceptance of an early retirement package, the faculty member would have been unable to contest the complaints that formed the basis of the PIP because the student complaints were made anonymously, and records of the students’ names were not kept. This is a potential or likely violation of SBHE Policy 605.4(10) and constitutional and statutory due process requirements. State entities cannot base employee disciplinary action on anonymous complaints unless those complaints have been corroborated by documentary or other evidence which may be made available to the employee.

Recommendation: DSU should not base disciplinary action on anonymous complaints or concerns absent documentary evidence or other witnesses who are not anonymous.

2. The faculty member’s PIP cites, as an example of poor communication with colleagues, a co-worker who previously made a complaint against the faculty member approximately a year earlier. However, when DSU appointed an unrelated faculty member to investigate the complaint, the complainant withdrew the complaint and stated that they did not want to move forward. As a result, no investigation was completed, no findings were made, and no disciplinary action was taken at the time.

Recommendation: DSU should not base disciplinary action on complaints which were not investigated and upon which findings were not issued, as the subject of the complaint does not have the opportunity to respond to or appeal from any such investigation or findings.

Conclusion

The investigation, while not completed, revealed two potentially significant violations in the process by which DSU implemented the PIP against the faculty member. These violations could have exposed DSU, the NDUS, and the SBHE to legal or reputational risk had the faculty member sought legal recourse if the PIP resulted in termination or if the faculty member sought an appeal from the PIP. I suggest that DSU evaluate its disciplinary process to ensure that faculty members and employees alike receive the due process to which they are entitled to under applicable SBHE policy, DSU policy, and applicable constitutional and statutory requirements.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Performance Improvement Plan Violations April 25, 2022

Sources of Complaint	Direct Complaint
Date(s) of Complaint	2/11/2022
Allegation	Inappropriate Comments by Faculty Member Performance Improvement Plan Violation
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 306.1 Compliance Charter SBHE Policy 308.1 Officer and Employee Code of Conduct SBHE Policy 401.1 Academic Freedom DSU Policy 401.1 Faculty Rights and Responsibilities/Academic Freedom and Community Welfare SBHE Policy 520 Title IX – Sexual Harassment The North Dakota Human Rights Act (N.D.C.C. § 14-02.4-02(6)) North Dakota Century Code § 15-10.4-02(3) Americans With Disabilities Act (ADA) Regulations
Conclusion	Investigation results support the allegation
Investigator	Karol Riedman

Background Information

On October 29, 2021, the NDUS Office of Compliance and Ethics (“Office”) received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous report alleged that a faculty member made inappropriate comments during class that made students uncomfortable. The Office referred the matter to the institution to investigate on November 3, 2021, and the institution’s president referred the matter to the Title IX Coordinator for investigation. The Office did not immediately hear back from the institution on the results of the investigation.

Subsequently, on February 11, 2022, the Office received a direct report from a third party (not the accused faculty member), alleging that a faculty member had been placed on an unreasonable/illegal Performance Improvement Plan (PIP). As a result, the Office contacted DSU to determine the results of the prior investigation of the October 29, 2021 report. The Office learned that the institution investigated the matter and found the allegations were

supported by the investigation. The matter resulted in the faculty member receiving a Performance Improvement Plan (PIP). This investigation followed.

Policy References

SBHE Policy 306.1(10)(c) provides as follows:

Routine complaints [. . .] concerning a particular institution will be forwarded to the institution's designated investigator(s). Campus investigation reports shall be forwarded to the institution president and to the Officer. Additional investigation or action may be recommended by the Officer.

SBHE Policy 308.1(2)-(3), (13) states:

2. The SBHE supports an environment that is free of discrimination or harassment.... Likewise, sexual or other harassment (including actions contributing to a hostile work environment) in violation of federal or state law or SBHE Policy 603.1, is prohibited. Policy 520 governs sexual harassment which violates Title IX of the Education Amendments of 1972.

3. All SBHE members, officers, and employees are expected to perform their duties conscientiously, honestly, and in accordance with the best interests of the NDUS. All SBHE members, officers, and employees shall comply with applicable federal and state laws.

13. Alleged violations of this code involving NDUS officers or employees shall be investigated by the appropriate NDUS officer. All officers and employees shall cooperate in investigations of alleged violations. A violation of this code is cause for dismissal or other disciplinary action, in addition to any criminal or other civil sanctions that apply.

North Dakota Century Code § 15-10.4-02(3) requires the adoption of SBHE and institution policies which, at a minimum:

Protect[] the academic freedom and free speech rights of faculty by guaranteeing, at a minimum, no faculty member will face adverse employment action for classroom speech, unless the speech is not reasonably germane to the subject matter of the class as broadly construed and comprises a substantial portion of classroom instruction.

SBHE Policy 401.1(2) & (4) (and DSU Policy, substantially similarly) states, in part:

2. Academic Freedom. *[. . .] Faculty are entitled [to] freedom in designing and teaching their assigned courses.*

4. Classroom Speech and Expression. *Faculty at institutions under the control of the SBHE shall generally adhere to the 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments adopted by the American Association of University Professors, which provides that "Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter*

which has no relation to their subject.” As a result, no faculty member may face adverse employment action for classroom speech unless the speech is not reasonably germane to the subject matter of the class as broadly construed and comprises a substantial portion of classroom instruction. As a general rule, faculty shall not face discipline or adverse employment action based on classroom speech unless such speech violates other institutional policies or procedures. Institutions may provide additional protections for classroom speech and the speech of faculty in instruction-related activities, such as office hours, mentoring, advising, and other similar situations.

SBHE Policy 605.4(10) provides, in relevant part:

The faculty member shall be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. The institution shall cooperate with the committee in securing witnesses and making available documentary and other evidence. The faculty member and the institution shall have the right to confront and cross-examine all witnesses.

SBHE Policy 520(2)(m) defines sexual harassment as related to the classroom:

Sexual Harassment. Conduct, on the basis of sex, constituting one (or more) of the following:

- i. An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct;*
- ii. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution’s education program or activity.*

The North Dakota Human Rights Act (N.D.C.C. § 14-02.4-02(6)) provides in part that:

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct, or other verbal or physical conduct or communication of a sexual nature when:

- a. Submission to that conduct is made a term or condition, either explicitly or implicitly, of obtaining [. . .] education;*
- b. Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual’s [. . .] education[;] or*
- c. That conduct or communication has the purpose or effect of substantially interfering with an individual’s [. . .] educational environment[.]*

The Americans with Disabilities Act (ADA) (42 U.S.C. § 12112) states:

- (a) No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.*

(d) Medical Examinations and Inquiries

1. In General. The prohibition against discrimination as referred to in Subsection (a) shall include medical examinations and inquiries.

4. Examination and Study

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination [. . .] unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Investigation and Findings

The initial report of inappropriate comments made by a tenured faculty member in class was referred to DSU for investigation and resolution. The President assigned the report to the Title IX Coordinator, who later referred the investigation to the Director of Human Resources. Because the report was from an anonymous source, no interviews were possible. No formal Title IX or other harassment complaints had been made by students in reference to this allegation.

The initial report stated that the instructor “made a really sexist comment about how a man in history ‘must really like them stacked’ and then proceeded to talk about how men liked women with big breasts. This was super embarrassing for me and the other girls.”

DSU investigators reviewed student evaluations and comments for the Fall 2015 through Fall 2021 semesters for all courses taught by this instructor. A total of 496 students were enrolled in these classes. Eighteen student evaluations were submitted during this period with three comments that were interpreted as describing concerning or offensive comments. Of these, one review stated “[a]lthough [they] may not have meant a lot of things literally, I took a lot of [their] sayings to offence,” while another described “condescending” and “not okay” remarks. Neither of these explicitly referred to sexual or sexist comments. Only one of the reviews mentioned “sexual jokes and/or references in class that made me uncomfortable.” As a result, only one student review mentioned analogous comments to those described by the initial report. This represents less than 0.2 percent of the faculty member’s total students during that time period (or less than 6% of recorded student reviews).

DSU’s Provost and Director of Human Resources also reviewed selected class recordings and noted several comments they interpreted as concerning or offensive. These comments included several references to the consumption of alcohol, some of which were obvious hyperbole, and “riffing” on the subject matter of the course, including some comments which were arguably sexual in nature. None of these comments were directed to or purporting to describe students. Each of these comments were brief and did not result in a substantial portion of the day’s instruction. The comment described in the initial report was not discovered during the review.

Based on the reports and the finding, the faculty member was placed on a Performance Improvement Plan (PIP) which required the completion of a sexual harassment prevention training immediately and eight counseling sessions to be completed by the end of the Spring

2022 semester. The PIP also required that student evaluations be completed for all classes and should show no issues of this nature through the end of academic year 2022-2023.

After the PIP was entered, the Office of Compliance and Ethics received a direct report from a different faculty member asserting that the PIP was unreasonable or illegal and violated SBHE Policy. The Office requested the results of the DSU investigation and then learned that the faculty member had been placed on a PIP. This investigation followed.

The investigation of the alleged unreasonable or illegal PIP was done by the Office in consultation with legal counsel, given the complexity of the legal issues presented by the reports. The investigation included a review of the PIP itself, the cited student evaluations and class recordings, as well as interviewing the faculty member and selected DSU administrators. The goal of this investigation was to answer these questions:

1. Did the institution violate SBHE Policy 306.1?
 2. Did the comments in question constitute sexual harassment under the Title IX or the North Dakota Human Rights Act?
 3. Did the investigation conducted by DSU and the resultant disciplinary decision infringe on rights protected by Policy 401.1 Academic Freedom, due process, and state law?
 4. Were the proposed corrective actions in the PIP reasonable, permissible, and appropriate?
1. Under SBHE Policy 306.1, when the Office of Compliance and Ethics refers an investigation to a campus for investigation, the campus is responsible for reporting to the Office the results of the investigation and providing any report that was prepared. Here, the campus completed an extensive investigation that concluded that the report was substantiated, and the faculty member was placed on a PIP based on this conclusion. However, the results of the investigation were never reported to the Office as required by the policy.

Recommendation: DSU should train its designated investigators on the process of conducting a referred investigation, including the final step of reporting the outcome of the investigation to the Office of Compliance and Ethics.

2. The statement in the initial report potentially raises concerns related to sexual harassment. The definition of sexual harassment is set out in SBHE Policy 520 (for Title IX harassment) and the North Dakota Human Rights Act, N.D.C.C. 14-02.4-02(6). Neither the comments alleged in the initial complaint (and not substantiated by DSU's investigation) nor the additional statements located by DSU during the investigation constitute sexual harassment under SBHE Policy. In coming to this conclusion, the Office reviewed the student comments in evaluations and class recordings relied upon by DSU in imposing the PIP.

Policy 520 requires, among other things, that the conduct in question must be so severe, pervasive, and objectively offensive that they effectively deny the students access to their educational program. The comments in question do not meet applicable requirements for severity or pervasiveness, even if they arguably meet the definition of objective offensiveness (though even that is unlikely). Similarly, the conduct of the faculty member does not constitute sexual harassment under the NDHRA, as submission to the conduct was

not term or condition of receiving education, and there are no allegations by any complainant, named or unnamed, that a response to the conduct was a factor in grading or that the conduct substantially interfered with the educational environment.

Recommendations: Prior to conducting an extensive investigation into alleged sexual harassment (such as the one in this case), DSU should consider whether the alleged conduct, if it occurred, would suffice to meet the definition of sexual harassment under state law or SBHE Policy. DSU should also consider additional training into the definitions of harassment, including sexual harassment, for all individuals designated to investigate such allegations. To the extent that the PIP is based wholly or partially on a finding of sexual harassment, it should be terminated.

3. DSU's investigation into (and subsequent imposition of a PIP against) the faculty member based on the initial report and the subsequently-discovered classroom statements likely violated principles of academic freedom as adopted by N.D.C.C. § 15-10.4-02(3), SBHE Policy 401.1, and the analogous DSU policy. Each of these policies specifically protects the classroom speech of faculty members unless the speech is *both* "not reasonably germane to the subject matter of the class as broadly construed" *and* "comprises a substantial portion of classroom instruction." Here, there is no reasonable argument that these elements are met.

DSU attached a list of eight out-of-context statements extracted from the faculty member's lectures in POLS 115 on October 4 and 15, 2021 to support the imposition of the PIP. Five of these statements included arguably sexual content, two were hyperbolic references to alcohol consumption, and one was a reference to a serial killer. Perhaps ironically, several of the statements DSU used as the basis for imposing the PIP came from a lecture with the topic "Freedom of Speech/Censorship," which included an eight-minute discussion on the definition of obscenity and when it is protected. Throughout both lectures, the faculty member sprinkled side comments, informal chatter, and attempts at humor. However, most of these comments, while perhaps not always in good taste, were at least indirectly related to the subject matter being discussed, and none consumed a substantial amount of class time, even when combined. As a result, the comments may not serve as a basis for faculty discipline pursuant to SBHE Policy 401.1 and broader First Amendment principles.

Moreover, the imposition of discipline also likely violated the faculty member's due process rights. DSU rested its decision to impose the PIP on "[c]omplaints from student(s) regarding frequent sexual references/innuendos and other inappropriate comments during class lectures[.]" However, there are no student complaints which may properly form the basis for disciplinary action. The only complaints available to the campus investigators include the anonymous student evaluation comments and the anonymous initial report, none of which were substantiated by the investigation. Had the faculty member filed a SCoFR appeal, the faculty member would have been unable to contest the complaints which formed the basis of the PIP because these student complaints were not substantiated by the investigation. This is a likely violation of SBHE Policy 605.4(10) and statutory and constitutional due process requirements. State entities cannot base employee disciplinary action on anonymous complaints unless they have been corroborated by documentary or other evidence which has

been made available to the employee. As a result, neither the anonymous initial complaint nor the evaluation comments may constitute the basis for the PIP.

Even leaving aside the question of the imposition of the PIP, the mere investigation of purely classroom speech without a clear allegation of speech which would violate applicable policies has a chilling effect on academic freedom. This is particularly true where, as here, the investigation of a single anonymous allegation resulted in DSU investigating six years of student evaluations and reviewing several lectures to extract out-of-context remarks. DSU should take care to ensure that investigations are reasonably related to the instigating report, both in subject matter and in scope, to ensure that an investigation does not unreasonably intrude into matters of academic freedom.

Similarly, the faculty member's college dean ("Dean A") sent an email dated April 1, 2022 which indicated that DSU intended to continue monitoring the faculty member's classes "from time to time through the 2022-2023 academic year to ensure that everything continues in a positive direction." If carried out, this would also constitute a potential violation of SBHE Policy 401.1 (2) ("Faculty are entitled [to] freedom in designing and teaching their assigned courses."), as it explicitly seeks to influence the way in which the faculty member teaches.

Recommendations: The faculty member's PIP should be immediately terminated (to the extent it has not already been terminated) and not used as any basis for future performance evaluations, contractual decisions, or reviews. DSU should consider providing additional training to its investigators and administrators to ensure that the proper weight is provided to academic freedom during the investigative process. DSU should not base disciplinary action on classroom speech unless the applicable policies and laws are plainly met and in consultation with legal counsel. Moreover, DSU should not base disciplinary action on anonymous complaints or concerns absent documentary evidence or other non-anonymous witnesses.

4. A PIP should be used when there is a commitment to help an employee succeed, not as a way for a manager to begin a termination process. As a result, the PIP needs to clearly set out the performance issue and set feasible goals which are reasonably within the control of the employee (and which can be accurately and objectively assessed at the conclusion of the PIP). Here, the corrective action in the PIP required the instructor to watch a training video, complete eight counseling sessions through EAP and receive a significant number of student evaluations over the next three semesters, with no comments similar to the offensive comments cited by the complainant.

First and foremost, as discussed above, the PIP was issued in likely violation of academic freedom and due process and as a result no element of the PIP should be maintained. Notwithstanding, the requirement to complete a training session is the least objectionable of the PIP's requirements, and DSU may have been permitted to ask the faculty member to complete the training even in the absence of a PIP or any other stepped discipline. Based on the investigation, it appears that the faculty member did complete the assigned training, so while the PIP should not have been entered, it appears a portion of DSU's goals were met.

Recommendation: DSU should consider structuring its contracts with faculty members to permit DSU to require training as assigned, to the extent that it does not already. This would cover not only such common training requirements as IT security training, but also refresher courses on harassment or appropriate workplace conduct, without involving a PIP or a stepped disciplinary process.

Second, DSU likely lacked the authority under the circumstances to require the faculty member to attend counseling sessions with the Employee Assistance Program (EAP). The Americans with Disabilities Act prohibits employers from discriminating against qualified individuals based on a disability and protects both individuals with a disability and individuals who are treated as if they have a disability. In 2000, the EEOC stated in an informal guidance letter that requiring an employee to use an EAP may violate the prohibition on treating an employee as if they have a disability without medical information to support that position.⁵ Here, for example, the most serious allegation substantiated was that the faculty member made arguably inappropriate comments during the course of several lectures. Nothing about this allegation would indicate the presence of a disability.

Additionally, the ADA prohibits an employer from “[requiring] a medical examination [. . .] unless such examination is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A). For these purposes, “job-related” means that the disability requiring the examination raises concerns regarding the ability of the employee to perform their job duties, while “business necessity” is a more exacting standard than mere consistency with legitimate business goals.⁶ A federal appellate court recently stated that employers can violate this portion of the ADA by requiring an employee to use an EAP. The court held that mandatory psychological counseling constitutes a “medical examination” and therefore violates the ADA if it is not “consistent with business necessity.” Here, there is no indication that a medical or psychological condition impacted the faculty member’s performance of their job duties. Therefore, the counseling requirement was neither “job-related” nor “consistent with business necessity,” and potentially violated the ADA.

When the Office became aware of this requirement and obtained a copy of the PIP, the Office immediately contacted legal counsel due to the legal risk it posed to DSU, the NDUS, and the SBHE. NDUS legal counsel shared the concern with DSU’s attorney on March 8, 2022. DSU’s counsel subsequently informed NDUS legal counsel that he had contacted DSU and that DSU represented to him that the counseling requirement would be converted to a training requirement.

This representation from DSU was false. On April 13, 2022, the Office obtained an email sent to the faculty member by Dean A on April 1, 2022, copying the Director of Human Resources. In the email, Dean A stated that after the faculty member attended their next

⁵ Letter, Christopher J. Kuczynski, Assistant Legal Counsel, ADA Policy Division, Equal Employment Opportunity Commission (July 19, 2000).

⁶ *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 815 n.8 (6th Cir. 2012).

appointment and if the provider “concur[s] that everything appears to be in order,” the faculty member would not be required to attend further appointments.

The individuals involved in the imposition and administration of the faculty member’s PIP, including, but not limited to, the Provost, the Dean of the College of Arts and Sciences, and the Director of Human Resources were placed on notice that the requirement to attend counseling violated the ADA on or about March 8, 2022. Despite this, the faculty member was required to attend one or more additional counseling sessions. Pursuant to SBHE Policy 308.1(3), “[a]ll SBHE members, officers, and employees shall comply with applicable federal and state laws.” Here, the DSU administration was put on notice of a violation of the ADA on or about March 8th, 2022 yet maintained that violation.

To be clear, the ADA permits employers to recommend that employees seek assistance from the EAP, and the EAP can be invaluable when used on a voluntary basis for employees suffering from issues related to finances, stress, work conflicts, chemical dependency, and other life concerns. However, there must be a level of trust between the EAP counselor and the employee, so it is not a best practice to require EAP participation even where appropriate, because employees who are uncooperative or resentful of having to attend sessions may not be receptive or receive little benefit from the EAP sessions.

That notwithstanding, for the EAP to be successful, the employee must be confident that the discussions and treatment received from the EAP will remain protected from the employer and not used in personnel actions. Here, based on Dean A’s email dated April 1, 2022, the DSU administration has directly involved itself in the patient-provider relationship between the faculty member and their provider, which it should avoid unless it is part of the interactive process related to a specific accommodation request.

Recommendation: DSU should ensure that any stepped disciplinary processes do not require an employee to seek counseling from the EAP. Instead, the EAP can be offered as a resource to employees but should not be required unless part of the interactive process related to an employee’s disability, in consultation with legal counsel. DSU should also avoid becoming directly involved in the EAP process in order to respect the medical privacy of participants.

Finally, DSU included requirements as part of the PIP which are not within the employee’s ability to control. A PIP is meant to provide an employee with performance issues the opportunity to succeed and not simply as part of a document trail to justify future personnel actions. As a result, the goals set in the PIP must be feasible, measurable and within the reasonable control of the employee. Here, the PIP requires the faculty member to ensure that there are evaluations completed for all classes through the end of the 2022-23 academic year by a “significant number of students and should show no issues of this nature.” However, a faculty member has little or no control over the number of students who fill out evaluations, and even less control over any comments that might be made.

Recommendation: DSU should ensure that PIPs are based on “SMART” goals: **S**pecific and **M**easurable objectives that are **A**chievable, **R**elevant, and **T**ime-bound. SMART goals, as

identified by SHRM, help to ensure that PIPs are used only when there is a commitment to help an employee improve, to give the employee fair notice of what improvements are required, and to provide sufficient time for the employee to bring their conduct and/or performance into alignment with institutional expectations.

Conclusion

The original concern reported the faculty member made sexist comments that were embarrassing to students. Neither the complainant nor the specific comments were substantiated in any of the investigation done by DSU. That should have ended the investigation. Instead, DSU conducted a detailed review of six years of student evaluations and several class recordings and found several comments which DSU's investigators subjectively found inappropriate or offensive. The comments do not fulfill the definition of sexual harassment and, despite being arguably unnecessary or in poor taste, also do not represent controversial matter entirely unrelated to the subject matter or a substantial portion of classroom instruction. The comments were thereby protected by academic freedom, and the instructor should not face a PIP or an adverse employment action. Additionally, the corrective action required in the PIP included outcomes that were not under the instructor's control, as well as unallowable requirements for medical examination and treatment in likely violation of the ADA. Finally, the results of DSU's investigation were not reported to the Office.

Recommendation:

The faculty member's PIP should be immediately terminated (to the extent that it has not been terminated already), and the instructor should be reimbursed for any additional costs incurred or leave used to comply with the requirements. I recommend DSU administration and investigators receive additional training in the relevant policies and law including Academic Freedom, disciplinary processes, and the American Disabilities Act. DSU should consider having future proposed PIPs involving sensitive matters reviewed by experienced NDUS colleagues or legal counsel.

Informal Suggestion:

Since neither the complainant nor the alleged comments that began this action could be verified, a reasonable solution might have been an informal discussion with the faculty member regarding sensitivity to informal side comments or attempted humor that may not be perceived favorably by the class, rather than escalating to a full-scale investigation that threatens academic freedom. In fact, it appears this suggestion was made at several stages of the investigation but was not adopted by DSU.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



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Summary Investigative Report Department Chair Replacement April 25, 2022

Source of Complaint	Direct Complaint
Date of Complaint	03/10/2022
Topic of Allegation	Inappropriate process for replacing Department Chair
Institution	Dickinson State University
Policy referenced/related	DSU Policy 602.2.001 Department Chair Appointment
Conclusion	No violation, recommendation made
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a direct report in regard to filling a vacant psychology faculty position in the Social Sciences Department. The report alleged that the department advocated strongly for a tenured PhD position, as it had been in the past, but DSU Administration intended to post the position as a non-tenured/non-tenure track one-year contract. The report further alleges that the Dean of the College of Arts and Science stated the DSU Administration would consider posting a tenure-track position if the current Department Chair would step down; then the new position would consist of a combination of Department Chair and part time teaching duties.

Policy References

DSU Policy 602.2.001 provides:

Department Chairs are appointed to an annual term by the Provost/Vice President for Academic Affairs (VPAA) upon the recommendation of the College Dean and notification of the President. Department Chairs serve at the pleasure of the College Dean and Provost/VPAA and the appointment may be revoked at any time based on job performance. The Chair is evaluated annually by the Department Faculty, College Dean and Provost/VPAA. The appointment may be renewed for successive years upon the recommendation of the College Dean and approval of the Provost/VPAA.

Investigation and Findings

The Office of Compliance and Ethics investigated the direct complaint in this matter because the complaint alleged wrongdoing by senior DSU administrators. The report set out two main concerns: the decision by DSU administration to replace a tenured position with a non-tenured term position and the alleged attempt to remove an existing department chair as the requirement for agreement to the first request.

1. Preliminarily, the reporter and current faculty members interviewed by the Office asserted that the demand for psychologists in the Dickinson area is extremely high due to expansion of area behavioral health centers. As a result, when a tenured faculty member left the department, faculty members advocated that the position be either a tenured or tenure-track position that would require a Ph.D. The faculty members asserted that this would attract highly qualified and experienced candidates, and that a non-tenured/non-tenure track appointment under an annual or two-year contract would be more likely to produce less experienced candidates with less motivation to stay in the position. This viewpoint was confirmed by three current faculty members.

While the information provided by the reporter was substantiated by the investigation, the allegation does not violate any policy or procedure which may be reviewed by the Office. While it is certainly best practices for an institution's administration to solicit feedback and input from the department prior to posting a vacant position, the administration has no obligation to defer to the department's preferences regarding the qualifications or structure of the posted position.

2. When the office interviewed the Dean of the College of Arts and Sciences regarding the allegation that a tenure track position would be posted only if the current Department Chair stepped down, the Dean stated that he was misunderstood. Instead, the Dean stated that he had intended to communicate that DSU administration seems to prefer using tenured faculty in a leadership role and thus may be more likely to post a tenure/tenure-track position if being Department Chair was part of the position description. He also asserted that there was no intent on the part of DSU administration to communicate a desire for the current Department Chair to step down, or to offer a bargain to that effect.

The appointment or removal of a Department Chair is at the discretion of the College Dean and the Provost/VPAA, subject to DSU Policy 602.2.001. Unless the decision to remove a Department Chair is made for a reason that violates policy, procedure, or law, there is nothing for the Office to investigate. Here, the Department Chair remains unchanged. As a result, while it may be advisable for DSU Administration to consider how communication may be improved, the allegations in the report were not substantiated.

Conclusion:

Communication issues have often been at the root of hotline and direct reports, particularly those regarding DSU. Care should be taken by both parties, but the administration in particular, to ensure the message is both given and received clearly so that misunderstandings do not complicate an otherwise innocent conversation. Similarly, it would be helpful for DSU community members to seek clarification and continued discussion rather than assuming the worst, and DSU administration should be clear that it is open to that feedback (if it intends to be). In the end, the position in question was advertised as an 18- month (two year) contract with potential to convert to tenure-track. There has been no change in the Department Chair of Social Sciences. There was no violation of policy or procedure.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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NDUS Chief Compliance Officer



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Summary Investigative Report Incomplete Response to Compliance Request April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline
Date of Complaint	03/07/2021
Topic of Allegation	Failing to provide requested information to the NDUS Office of Compliance and Ethics
Institution	Dickinson State University
Policy referenced/related	Policy 306.1 Compliance Office
Conclusion	Investigation supports the allegation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Eide Bailly Fraud Hotline alleging that in reference to the initial hotline report regarding Conflict of Interest and improper procurement process in the Learning Core instructional design contract, DSU Administration did not provide the Office with complete information about this request. The report also alleged that the request for information, when shared among members of DSU Administration, Administrator A responded saying “No problem. Will get “Karol with a K” all the information she needs. She is easy to work with.”

Policy References

SBHE Policy 306.1(4) Compliance Office Charter states in part:

The Office shall be afforded unrestricted access to any and all NDUS and its institutions’ records, physical properties, and personnel pertinent to carrying out any engagement, subject to the requirements of state and federal privacy laws such as FERPA and HIPAA. All NDUS employees shall assist the Office in fulfilling its roles and responsibilities by complying with the Office’s reasonable requests.

SBHE Policy 308.1(13) provides in part:

Alleged violations of this code involving NDUS officers or employees shall be investigated by the appropriate NDUS officer. All officers and employees shall cooperate in investigations of alleged violations. A violation of this code is cause for dismissal or other disciplinary action, in addition to any criminal or other civil sanctions that apply.

Investigation and Findings

On Thursday, August 20, 2020, the NDUS Office of Compliance and Ethics received a hotline report alleging that DSU Administration ordered or recommended DSU staff to give preferential treatment to Learning Corps LLC because of their past association with the owners of the company, which was a conflict of interest. The Office asked DSU Administration to submit information on any potential/actual/perceived conflicts of interest relating to the Learning Corps/Instructional Design procurement. Administrator B responded that they had all the backup in regard to this contract and would send the information when they were back in the office on the following Monday August 24, 2022. However, Administrator A replied to the Office on Friday August 21, 2022, by providing the relevant contract and assuring the Office that the proper procurement process was followed. Regarding potential conflict of interest, they stated, “Yes, (Administrator C) did know one of the four principals of the LLC. They had worked together at the one university in Wyoming. However, we don’t believe this was a relevant point at any juncture of the decision making.” Because it is not a violation to be acquainted with vendors due to prior association, after confirming the prior professional relationship between Administrator C and one of the principals of Learning Corps, the hotline report was not investigated further.

Reports of a conflict of interest by Administrator C and improper procurement related to Learning Corps continued to be received, so a full investigation began in March 2021. During this investigation, volumes of email communications were reviewed and DSU administrators were interviewed. A Summary Investigation Report regarding the allegation of Conflict of Interest was issued in June 2021, with a conclusion that there was no actual conflict of interest, as that term is defined by NDUS policy, but additional steps were recommended to avoid the appearance of a conflict of interest.

During the full investigation, the emails referred to were obtained and confirmed. Many additional relevant emails and documents that related to the conflict of interest question were also obtained and reviewed. The report from the fraud hotline was substantiated.

Recommendation:

All relevant information should be produced in response to a request from the Office. If the request produces excessively numerous responses, clarifying questions should be asked of the Office, rather than administration officials substituting their judgment for that of the Office.

Conclusion

All NDUS employees are required to fully respond to reasonable requests from the Office. DSU Administration was assured that the Office would receive “all the information she needs.” However, documents and emails that were used in the 2021 full investigation were also available in August 2020 but were not provided. This delayed the formal investigation 6-8 months, and exacerbated the existing issues of trust on campus, resulting in the filing of numerous additional hotline and direct reports to the Office. If DSU Administration had fully responded to the Office’s request, the Office’s report may have been issued much earlier.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive, flowing style.

Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Conflict of Interest: Grant Writing April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline, multiple direct reports
Date of Complaint	04/01/2021 and additional reports
Topic of Allegation	Conflict of Interest: Procurement
Institution	Dickinson State University
Policy referenced/related	Policy 308.4 Conflict of Interest
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics initially received a report through the Eide Bailly Fraud Hotline regarding a conflict of interest related to the Governor’s Emergency Education Relief Fund (GEER) Grant. Subsequently, so many similar direct reports were received regarding the same matter that the Office stopped accepting additional reports regarding the same subject matter. The anonymous reporter(s) stated that DSU asked Learning Corps (LC), an existing contractor, to write the grant proposal that was ultimately submitted for GEER Grant consideration. The reporter(s) alleged that DSU Administration provided information and examples to LC, who then wrote the grant proposal specifically tailored for activities LC would be interested in performing, with information that would give LC an unfair advantage in the bidding process.

Policy References

SBHE Policy 308.4 Conflict of Interest states in part:

A conflict of interest arises when an individual is knowingly in a position to derive personal benefit from actions or decisions made in their official capacity. In the event of an actual conflict of interest, or the appearance of a conflict of interest, the conflicted individual must not be involved in the activity or decision giving rise to the conflict of interest.

Investigation and Findings

LC was engaged to provide instructional design-related services for DSU under a July 2020 contract. Emails and other documents support the allegation that LC was involved in preparing the grant proposal for GEER funding, and that DSU Administration provided information and consulted with LC in the grant-writing process. The proposal was submitted by DSU but was not funded.

However, even if DSU was awarded a GEER grant, LC would have been required to submit a proposal to receive any work under the grant. Due to the fact that LC had been involved in preparing the proposal, this could have been a plausible conflict of interest and would have raised questions regarding the fairness of the procurement process. However, DSU's proposal was not successful, so these concerns are speculative. The Office does not investigate hypothetical situations.

Conclusion

Generally, there is no inherent conflict of interest in engaging a vendor to assist with the preparation of a grant application. Moreover, because DSU did not receive the grant, questions about what may have happened had the grant been awarded are speculative and cannot be investigated. The reports were not substantiated.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Delayed Open Record Request Fulfillment April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline
Date of Complaint	04/28/2021
Topic of Allegation	Unreasonable Delay in Fulfilling Open Records Request
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct N.D.C.C. Section 44-04-18
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Compliance Office received a report through the Eide Bailly Fraud Hotline. The anonymous reporter stated that DSU was unreasonably delaying the release of open records in response to a legal open records request in violation of guidance provided by the Attorney General’s office.

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct states in part:

In all matters involving communication with NDUS students, customers, suppliers, government authorities, the public and others, SBHE members, officers and employees shall endeavor to make complete, accurate, and timely communications and respond promptly and courteously to all proper requests for information and complaints.

N.D.C.C. Section 44-04-18 (8) states:

This section is violated when a person's right to review or receive a copy of a record that is not exempt or confidential is denied or unreasonably delayed or when a fee is charged in excess of the amount authorized in subsections 2 and 3.

SBHE Policy 311(9) Public Records (as in effect as of the date of this report):

Copies of records that are not confidential or exempt from public disclosure shall be provided upon request.

Investigation and Findings

The concern report did not specify the exact records requested nor the applicable dates that would indicate an unreasonable delay but did refer to “survey results to evaluate administrators.” When the Office contacted DSU representatives, the office was informed that the report related to the survey had not been finalized but would be provided to the requestor when the Faculty Senate’s Executive Committee finalized it. Based on communications from the DSU Administration, the report was not considered finalized until roughly July 2021.

However, the DSU Administration could not find records reflecting the date the open records request was submitted, nor the date the record request was fulfilled. When the Office made a request for other similar requests, the DSU Administration was unable to locate other open records requests in process relating to “survey results to evaluate administrators.” The above records have been provided to the requestor. However, due to the anonymous and vague nature of the report, the Office cannot substantiate that this request was the same one referred to in the report.

The North Dakota Century Code provides a specific procedure for those who contend that their rights have been violated by a state agency not properly responding to an open records request. *See* N.D.C.C. § 44-04-21.1(1); N.D.C.C. § 44-04-21.2(1). Because the Century Code designates the Office of Attorney General and the civil court system as the sole avenues for seeking review of a violation of the Open Records law, the Office is not equipped to provide an opinion as to whether DSU’s actions violated the Open Records law.

Notwithstanding, while the Public Records policy in effect at the time has now been substantially revised, the thrust of the requirement to provide records upon public request has not changed. Notably, there is no exception in the current Public Records policy for draft documents or documents which have not been finalized. As a result, under the policy, the DSU administration would have been required to provide a draft report to the requestor if requested, even though it had not been finalized. However, due to the lack of detail in the report, the Office cannot affirmatively determine that the report was the one DSU Administration referred to, so the report cannot be substantiated.

Recommendation: DSU should consider establishing a uniform system for tracking and resolving open records requests to avoid situations where the date a request was received or fulfilled cannot be located.

Conclusion

The reporter did not specifically identify the records requested, so the Office is unable to substantiate the concerns made in the report. Notwithstanding, DSU Administration should consider more carefully tracking, or providing training in responding to, open records requests. Moreover, this Office is not equipped to evaluate alleged violations of the open records law, as the administrative review process and authority is exclusively vested in the Attorney General's Office and the civil court system. However, the Office may determine whether a response violated the SBHE Policy governing open records requests.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Multiple Separations: Code of Conduct April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline
Date of Complaint	06/03/2021
Topic of Allegation	Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct
Conclusion	Culture/communication issue; Cannot be sufficiently investigated
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Eide Bailly Fraud Hotline. The anonymous reporter listed numerous academic, administrative and technology employees that have left employment at DSU “since (President Steve) Easton appointed (Debra) Dragseth Provost. These included Vice President of Finance and Administration, Vice President of Student Affairs and University Relations, Director of Technology Resources and Education Center and Distance Learning Specialist, Information Services Technician, Education and Programming Specialist, Director of University Relations, University Communications Specialist, Tenured Full Professor of History, Tenured Full Professor of Geology and Tenure-track Assistant Professor of Nursing.” The reporter stated that “this exodus of talent and institutional memory reflects the failure of current DSU administrators. The president, provost and deans have rejected the leadership values and the standards of conduct that are promised in and required by the DSU Code of Conduct; this is the outcome.”

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct states in part:

The SBHE supports an environment that is free of discrimination or harassment. All SBHE members, officers and employees are expected to conduct themselves in a businesslike manner.

Investigation and Findings

The concern report is very general, connecting multiple employee voluntary and involuntary separations to the actions of DSU Administration. Additional details were not provided, and because the source of the report was anonymous, it was not possible to gather additional information to determine if there was specific evidence of a policy violation.

The content of the report suggests culture and/or communication issues between administration and faculty/staff, which are beyond the Office's investigatory scope.

Conclusion

The investigation was limited by lack of specific details and the anonymity of the reporter. The results of the investigation do not substantiate the allegation of a code of conduct policy violation.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Preferential Use of Riding Arena April 25, 2022

Source of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date of Complaint	09/18/2021
Topic of Allegation	Administrative and Academic Authority, Code of Conduct
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 308.1 Code of Conduct N.D.C.C. Article X Section 18 (anti-gifting clause) DSU Arena Use Forms and Regulations
Conclusion	No violation; informal suggestion provided
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website regarding the use of DSU riding facilities by a DSU Administrator (“Administrator A”) for personal use. The reporter expressed concerns about private use of DSU facilities which is not part of an employee benefits package, providing a state-funded benefit to an individual, and concerns of liability risk to DSU because a child was part of the activity. The reporter said the event was posted on Administrator A’s personal social media.

Policy References

SBHE Policy 308.1 (1a), (3) Officer and Employee Code of Conduct:

- This officer and employee code of conduct governs the SBHE and its members and establishes minimum standards for all NDUS officers and employees. The SBHE and entire NDUS are committed to uphold the highest ethical and professional standards. All SBHE members and NDUS officers and employees shall comply with all applicable laws, regulations, policies and procedures. Activities that achieve results unlawfully or in violation of applicable policies or procedures or by unethical behavior – including payments for illegal acts, indirect contributions, rebates, or bribery - are not tolerated*

and must be reported. All conduct must meet or exceed minimum standards established by law.

- 3. All SBHE members, officers and employees are expected to perform their duties conscientiously, honestly, and in accordance with the best interests of the NDUS. All SBHE members, officers and employees shall comply with applicable federal and state laws. SBHE members, officers and employees may not unlawfully use their position or the knowledge gained because of their position for private or personal advantage. All SBHE members, officers and employees are responsible for their own actions. Any individual who has concerns or questions regarding a perceived or potential conflict or regarding application or interpretation of federal or state law or SBHE policy is encouraged to communicate with a superior or with legal counsel.*

N.D.C.C. Article X Section 18 (excerpt) :

Neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

DSU Arena Use Forms and Regulations:

The process for public use of the indoor/outdoor arena – horseback riding is published on the DSU website. The Operating Procedures provide a general schedule of use for the arena, as well as required forms for participants which provide a roster/contact information, a waiver of liability (for adults and for parent/guardians of minors), acknowledgement of receiving a copy of N.D.C.C .53-10-01 ND Equine Law and receipt of a \$5.00 fee per horse per day.

Investigation and Findings

The Office of Compliance and Ethics investigated the direct complaint in this matter. When contacted, Administrator A confirmed that while three of the five persons present at this activity were DSU/NDUS employees, it was not a DSU activity as well as confirmed the understanding that the facility is open to the community, with permission from or notification to the Chair of the Department of Agriculture “Chair B.” Administrator A was not aware of a liability waiver and noted that the typical practice is to send Chair B a text message notifying of upcoming use of the arena. Administrator A did not make any reference to the \$5.00 fee.

The Office also contacted Chair B, who generally confirmed Administrator A’s description of the process. The use of this facility is open to the public, except during DSU sponsored activities. There is a process to acknowledge who is using the facility (with permission) but is not reserved; all users at a given time are expected to accommodate all other users. There is a liability waiver that must be completed (one for adults and one for minors) and records are kept in Chair B’s office. According to Chair B, some first-time users may be a bit lagging in getting paperwork filled out but DSU works with all public users to get this done as soon as possible. Chair A noted that some follow up could be made to ensure that all forms were current and on file with the office, but because the anonymous report did not provide a date and time, it was not possible to

verify if notifications and waivers were in place for the activity in question or if the required nominal fee was received.

Conclusion:

After an investigation, the Office was not able to substantiate the specific allegations in the report due to its anonymous nature and lack of time/date information. DSU allows public use of the arena and has a process in place that requires a contact/roster, liability waivers, providing a copy of N.D.C.C. 53-10-01 and collecting a nominal fee. Per the procedure, all forms and the use fee must be received by DSU's Department of Agriculture and Technical Studies office prior to use of the arena. Similarly, there is no violation of the anti-gift clause of the North Dakota Constitution (Article X, Sec. 18), as DSU charges a fee for use of the facility, the facility is made available for the public benefit, and use is not contingent on DSU employment. However, based on the information received during the investigation, DSU could convey information to the community and potential users of the riding facilities more clearly.

Informal Suggestion:

DSU should consider the effectiveness of the current system of notification and documentation prior to public use of the facility and make any appropriate improvements in communication and compliance that may be needed. One possible solution would be to create an electronic form and payment process accessible via QR code or web link set out in signage at the riding facility.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Disclosure of Exempt Hotline Report April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline
Date of Complaint	12/09/2021; 12/13/2021
Topic of Allegation	Disclosure of Exempt Report; Campus Climate/Code of Conduct
Institution	Dickinson State University
Policy referenced/related	N.D.C.C. § 44-04-18.1(6); SBHE Policy 311 (Not in effect at time); SBHE Policy 308.1(2)
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics (“Office”) received two anonymous reports through the Eide Bailly fraud hotline, as well as a direct report. The reporters, who may be the same or different individuals, alleged that a report had been disclosed to the DSU Faculty Senate President “Faculty A” during the process of an investigation. Faculty A is then alleged to have discussed the report in detail during a public forum on December 2, 2021, followed by an email to a faculty listserv on December 7, 2021. The reporter alleged that this constituted “intimidate[ion], bully[ing], and isolat[ion to] faculty.”

Policy References

N.D.C.C. § 44-04-18.1(6) provides:

Records relating to a public entity’s internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint.

SBHE Policy 311(8)(f) Public Records (subsequently adopted on February 23, 2022) states as follows:

Other Exempt or Confidential Records. Additional records exempt from disclosure or confidential under the open records law include [. . .] Complaints submitted to the NDUS Office of Compliance and Ethics or an institution official, for the shorter of 75 days from the date of submission, or the conclusion of the investigation into the Complaint (N.D.C.C. § 44-04-18.1(6)).

SBHE Policy 308.1(2) Officer and Employee Code of Conduct provides in relevant part:

The SBHE supports an environment that is free of discrimination or harassment. All SBHE members, officers and employees are expected to conduct themselves in a businesslike manner.

Investigation and Findings

The Office received a direct report through the Compliance and Ethics webpage reporting link on the ndus.edu website on October 29, 2021.⁷ In order to investigate this report, the Office sought information about the matter from Administrator B, one of the designated compliance contacts at DSU. During the course of his investigation, Administrator B shared some or all of the details of the report with Faculty A, as is appropriate to gather information during an investigation. Faculty A then allegedly described the report in detail during the faculty forum on December 2, 2021, and sent an email, which was reviewed by the Office, to the same effect. To the extent that Faculty A is alleged to have violated N.D.C.C. § 44-04-18.1(6), which makes complaints and materials related to an internal investigation exempt for the shorter of 75 days or until a final report is issued, the investigation did not reveal any indication that Faculty A was informed of the exempt status of the report or investigation, or that Faculty A intended to violate the statute. As a result, no violation is found on this point.

The Office additionally noted that since the date of these events, this exemption was added to SBHE Policy 311. As a result, all NDUS employees, including those at DSU, are urged to ensure that information related to reports or investigations of the Office or institution officials is properly protected for the statutory period.

With respect to the allegation that Faculty A engaged in activity constituting “intimidate[ion], bully[ing], and isolate[ing to] faculty,” this allegation is subject to review and resolution by the “appropriate NDUS officer” pursuant to SBHE Policy 308.1(13). Given that the underlying communications and substance are related to a campus climate issue, this Office is not the appropriate NDUS officer, and DSU may conduct further investigations as it deems appropriate.

Conclusion

The investigation did not reveal an intentional violation of Century Code, SBHE Policy, or DSU Policy. However, the Office suggests that all NDUS institutions, including DSU, are aware of the exempt status of complaints and investigations under N.D.C.C. § 44-04-18.1(6) and SBHE Policy 311(8)(f) to avoid future incidents of this nature.

⁷ This report is addressed by a separate investigation report issued on the same day as this one.

The remaining allegations related to campus climate and potential code of conduct violations either could not be investigated due to the anonymous nature of the reports or are best resolved at the campus level.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive style.

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Summary Investigative Report Gift Card Incentives April 25, 2022

Source of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date of Complaint	03/17/2022
Topic of Allegation	Gift cards given in violation of purchasing, “anti-gift” clause
Institution	Dickinson State University
Policy referenced/related	NDUS Procedure 803.1 ND Constitution Article X Section 18
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous reporter provided a link to a DSU page that offered students an entry in a drawing to win gift cards if they participated in a survey. <https://dickinsonstatenews.com/freshmen-seniors-complete-the-nsse-survey/> The reporter questioned whether DSU funds could be used to give students gift cards to incentivize participation.

Policy References

ND Constitution Article X Section 18:

Section 18. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

NDUS Procedure 803.1(8) Purchasing (in relevant part):

An amendment was recently added to this procedure to clarify application of the above section of the ND Constitution to the NDUS purchasing procedures. The amendment was approved April 13, 2022.

The North Dakota Constitution prohibits the use of public funds to provide gifts or donations in aid of any individual, association, or corporation. As a result, no NDUS entity or institution may use public funds in any amount or of any kind, including state and local funds, to provide gifts or donations to employees, students, constituents, or any individual, association, or corporation, except as provided in this procedure.

For the purposes of this section, a gift or donation means the provision of a benefit without a reciprocal exchange for value.

- *NDUS entities or institutions may use public funds to provide reasonable awards to employees in support of retention pursuant to an institution policy or procedure, including, but not limited to, retention awards, service awards, or retirement awards. Notwithstanding, such awards shall constitute a taxable event for the employee, and the amount of any cash award or gift certificate or gift card shall be reported as taxable income. Similarly, the fair market value of any tangible item provided as part of such an award shall be reported as taxable income.*
- *NDUS entities or institutions may provide branded items to members of the public as part of a student recruitment, marketing, or athletics strategy or program using non-appropriated funds. For the purposes of this section, non-appropriated funds include those funds allocated by the legislature but for which the funding source is not the state general fund.*
- *Grant funds received from entities other than the State of North Dakota are not subject to this section provided that the terms of the grant agreement are followed and the grant funds are not commingled with public funds.*

Investigation and Findings

The report referenced an entry in the DSU News page of the DSU website:

<https://dickinsonstatenews.com/freshmen-seniors-complete-the-nsse-survey/>

The announcement included this passage:

📣 ATTENTION, freshmen & seniors !! Complete the NSSE survey by April 4 to be entered in a drawing for 1 of 4 Starbucks \$25 gift cards! 📧 Check your email for the link.

The state constitution generally prohibits using state funds (including as expended via p-card) for gifts or donations to employees, members of the public, or any other entity. ND Constitution Article X, Section 18 (the “anti-gifting clause”). Therefore, the crucial element in this investigation is the source of the funds used for the gift cards.

The Office of Compliance and Ethics referred the report to DSU for investigation. DSU Administration stated that the survey process is covered by the National Survey of Student Engagement's blanket IRB, which allows an institution to provide a student participation incentive, but it must be approved by NSSE to ensure compliance with IRB requirements. DSU provided documentation of the above statements as well as the official approval from NSSE for the use of incentives. In addition, DSU noted that the cost of the gift cards was provided by the Dickinson State University Heritage Foundation.

Conclusion

The topic of gift cards and their allowed and prohibited uses have been discussed throughout the NDUS in recent months, and this report is positive evidence that awareness of potential anti-gifting issues is growing at the campus level. In this case, offering the incentive of a drawing for gift cards for students completing a survey has followed all relevant guidelines and is permissible, including the use of non-public funds for the gift cards. Thus, the results of the investigation do not substantiate the allegation of a violation of law or procedure.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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