



INDIANA UNIVERSITY

OFFICE OF THE EXECUTIVE VICE PRESIDENT
FOR UNIVERSITY ACADEMIC AFFAIRS

March 17, 2021

Professor Eric Rasmusen
2810 South Dale Court
Bloomington, IN 47401-2412
VIA email erasmuse@indiana.edu and erasmuse61@gmail.com

NOTICE OF APPELLATE DECISION

Dear Professor Rasmusen:

You have appealed the Level One sanctions in the February 26, 2021, decision of Vice Provost for Faculty and Academic Affairs (VPFAA) Eliza Pavalko. Provost Lauren Robel recused herself from the case and appointed me in her place on February 9, 2021, and I have received no objection to the recusal or appointment. In accordance with Indiana University Policy UA-03, as in effect at the time of the actions at issue, I have reviewed the documents you provided. For the reasons given below, I deny the appeal and uphold the decision of the VPFAA in its entirety. Specifically, I find that you have failed to demonstrate that the VPFAA decision contained significant, outcome-affecting procedural error or significant bias. You may further appeal my determination to the Faculty Board of Review, in accordance with the terms described in the VPFAA's decision.

The record on appeal consists of your three-page letter to me (dated March 7, 2021, and emailed to me on March 8, 2021), in which you make various arguments for reversing the decision of the VPFAA. I will refer to this letter as the "Main Appeal." Appended to the Main Appeal were the following documents, using your terminology to identify them:

- Attachment Alpha, which consists of the January 25, 2021, Office of Institutional Equity (OIE) report with your own extensive commentary interspersed within the OIE report;
 - Attachment A, labeled "Confidential Answers to Student Questions";
 - Attachment B, labeled "Scribes Schedule";
 - Attachment C, your written response to OIE following your September 2020 interview with that entity;
 - Attachment D, your class syllabus for G406;
 - Attachment E, your course readings for G406; and
- Attachment Beta, the VPFAA's decision of February 26, 2021.

Applicable Version of UA-03

In the Main Appeal, you challenge the use of the version of UA-03 that was adopted on March 1, 2015 (and later reviewed in subsequent years, hereafter “2019 Policy”). You contend that OIE’s investigation should have been governed by a newer version of the policy (“2020 Policy”), which was adopted on August 14, 2020, to conform to new U.S. Department of Education (DOE) regulations.

OIE’s investigation, as noted in Attachment Alpha, began in late 2019, and it involved actions arising on or before that date. The actions not only pre-date the 2020 UA-03 Policy, but they also pre-date the effective date of the DOE regulations that provided the basis for the 2020 Policy. It is basic fairness that (except in very unusual situations) a person’s actions are evaluated according to the rule or policy in effect at the time of those actions. Moreover, and conclusively, in making the 2020 regulatory revisions, DOE stated explicitly that the revisions were not intended to apply to already-pending matters, and that the new regulations are not retroactive. *See* U.S. DOE Guidance dated August 5, 2020.¹

Procedural fairness does not require application of the “newest” rules or what one perceives to be the most favorable rules for one’s case -just the ones that applied to your case at the time. Accordingly, the 2019 Policy applies to all aspects of the present case.

Effect of UA-01

You also argue that the use of UA-03 procedures for violations of UA-01 (Non-Discrimination/Equal Opportunity/Affirmative Action) is in error. This is not correct. UA-01 is a general prohibition on numerous types of discrimination and a statement of IU’s position on affirmative action. It contains no separate procedural rules. In contrast, UA-03 covers specific types of conduct, and it is designed to help implement the broad principles established in UA-01. Consistent with the university’s obligations under Title IX and Title VII, UA-03 contains very detailed procedures for handling matters within its purview. Therefore, it is reasonable to use UA-03 procedures in cases that involve UA-01 in addition to UA-03. This has been the university’s consistent practice in discrimination cases involving academic appointees, and indeed UA-01 specifically refers readers to OIE, which administers UA-03, for further information.

¹ As of this writing, the only contrary judicial view appears to be a New York federal district court case applying the new DOE regulations in a student sexual assault matter; that matter is obviously a case where the facts and issues are very different from those at hand. Significantly, under the new regulations, the university is permitted to continue to use the “preponderance of the evidence” standard of weighing the evidence. Further, under the new regulations, the university can continue with the same basic process used by OIE and the VPFAA in this matter – i.e., an internal investigation by OIE, an investigative report to the VPFAA, decision by the VPFAA, and an appeal to an appellate officer with the same evidentiary standards. The new regulations did not affect non-Title IX discrimination or harassment complaints against academic appointees. Methods for handling student Title IX sexual misconduct cases changed in significant ways, however.

In any event, you have received the fundamental rights of notice and the opportunity to be heard on the allegations against you. The exhibits you have appended to the Main Appeal and labeled as Attachments Alpha and Beta clearly establish that you received notice from OIE of the events and concerns at issue; that you met with OIE on September 8, 2020, to discuss with OIE, via Zoom, these issues; and that you later supplied OIE with further written comments following your meeting with OIE. Also, you will ultimately have access to the Faculty Board of Review if you wish to proceed with a further appeal. In all, the procedures followed in this case have afforded you notice of the accusations and numerous opportunities to provide evidence and argument to contradict them.

Scope of Review: Sanction Level One

The 2019 UA-03 policy, which is applicable to your case, sets out two alternative scopes of review for an appellate officer to use:

Following a finding of “Violation” and Level One Sanction, any party may request an appeal to the AO on the basis of:

- a. Significant procedural error that reasonably would have affected the outcome.
- b. Significant bias in the process.

Following a finding of “Violation” and Level Two Sanction, any party may request an appeal to the AO on the basis of:

- a. Significant procedural error that reasonably would have affected the outcome.
- b. Significant bias in the process.
- c. The finding of responsibility is not supported by the evidence in the Report of Investigation.
- d. The appropriateness of the sanction.

Which scope of review applies to a particular case depends on whether a respondent received Level One or Level Two sanctions. The sanction levels are described as follows:

Level One Sanctions include sanctions that do not directly modify job duties or actual salary, such as informal discussions, additional training, periodic review, letter to personnel file (other than to promotion and tenure dossier which is included in Level Two Sanctions below). Level One Sanctions shall not be appropriate in the event the respondent was found responsible for sexual assault or other sexual violence.

Level Two Sanctions include sanctions the directly modify job duties, salary or job status, including affecting compensation, consideration in tenure or promotion decision, suspension, and termination.

The VPFAA's decision indicates that the Level One scope of review applies and thus that the grounds of review are limited to procedural error and bias. You argue that the sanctions in the decision are Level Two sanctions and therefore that the evidentiary support and appropriateness of the sanction grounds also apply.

I conclude that the VPFAA's decision correctly stated the scope of review, because the sanctions provided in the decision – that you treat students of all backgrounds with respect; that your teaching be subject to monitoring, that the Kelley School of Business (KSB) not require its students to take courses taught by you; that KSB not assign you to certain committees, including those that evaluate students or faculty; and that students not be required or incentivized to access class materials through your personal website – are Level One sanctions. Like a letter of reprimand, they do not fundamentally change your job duties, nor do they impact your salary, your benefits, or your rank. Instead, the adjustments fall fully within the normal and traditional authority of deans to assign work and to guide faculty in their work. Individual faculty members are not entitled to teach a particular course or to serve on a particular committee. Moreover, the sanctions are remedial and directly aimed at resolving the problems noted in OIE's report. You continue to be employed as a full, tenured professor in the KSB, and the teaching, research, and service aspects of your role continue, with direction from the dean, as would be expected.

Since I find that the sanctions in the VPFAA's decision were Level One sanctions, I find that the appropriate standard of review to be used is whether there was significant bias in the process or significant procedural error that reasonably would have affected the outcome. Indeed, I am not authorized under the policy to review this matter for whether the finding of responsibility is supported by evidence in the report of the investigation or for whether the sanctions provided are appropriate.

Scope of Review: Waiver

In addition to the limitations on the scope of review under the terms of the policy, your Main Appeal indicates that you have waived claims of bias, retaliation, or disproportionate sanctions. You stated, in relevant part: "While I think there's bias and that this is retaliation for my 2019 Twitter posts and my article proposing that the Provost be fired, and that the sanctions are entirely disproportionate.... I will focus on the procedural errors in the new material in this Appeal." While one might interpret "focus on" simply to mean emphasis, a waiver is confirmed by the absence of any argument or evidence concerning bias, retaliation, or disproportionate sanction in the Main Appeal. While the appeal directs attention in general terms to the many (over 170, by my count) points that are scattered throughout Attachment Alpha, you make no effort to connect these individual points to the UA-03 criteria for appeal. It is unreasonable to expect any reader to wade through approximately 50 pages of de-contextualized and disjointed critiques of the OIE report, in order to unearth what arguments might possibly exist with respect to alleged bias, retaliation, or disproportionate sanctions.

In particular, Attachment Alpha sheds no light on any potential claim of significant bias in the process. I can find no reference to alleged bias on the part of the decision maker,

VPFAA Pavalko,² and although you refer to OIE allegedly “leading a witness,” I am unable to find support for this in the record, particularly when OIE’s report quotes a student witness who favored you, as well as witnesses who were neutral as to your behavior, in addition to those who found your classroom behavior objectionable.³ I note, too, that your Attachment A (a compilation of anonymous student comments about you that you apparently solicited as part of a classroom assignment) includes a substantial number of student comments that support the students in the OIE report who found your behavior objectionable and demeaning to various groups. The presence of this evidence in the OIE report itself severely undercuts a claim of bias. Likewise, the possibility frequently raised in Attachment Alpha that others could conceivably view your comments in a different light than either OIE or the VPFAA did, constitutes a differing opinion or conclusion from yours. It is not evidence of bias against you.

You also frequently claim or hint broadly at retaliation, but you produce no actual evidence in Attachment Alpha or elsewhere that such occurred. Instead, you appear to rely on the many unsupported interlineations in Attachment Alpha and on *post hoc ergo propter hoc* assertions. Attachment Alpha is replete with insinuations and rhetorical questions that attempt to imply nefarious motivations on the part of various individuals, but I find these to be without support in the materials that you have submitted.

Basis of Appeal: Procedural Error

The argument that you do preserve for this appeal is procedural error that reasonably would have affected the outcome. The asserted procedural error, however, must consist in failure to follow the specific procedures set out in the 2019 UA-03 policy. The broad objections you have to those procedures, which comprise much of your Main Appeal, and your personal and generalized dissatisfaction with UA-03 cannot supersede the applicable university policy and the DOE guidance that it follows.

From your Main Appeal and Attachment Alpha, I have been able to glean a number of specific procedural objections that you advance. First, you appear to claim that you were denied a right to present evidence. This is obviously not the case. You were interviewed by OIE, you supplemented the interview answers in writing (your Attachment C), and you have presented a detailed (line-by-line, or “fisking”) critique of the OIE report in Attachment Alpha. Moreover, in contravention of IU policy, you directly contacted your former students (including those who had dropped your course) from the Fall 2018, Spring 2019, and Fall 2019 semesters. You have been able to present all this material, highlighting the material you feel is most favorable to your cause, in Attachment Alpha. While the line-

² You refer to the Provost and KSB Dean Kesner and someone named Professor Harbaugh being biased against you, but you advance no cogent argument to establish that the Provost’s or the Dean’s alleged bias (or that of Professor Harbaugh) led to the decision at issue.

³As noted above, in the evidence you have presented (see, e.g., Attachment A, which includes many student comments that support those made by witnesses cited in the OIE report), it is clear there is considerable evidence in support of the student complaints about your in-class behavior as collected and reflected in the OIE report.

by-line technique of Attachment Alpha impedes the persuasiveness of the presentation, it is clear that you had ample opportunities to make arguments and present evidence.

You also seem to contend that the KSB's call for concerned students to come forward constitutes a procedural failure. Such a request, however, is hardly "irregular" or even particularly remarkable. When student concerns about potential misconduct come to light, it is the standard and responsible practice to ask those who may have been affected to come forward. Indeed, it is a vital practice when the wrongdoing at issue or the power differential between the perpetrator and victim is a type that tends to silence those most impacted.

You also appear to invoke the United States Supreme Court's *Brady v. Maryland* decision to argue that OIE should have provided you with "exculpatory" evidence. To state the obvious, *Brady* is a criminal case and completely inapposite to an internal administrative proceeding like the present one. There are not even Level Two sanctions at stake that would deprive you in any way of your position or livelihood. Even if some version of an exculpatory evidence rule were to apply, the fact is that OIE's report did include evidence favorable to you, and you highlighted those aspects in the Main Appeal and Attachment Alpha. While your interspersed comments in Attachment Alpha contain several intimations of sinister happenings behind the scenes, they lack both specificity and any evidence to support them. Simply to suggest that something *might* be so does not make it so or even make it likely.

You further contend that there is a procedural irregularity because you were not advised of the names of witnesses or complainants. In this particular case, which was a university-level investigation, the university itself is deemed to be the complainant. Witness names are not typically provided in OIE investigations, in accordance with the need to protect the privacy interests established in UA-03 (privacy interests are deemed important to protect in *both* versions of this policy), and to help prevent retaliation. You have already demonstrated by your actions that you will take steps to trace individual students in an attempt to sway them by engaging them in a mandatory class assignment and by reaching out to contact present and former students in previous semesters. Worse, you have threatened to intimidate students and faculty colleagues by your "warning" to VPFAA Pavalko (reported in her decision) that you would single them out for their views on your case. (The Attachment Alpha (pdf, p.6) similarly hints at "plans for what to do if the end result is unsatisfactory," a statement that can only be understood as a thinly veiled threat.) Your own words and actions provide ample reason for not naming individual witness names in the OIE report. Further, it is disingenuous to claim that you had neither time or permission to contact former students, because you did precisely that and reported the two positive responses you received.

In conclusion, having reviewed your submission, I hereby uphold the VPFAA's findings and sanctions.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John S. Applegate", with a long horizontal flourish extending to the right.

John S. Applegate
Executive Vice President for
University Academic Affairs

cc: Jeff Prince, Chair of Department of Business Economics and Business Policy
Dean Idalene Kesner, Kelley School of Business
Jennifer Kincaid, University Director of Institutional Equity and Title IX Coordinator
Eliza Pavalko, Vice Provost for Faculty and Academic Affairs