Office of the General Counsel

TO MEMBERS OF THE COMMITTEE ON COMPLIANCE AND AUDIT:

DISCUSSION ITEM

For Meeting of September 13, 2011

PRESENTATION ON THE UNIVERSITY’S GRIEVANCE AND DISCIPLINARY PROCESSES

EXECUTIVE SUMMARY

In response to a request by the Regents, General Counsel Robinson will review the University’s grievance and disciplinary processes for faculty and staff.

The University provides separate grievance and disciplinary procedures for Academic Senate members, non-Senate academic employees, and staff. These procedures provide employees with a mechanism to address and resolve complaints related to their employment and provide certain procedural protections to employees receiving discipline. For each of the grievance and disciplinary procedures discussed below, a systemwide policy establishes the key components of the process. Each campus supplements the processes with its own local procedures.

In addition to providing an overview of these procedures, General Counsel Robinson will discuss revisions currently being considered in the staff policies and will address questions that have been raised regarding the grievance procedures, including whether grievances are heard and resolved in an efficient and prompt manner and whether the University should reimburse the attorney fees and costs of successful grievants.

BACKGROUND

The key components of the University’s systemwide policies governing the grievance and disciplinary procedures for Academic Senate members, non-Senate academic employees, and staff are set forth below. These procedures do not apply to exclusively represented employees because their collective bargaining agreements contain grievance procedures.

Academic Senate Bylaw 335 contains the grievance procedure for Academic Senate appointees.¹ The key features of this grievance process include:

¹ See http://www.universityofcalifornia.edu/senate/manual/blpart3.html#bl335.
• **Scope:** Any member of the Academic Senate may grieve a violation of his or her rights or privileges within three years of the violation.

• **Initial Review:** If the Privilege & Tenure committee decides that the grievance states a *prima facie* case, the grievant is entitled to a formal hearing.

• **Hearing Officer:** The hearing takes place before a Hearing Committee of at least three members, who are appointed by the P&T Committee.

• **Evidence:** Each side may present evidence and cross-examine witnesses.

• **Remedy:** There is no limitation on the available remedy. In cases involving tenure, promotion or reappointment, however, the Committee may not reevaluate the grievant’s academic qualifications or professional competence.

• **Final Decision:** The Hearing Committee provides its findings and recommendations to the chancellor for his or her final decision.

Academic Senate Bylaw 336 discusses disciplinary procedures for Academic Senate appointees. While many procedures in Bylaw 336 are the same or similar to those in Bylaw 335, the following procedures differ significantly:

• **Probable Cause:** Before a disciplinary action can be formally filed with the P&T Committee against a member of the Academic Senate, probable cause that the Academic Senate member violated APM 015 (the Faculty Code of Conduct) must be found.

• **Campus-Specific Procedures:** Bylaw 336 gives campuses discretion on how to establish probable cause; most use a “Charges Committee” to review proposed disciplinary complaints and provide recommendations to the chancellor.

• **Timetable to Begin Proceeding:** After receiving formal notice of disciplinary action, the accused Academic Senate member has 21 days to provide a response. The P&T Committee then will consider the matter within 21 days after that. Bylaw 336 states that generally, a prehearing conference should be held within 30 days after the P&T Committee’s initial consideration and a hearing should be held within 90 days of appointment of hearing committee members.

Non-Senate academic employees may file grievances under Policy 140 of the Academic Personnel Manual (“APM 140”). The key features of APM 140 include:

• **Scope:** Any non-Senate academic appointee (except student academic appointees) may grieve arbitrary and capricious actions and violations of rules or policies that adversely affect their employment within 30 days of the action.

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Initial Review: If the grievance liaison decides that the grievance is complete, timely, and within the jurisdiction of APM 140, he or she forwards the grievance to the department or unit head.

Administrative Decision (Step II): The department head issues a decision within 30 days. The grievant may appeal the department head’s Step II decision within 15 days.

Final Appeal (Step III): The grievant is entitled to either (1) administrative review of the department head’s decision by the chancellor or his or her designee, or (2) formal hearing if the grievance challenges certain specified actions, including layoff, dismissal or non-reappointment, corrective action, and discrimination.

Hearing Officer: The Step III hearing takes place before a University or non-University hearing officer, who should be selected in 45 days. If the grievant chooses an outside hearing officer, the grievant splits the cost with the University. The hearing should commence within 60 days after the hearing officer’s selection.

Evidence: Each side may present evidence and cross-examine witnesses.

Remedy: The available remedy includes restoration of the pay, benefits, or rights lost, less income earned from other employment.

Final Decision: The chancellor renders a final Step III decision within 30 days. If a Step III hearing took place, the chancellor reviews and considers the hearing officer’s findings and recommendations.

Non-Academic Senate appointees are subject to discipline under APM 150. The important features of APM 150 are:

Investigatory Leave: Chancellor or his designee can place appointee on immediate investigatory leave with pay to review or investigate appointee’s conduct, where appointee’s presence on campus would not be helpful.

Written Notice of Intent: Before formally disciplining an appointee (e.g., written censure, suspension, reduction in salary, demotion, or dismissal), the University must provide a written Notice of Intent explaining intended action and reasons for that action. The appointee has 14 days to respond to Notice of Intent.

Written Notice of Action: Within 30 days from issuance of Notice of Intent, the University can provide a written Notice of Action stating intended action and its effective date.

Challenging Proposed Disciplinary Action: The appointee can grieve proposed disciplinary action under APM 140.
Two Alternate Paths to Challenge Dismissal: The dismissed appointee can select either an APM 140 review process or a hearing in front of an advisory Academic Senate committee under Standing Order 103.9.

Staff employees may file grievances under Policy 70 of the Personnel Policies for Staff Members (“PPSM 70”). Under PPSM 70, the processes available for Professional and Support Staff (PSS) differ from those available for Managers and Senior Professionals. The key features of PPSM 70 for PSS employees include:

- **Scope:** Any employee may file a grievance alleging a management action or violation of policy that adversely affected the employee within 30 days of the action.

- **Initial Review:** If the grievance officer decides the grievance is complete, timely, and within the jurisdiction of PPSM 70, he or she forwards the grievance to the department head for decision (Step I). The timeline for the Step I response is established by local procedure.

- **Administrative Decision (Step II):** The grievant may appeal the department head’s decision. PSS grievants may request the appointment of a fact-finder to assist the decision-maker if the Step II decision will be final and binding. Timelines are established by local procedure.

- **Final Appeal (Step III):** Only certain grievances are eligible for processing at Step III, under timelines established by local procedures. The Step II decision is final unless the grievant has alleged a violation of non-discrimination in employment, certain corrective actions, termination, medical separation, absence from work, hours of work, overtime, shift and weekend differential, layoff, and retaliation.

- **Hearing Officer:** The Step III hearing takes place before a University or non-University hearing officer. If the grievant chooses an outside hearing officer, the grievant splits the cost with the University. Timelines for appointment of the hearing officer and completion of the hearing are established by local procedures.

- **Evidence:** Each side may present evidence and cross-examine witnesses.

- **Remedy:** The available remedy includes restoration of the pay, benefits, or rights lost, less income earned from other employment.

- **Final Decision:** The Step III hearing officer’s decision is final and binding. Timelines are established by local procedures.

The key features of PPSM 70 as they apply to MSP employees in grades I through VII include:

- **Scope:** Same as above.

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3 See [http://atyourbservice.ucop.edu/employees/policies_employee_labor_relations/personnel_policies/spp70.html](http://atyourbservice.ucop.edu/employees/policies_employee_labor_relations/personnel_policies/spp70.html).
Initial Review (Step I): Same as above.

Administrative Decision (Step II): The grievant may appeal the department head’s Step I decision. Unlike PSS employees, MSP employees may not request fact-finding at Step II. Timelines are established by local procedure. The Step II decision is final and binding unless the grievant has alleged a violation of non-discrimination in employment, medical separation, or termination.

Final Appeal (Step III): Those grievances eligible for Step III processing are subject to a fact-finding process. The University appoints the Step III fact-finder, who must be a person outside of the grievant’s department.

Remedy: Same as above.

Final Decision: The Step III fact-finder provides the fact-finding report to the decision-maker for his or her consideration. The decision-maker renders a final and binding decision. Timelines are established by local procedures.

The Personnel Policies for Staff Members address discipline for PSS and MSP employees in Policies 62 through 65. The important features of the disciplinary procedures for PSS employees and MSP employees in grades I through VII are:

Investigatory Leave: An employee may be placed on immediate investigatory leave to review or investigate the employee’s conduct where the employee’s conduct warrants removal from the workplace.

Written Notice of Intent: Before formally disciplining a PSS employee (e.g., written warning, suspension, reduction in salary, demotion, or dismissal) or terminating an MSP employee, the University must provide a written Notice of Intent explaining intended action and reasons for that action. The employee has eight days to respond to Notice of Intent.

Written Notice of Action: After considering the employee’s response to the Notice of Intent, the University may provide a written notice of the action to be taken and its effective date.

Challenging Proposed Disciplinary Action: The employee can grieve disciplinary action under PPSM 70.

Employees in the Senior Management Group and MSP grades VIII and IX may not use PPSM 70 for complaints. Instead, they have limited grievance rights under PPSM II-70 (SMG employees) and PPSM 71 (MSP grades VIII and IX). University policy expects these senior managers to discuss and resolve complaints with their immediate supervisors. If the concerns cannot be

4 See http://atyourservice.ucop.edu/employees/policies_employee_labor_relations/personnel_policies/spp71.html (MSP VIII & IX) and http://atyourservice.ucop.edu/employees/policies_employee_labor_relations/personnel_policies/ii70.html (SMG).
resolved through discussion, they may be submitted in writing to the chancellor, or President for employees in the Office of the President, for resolution. These senior managers may, however, pursue complaints alleging violation of the policy on non-discrimination in employment. Discrimination complaints are referred to an independent third party for investigation and preparation of a report. The chancellor or President determines the appropriate action to be taken based on the report.

Currently, a systemwide work group is considering revisions to PPSM 70 to clarify and streamline the policy. One recommendation under consideration is to separate PPSM 70 into two separate policies, one for PSS employees and the other for MSP employees. PPSM 70’s current structure, covering two employee groups with different available procedures in one policy, has proven to create confusion among employees as well as those responsible for administering the policy. Other suggested changes include adding mechanisms for informal and early resolution of complaints, dismissal of a grievance if a grievant fails to participate in the process, and clarification of standards and burdens of proof at hearing.

In addition to the ongoing efforts to revise PPSM 70, questions recently have been raised generally about two aspects of the University’s grievance procedures. The first involves whether grievances are heard and resolved in an efficient and prompt manner. No mechanism currently exists to measure the average length of time it takes for the grievance process to be completed. Local implementing procedures contain timeframes within which most actions should occur, including the time for filing appeals and issuing decisions. Anecdotally, however, we know that some grievances have experienced significant delays in processing. Extended delays may occur, for example, when a grievance reaches the formal hearing stage and the parties cannot agree on mutually acceptable hearing dates. In some situations, grievants or their counsel have failed to respond to requests to move to the process forward. One of the recommendations of the PPSM 70 work group would address this scenario by expressly permitting the University to dismiss grievances for failure to prosecute.

The second question pertains to grievants’ requests to be reimbursed for their attorneys’ fees and costs if they prevail. Currently, the only University policy addressing reimbursement of attorneys’ fees is the University’s Whistleblower Policy. It allows the subject of a whistleblower complaint to request reimbursement for attorneys’ fees. None of the grievance procedures contains any provision for reimbursement of attorneys’ fees. Each grievance process permits employees to be represented by counsel of their choice at their own cost, but representation by counsel is not required at any point. Adding a provision guaranteeing the payment of attorneys’ fees to a successful grievant could lead to increased litigiousness and protracted disputes over the appropriate amount of fees to be reimbursed.

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5 Under the University’s Whistleblower Policy, subjects of a whistleblower complaint may retain counsel and may request that the University pay or reimburse the attorney’s fees. Chancellors or their designees may grant a request for reimbursement in their discretion, but the policy creates no entitlement to such payments or reimbursements. See http://www.ucop.edu/ucophome/coordrev/policy/PP040208Policy.pdf at page 14.