

MEMORANDUM

10-07
Faculty Assembly
Report

TO: Faculty Assembly Delegates
Faculty Senate Presidents, UNC System Campuses¹

FROM: Faculty Assembly Executive Committee²

RE: Background Materials: Code 603/604 Committee Recommendations Relating to Discharge of Tenured Faculty, Non-Reappointment Review, Grievances, Post-Tenure Review, Non-Tenure Track and Special Faculty Procedures, and Proposed Faculty Assembly Action for September 28, 2007 Meeting

DATE: September 13, 2007

I. Introduction

We are writing with considerable urgency. As some of you are aware, the Board of Governors Committee on Personnel and Tenure began a discussion of post-tenure review at its November 2006 meeting. Subsequently, University System Vice President Harold Martin appointed a committee (the "Code 603/604 Committee, chaired by Provost Larry Nielsen of NCSU) to review a variety of topics under Chapter VI of the University Code. The charge and other materials relating to the Code 603/604 Committee are attached as Appendix E to this memorandum.

Faculty Assembly Chair Brenda Killingsworth received the proposed report and Code revisions developed by the "Code 603/604 Committee" in mid-July. She and Faculty Assembly Secretary Judith Wegner met with Provost Nielsen on July 17, 2007. She then circulated the Code 603/604 Committee's proposals to the Faculty Assembly Executive Committee and to Faculty Senate Presidents. The Faculty Assembly Executive Committee (FAEC) met with Provost Nielsen on August 17 to discuss the report further and to hear his views. Although the amendments to the University Code proposed by the Code 603/604 Committee were initially slated for presentation to the Board of Governors at its September 5 meeting, University System Vice President Harold Martin indicated that he would postpone consideration of the Code 603/604 Committee's proposals until a subsequent meeting this fall.

The recommendations of the Code 603/604 Committee would significantly modify portions of the University Code. These portions relate to the grounds and procedures for discharge of tenured faculty members, non-reappointment review of tenure-track faculty members, rights of "special faculty" (those who are not on the tenure-track), rights of EPA non-faculty personnel, post-tenure review, and grievances.

The FAEC developed alternative language for key aspects of the original proposal, and prepared this memorandum expressing its rationale for proposed alternative changes. It hoped that, despite grave misgivings, this approach would allow the Faculty Assembly and Faculty Senates to speak constructively about important changes to the University Code.

The FAEC has also developed a proposed resolution for consideration at the Faculty Assembly's September 28, 2007 meeting. That resolution and the specific text changes proposed by the FAEC as a better alternative to

¹ Copies of this memorandum and related materials will also be sent to UNC System Vice President Harold Martin, Members of Code 603/604 Committee, and Campus Provosts

² Members of the Faculty Assembly Executive Committee who discussed and commented on this matter included: Brenda Killingsworth (ECU, Faculty Assembly Chair), Gary Jones (WCU, Vice Chair), Judith Wegner (UNC-CH, secretary, and principal drafter), Bonnie Yankaskas (UNC-CH, self-study committee chair), Greg Starrett (UNCC, academic freedom and tenure committee chair), Sandie Gravett (ASU, budget committee chair), Dennis Dailey (NCSU, faculty benefits committee chair), and Acha Debala (NCCU, outgoing historically minority institutions chair). Relevant information was also circulated for comment to those on the Executive Committee who were unable to attend the August meeting (educational programs chair Eileen Kohlenberg (UNCG), governance committee chair Mark Taggart (ECU), and faculty development chair Meg Morgan (UNCC). In addition, Chair Killingsworth circulated the Code 603/604 Committee's proposals to faculty senate leaders across the system in August 2007 and requested comments. Formal comments were received from NCSU and UNC-CH, and informal comments from ASU (from Gary Jones).

recommended changes submitted by the Code 603/604 Committee are included as Appendix A of this memorandum. Other appendices include background on the relationship of University Code provisions to other official documents and to other recent activities affecting University policies (Appendix B), relevant portions of the University Code as it currently exists (Appendix C), information on current post-tenure review policies, guidelines, and revised guidelines submitted to the Board of Governors Personnel and Tenure Committee in June 2007 (Appendix D) and a full set of materials provided by NCSU Provost Larry Nielsen, chair of the Code 603/604 committee, in connection with meetings of the FAEC in August 2007 (Appendix E).

The FAEC asks that Faculty Assembly delegates and Faculty Senates review all this material very carefully, and seek counsel with your colleagues in advance of the September 28 Faculty Assembly meeting. The resolution and alternative language (included in appendix A) will be considered at that meeting.

II. Specific Proposals.

A. Discharge of Tenured Faculty Members (Code Section 603, portion of Section 602)

The Code 603/604 Committee recommended major changes in two areas under existing Code Sections 602 and 603 relating to discharge of tenured faculty members.

1. Grounds.

a. *Code 603/604 Committee Proposal*

Currently, under existing Code section 602, tenured faculty members can be discharged only for "incompetence, neglect of duty, or misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty." The Code 603/604 Committee recommended adding a fourth grounds for discharge ("unsatisfactory performance, including but not limited to multiple unsatisfactory post-tenure reviews") and added very broad definitions of each of the grounds for discharge.³ The Code 603/604 Committee also recommended shifting the reference to suspension and demotion in rank, which had previously been listed in the same sentence as discharge (thus limiting the grounds for any of these sanctions to the listed criteria) and placing it later in the Code section, thereby raising questions whether tenured faculty members might be subject to suspension or demotion in rank on grounds other than those specified.⁴

³ The Code 603/604 Committee proposed to incorporate the following definitions of the bases for possible discharge:

(1.1) As used in this Code, the following words and phrases shall mean:

- a. Incompetence: failure to demonstrate the requisite skills, knowledge, or ability in performing faculty responsibilities. Examples include, but are not limited to, using poor teaching techniques or outdated knowledge of the subject matter. This use of "incompetence" is not to be equated with the legal concept of mentally incompetent.
- b. Neglect of duty: failure to perform one or more faculty responsibilities due to a deliberate act, unwillingness to act, or insufficient attention.
- c. Unsatisfactory performance: inadequate performance, including results which are less than satisfactory on the cumulative review required by UNC Policy 400.3.3.
- d. Misconduct: conduct that violates law, policy, professional expectations (including mismanagement), or ethics, or involves dishonesty or moral turpitude.

⁴ The text proposed by the Code 603/604 Committee would read:

(1) A faculty member who is the beneficiary of institutional guarantees of tenure shall enjoy protection against unjust and arbitrary application of disciplinary penalties. During the period of such guarantees the faculty member may be discharged from employment only for reasons of (a) incompetence, (b) neglect of duty, (c) unsatisfactory performance, including but not limited to multiple unsatisfactory post tenure reviews, or (d) misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty. A faculty member may also be suspended or demoted in rank for misconduct of a serious

Provost Nielsen advised the FAEC that the Code 603/604 Committee's recommendations were based on a desire to add clarity to the current Code provisions (in which key words like "incompetence" are undefined) and the Code 603/604 Committee's judgment that repeated and continuing unsatisfactory performance should be grounds for discharge. In the Code 603/604 Committee's view, the current language does not adequately specify that chronic poor performance is grounds for serious sanction, since "incompetence" might be interpreted to refer to mental incompetence only, "neglect of duties" is unclear, and "misconduct" might not apply to a failure to perform professional duties. Provost Nielsen also indicated that the Code 603/604 Committee had considered two alternatives in addressing the unsatisfactory performance issues, including adding definitions to the existing criteria or adding an additional ground for discharge (they adopted the latter approach).

b. *Faculty Assembly Executive Committee Proposal.*

The FAEC discussed this matter at length, and concluded that there are indeed situations in which tenured faculty members may properly be subject to discharge. It also concluded that the existing language of the Code is potentially ambiguous. The FAEC also believed that the proposed additional definitions of the grounds for faculty discharge proffered by the Code 603/604 Committee were extremely vague, and that the inclusion of the proposed new grounds for discharge ("unsatisfactory performance, including but not limited to multiple unsatisfactory post-tenure reviews") was even vaguer. The reference to "results which are less than satisfactory on the cumulative review under UNC Policy 400.3.3" is also confusing since the word "the" might be understood to refer to a single post-tenure review (rather than recurring reviews). The shift from sanctions for "deficient" performance to sanctions for "less than satisfactory" performance raises special concerns because it might be used to sanction anyone performing at a level "below average" (when the point of the standard is to set an absolute standard of poor performance rather than a subjective criterion that is potentially subject to manipulation). Concerns about the changes proposed were echoed in the comments from Faculty Senate Chairs received to date from NCSU and UNC-CH.

The FAEC therefore developed the following proposed language that it proposes to be used in Code Sections 603 and 602⁵ instead of the language recommended by the Code 603/604 Committee:

nature but not so serious as to indicate that the individual is unfit to continue as a member of the faculty. These sanctions may be imposed only in accordance with the procedures prescribed in this section. For purposes of this Code, a faculty member serving a stated term shall be regarded as having tenure until the end of that term. These procedures shall not apply to nonreappointment (Section 604) or termination of employment (Section 605).

Currently, the provision reads:

- (1) A faculty member, who is the beneficiary of institutional guarantees of tenure, shall enjoy protection against unjust and arbitrary application of disciplinary penalties. During the period of such guarantees the faculty member may be discharged or suspended from employment or diminished in rank only for reasons of incompetence, neglect of duty, or misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty.

⁵ The Code 603/604 Committee recommended that Section 602 also be amended in pertinent part as follows:

- (6) Institutional tenure policies and regulations shall distinguish among the following:
 - (a) the nonreappointment (or nonrenewal) of a faculty member at the expiration of a specified term of service;
 - (b) the discharge from employment of a faculty member with permanent tenure or of a faculty member appointed to a specified term of service before that term expires only for reasons of (a) incompetence, (b) neglect of duty, (c) unsatisfactory performance, including but not limited to multiple unsatisfactory post tenure reviews, or (d) misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty. A faculty member may also be suspended or demoted in rank for misconduct of a serious nature but not so serious as to indicate that the individual is unfit to continue as a member of the faculty;

The FAEC proposes that University Code Section 602 paragraph (6) (b) be revised to read as follows:

- (b) the discharge from employment of a faculty member with permanent tenure or of a faculty member appointed to a specified term of service before that term expires only for reasons of (a) incompetence, (b) neglect of duty, ~~(c) unsatisfactory performance, including but not limited to multiple unsatisfactory post tenure reviews, or (d)~~ (c) misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty, *as specified in Code Section 603.*

- (1) *A faculty member who is the beneficiary of institutional guarantees of tenure shall enjoy protection against unjust and arbitrary application of disciplinary penalties. During the period of such guarantees the faculty member may be discharged from employment, suspended, or demoted in rank only for reasons of*
- (a) *incompetence, including significant, sustained unsatisfactory performance after the faculty member has been given an opportunity to remedy such performance and fails to do so within a reasonable time;*
 - (b) *neglect of duty including sustained failure to meet assigned classes or to perform other core faculty professional obligations, or*
 - (c) *misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty, including significant demonstrated violations of professional ethics, substantial mistreatment of students, significant research misconduct, willful financial fraud related to university duties, or demonstrated criminal conduct sufficiently related to a faculty member's academic responsibilities as to disqualify the individual from effective performance of university duties.*

An action to discharge a faculty member will ordinarily be used only in instances in which the faculty member's conduct is so serious as to render the individual permanently unfit to continue as a member of the faculty. Lesser sanctions including suspension and demotion in rank might be used in other instances.

The FAEC believe that its proposed language is preferable for a number of reasons. This language is intended to accomplish the following goals. The FAEC's language

- Anchors "incompetence" to "significant, sustained unsatisfactory performance" in situations when a faculty member has been given an "opportunity to remedy such performance" and "fails to do so in a reasonable time." The FAEC believes that the Code 603/604 Committee's proposal to treat "poor teaching techniques" and "outdated knowledge" as bases for finding "incompetence" would incorporate considerable subjectivity into the situation and instead concluded that "significant, sustained" poor performance was a more appropriate measure of true incompetence. The FAEC notes that the Board of Governor's existing post-tenure review policy (Policy Manual Section 400.3.3, Section 1.a.3 already provides that "for those whose performance remains deficient, providing for the imposition of appropriate sanctions which may, in the most serious cases, include a recommendation for discharge"), so that it is best that relevant policies reference that fact.
- Anchors "neglect of duty" to situations such as "sustained failure" to "meet assigned classes" or to perform "other core faculty professional obligations." The FAEC believes that sustained failures of this sort warrant sanction, quite apart from any failures to perform satisfactorily that are evident in the course of periodic performance reviews.
- Clarifies the types of misconduct that may warrant sanction. Several of the types of misconduct listed are addressed under other policies. For example, Section 500.7 of the University Policy Manual already addresses research misconduct and provides that dismissal, suspension, or demotion may be appropriate penalties.⁶ Significant demonstrated violations of professional ethics (for example, by those in the health professions), substantial

⁶ V. Administrative and Disciplinary Actions.

- a. **Seriousness of the Misconduct.** In deciding what administrative or disciplinary actions are appropriate, the institution or entity should consider the seriousness of the misconduct, including, but not limited to, the degree to which the misconduct was knowing, intentional, or reckless; was an isolated event or part of a pattern; or had significant impact on the research record, research subjects, other researchers, institutions, or the public welfare.
- b. **Possible Administrative and Disciplinary Actions.** Administrative and disciplinary actions available include, but are not limited to, appropriate steps to correct the research record; letters of reprimand; the imposition of special certification or assurance requirements to ensure compliance with applicable regulations or terms of an award; suspension or termination of an active award; written warning; demotion; suspension; salary reduction; dismissal; or other serious discipline according to the appropriate policies applicable to students, faculty or staff. With respect to administrative actions or discipline imposed upon employees, the institution or entity must comply with all relevant personnel policies and laws. With respect to administrative actions or discipline imposed upon students, the institution or entity must comply with all relevant student policies and codes.

mistreatment of students, willful financial fraud, or demonstrated criminal conduct that is sufficiently related to the faculty member's academic responsibilities to disqualify the individual from effectively performing their university duties. The references to "demonstrated" conduct are intended to indicate that findings would be required through other processes (such as existing systems for review of violations of professional ethics by licensing authorities, review of research misconduct under University and other policies, and review of alleged criminal conduct through the justice system)

- Once again anchors sanctions of suspension or demotion in rank to the stated grounds for sanction, while also including the statement by proposed by the Code 603/604 Committee indicating that lesser sanctions should ordinarily be used.

2. Process

a. *Code 603/604 Committee Proposal.*

The 603/604 Committee proposed several changes to the processes by which discharge, suspension, or demotion actions would be pursued. Many of the detailed provisions that currently exist would stay the same, except as to the following most important points:

- (a) provisions regarding notice and reasons for proposed sanction are clarified and expedited (currently, a faculty member receives notice but would have to request reasons to be stated; the proposal would provide that notice and reasons must be given at the outset at one time); references to "days" are also clarified to indicate that weekends and institutional holidays are not to be included in computation;
- (b) the timing and length of faculty hearing processes would be set and limited to 90 days (not including official university breaks and holidays);⁷
- (c) the burden of proof and standard of proof for faculty hearing committee review would be specified (which it is not at present), and statements would be added indicating that the University must bear the burden of proving grounds for the proposed sanction using under a relatively lax evidentiary standard ("preponderance" or "weight of the evidence" rather than "clear and convincing evidence");
- (d) the current system of providing appeals to the Board of Trustees and then to the Board of Governors (following review by the institutional faculty hearing committee and the Chancellor) would be changed to eliminate the Board of Trustees and to provide an appeal directly to the Board of Governors; this proposal would allow the time line for appeals to be shortened and would bring the process for review of serious sanctions more closely into line with the process for review of decisions not to reappoint or grant tenure to tenure-track faculty (which already provides an appeal to the Board of Governors but not the Board of Trustees)

b. *Faculty Assembly Executive Committee Proposal.*

The FAEC believes that features of the proposal summarized in items (a) and (d) above are beneficial in that they expedite and simplify the review process. With regard to point (b), it recommends that specifications regarding duration of hearing processes should be stated in aspirational rather than mandatory terms. With regard to point (c), it believes that

⁷ The proposal by the Code 603/604 Committee reads as follows:

- (5) If the faculty member makes a timely written request for a hearing, the chancellor shall ensure a process is in place so that the hearing is timely accorded before an elected standing committee of the institution's faculty. The hearing shall be on the written specification of reasons for the intended discharge or imposition of a serious sanction. The hearing committee shall accord the faculty member 20 days from the time it receives the faculty member's written request for a hearing to prepare a defense. The hearing committee may, upon the faculty member's written request and for good cause, extend this time by written notice to the faculty member. This hearing *shall be concluded* within 90 days from the date the committee receives the request for hearing (not including summer and winter breaks). The chancellor may grant an enlargement of this time for good cause.

a higher standard of proof ("clear and convincing evidence") is warranted because faculty members who have institutional tenure hold a legally protected property right in employment that should not be adversely affected except based on very solid evidence. If serious sanction is warranted, administrators should be able to document and present a well-substantiated case.

The FAEC's proposed language is as follows:

- (5) If the faculty member makes a timely written request for a hearing, the chancellor shall ensure a process is in place so that the hearing is timely accorded before an elected standing committee of the institution's faculty. The hearing shall be on the written specification of reasons for the intended discharge or imposition of a serious sanction. The hearing committee shall accord the faculty member 20 days from the time it receives the faculty member's written request for a hearing to prepare a defense. The hearing committee may, upon the faculty member's written request and for good cause, extend this time by written notice to the faculty member. The hearing committee will ordinarily endeavor to complete the hearing within 90 calendar days *except under unusual circumstances* such as when a hearing request is received during official university breaks and holidays and despite reasonable efforts the hearing committee cannot be assembled, *or when additional fact-finding is required apart from the university discharge process.*
- (8) In reaching decisions on which its written recommendations to the chancellor shall be based, the committee shall consider only the evidence presented at the hearing and such written or oral arguments as the committee, in its discretion, may allow. The university has the burden of proof. *In evaluating the evidence, the committee shall use the standard of "clear and convincing" evidence in determining whether the institution has met its burden of showing that permissible grounds for serious sanction exist and are the basis for the recommended action.* The committee shall make its written recommendations to the chancellor within ten days after its hearing concludes or after the full transcript is received, whichever is later.

D. Non-Reappointment of Tenure-Track Faculty Members (Code Section 604)

a. Proposals by the Code 603/604 Committee

Current Code Section 604 is relatively short, providing simply that notice be afforded tenure-track faculty members who will not be reappointed, specifying impermissible reasons for non-reappointment, and stating without much elaboration that an appeal may be had to the Board of Governors. This provision also includes language indicating that no notice is required to "special faculty members," which is proposed to be moved to a separate section as discussed below.

(a) Proposed Section 604B continues to specify impermissible grounds for non-reappointment, making modest revisions to add references color as well as race, creed as well as religion, and "veteran's status."

The major proposed changes involve an addition of extended language regarding the processes to be used on campuses and by the Board of Governors when a tenure-track faculty member seeks further review of a decision not to reappoint (for example, when a faculty member in an initial term as an assistant professor is not reappointed to a second term, or when a second-term assistant professor is denied tenure so that their term of employment ends after notice and a specified period). These provisions are designed to provide a minimum framework, since regulations of the Boards of Trustees for the individual campuses provide more detailed elaboration in most cases.

The major elements of the proposed review process would include requiring each campus⁸ to provide for procedures that allow an affected tenure-track faculty member to

⁸ 604 D. Appeals and Grievances.

(1) Campus Based Appeal. Subject to limitations contained in this Code and the Policies of the Board of Governors, each constituent institution shall have a procedure whereby a tenure track faculty member may appeal or grieve the decision of the constituent institution not to reappoint the faculty member. Such procedures shall at a minimum provide for the following:

- (a) A reasonable time within which after receiving the notice of non-reappointment, the faculty member may appeal or grieve. If the faculty member does not timely appeal or grieve the notice of non-reappointment, the non-reappointment is final without recourse to any institutional grievance or appellate procedure.

- receive notice of the proposed non-reappointment, and be assured an opportunity to request further review by “appeal[ing]” or “griev[ing]” the decision within “a reasonable time”;
- have access to an elected faculty committee through which to seek review,
- receive review using specified procedural standards (including requiring the faculty member in question to bear the burden of proof using a “preponderance of evidence” standard), and
- allow limited grounds on which such review could be sustained (prohibited forms of discrimination, First Amendment, “personal malice”) or material procedural irregularities that cast doubt on the integrity of the decision not to reappoint (without allowing the faculty committee to “second-guess professional judgments based on permissible considerations”)

In addition, if after review and recommendations by the faculty hearing committee, the chancellor upheld the decision not to reappoint, an affected faculty member

- would be allowed to request review by the Board of Governors only to assure (1) that the campus-based process for making the decision was not materially flawed, so as to raise questions about whether the faculty member’s contentions were fairly and reliably considered, (2) that the result reached by the chancellor was not clearly erroneous, and (3) that the decision was not contrary to controlling law or policy.⁹

b. Faculty Assembly Executive Committee Proposal.

The FAEC appreciates the importance of clarifying the basic rights of review for non-reappointed tenure-track faculty members from across the whole University system. It recommends that several relatively modest changes be made to this proposal to add greater clarity:

- (a) Accept the suggested additions of impermissible grounds for non-reappointment, but request addition of language that would clearly allow campuses to add additional impermissible grounds as appropriate (such as “sexual orientation” and “age”, for example). In addition, for ease of use and clarity, include as part of this Code section a brief definition of “personal malice” drawn from the more detailed language of

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- (b) If the faculty member timely files an appeal or grievance, the chancellor shall ensure a process is in place so that a hearing is timely accorded before an elected standing committee of the institution’s faculty.
- (c) In reaching decisions on which its written recommendations to the chancellor shall be based, the committee shall consider only the evidence presented at the hearing and such written or oral arguments as the committee, in its discretion, may allow. The faculty member shall have the burden of proof. In evaluating the evidence the committee shall use the standard of preponderance of the evidence (which is the same as the greater weight of the evidence.)
- (d) The purpose of the campus based review process is to determine (1) whether the decision was based on considerations that *The Code* provides are impermissible; and (2) whether the procedures followed to reach the decision materially deviated from prescribed procedures such that doubt is cast on the integrity of the decision not to reappoint. *The review process is not to second-guess professional judgments based on permissible considerations.*

⁹ (2) Appeal to the Board of Governors. If the chancellor concurs in a recommendation of the committee that is favorable to the faculty member, the chancellor’s decision shall be final. If the chancellor either declines to accept a committee recommendation that is favorable to the faculty member or concurs in a committee recommendation that is unfavorable to the faculty member, the faculty member may appeal by filing a written notice of appeal with the Board of Governors, by submitting such notice to the President, by certified mail, return receipt requested, or by another means that provides proof of delivery, within 10 days after the faculty member’s receipt of the chancellor’s decision. The notice must contain a brief statement of the basis for the appeal. The purpose of appeal to the Board of Governors is to assure (1) that the campus-based process for making the decision was not materially flawed, so as to raise questions about whether the faculty member’s contentions were fairly and reliably considered, (2) that the result reached by the chancellor was not clearly erroneous, and (3) that the decision was not contrary to controlling law or policy.

section 101 of the UNC Policy Manual.¹⁰ The proposed further revision of Section 604B under the FAEC would read:

In no event shall a decision not to reappoint a faculty member be based upon (a) the exercise by the faculty member of rights guaranteed by the First Amendment to the United States Constitution, or by Article I of the North Carolina Constitution, or (b) the faculty member's race, color, sex, religion, creed, national origin, age, disability, ~~or~~ veteran's status *or other forms of discrimination prohibited under regulations adopted by campus Boards of Trustees*, or (c) personal malice. For purposes of this section, *the term "personal malice" means dislike, animosity, ill-will or hatred based on personal characteristics, traits or circumstances of an individual.*

- (b) Change language referring "appeals and grievances" throughout the section and instead use neutral language ("review of non-reappointment decision") throughout so as not to confuse faculty and administrators on campuses that use "grievance" as a term of art applicable only with regard to matters covered by Code Section 607 (matters other than non-reappointment, as discussed below).¹¹ In addition, specify a minimum number of days in which the faculty member could seek review (perhaps 14 days) or a longer time if determined appropriate by individual campuses
- (c) Accept the allocation of the burden of proof on the faculty member and the "preponderance of the evidence" standard for reviewing evidence (as appropriate in a situation involving an untenured faculty member, although not in a case in which a faculty member already has tenure and is being subject to serious sanction, as discussed above).
- (e) Remove the unnecessary statement ("The review process is not to second-guess professional judgments based on permissible considerations") since the burden of proof and stated grounds for review are sufficiently specific.

¹⁰ UNC Policy Manual Section 101 defines "personal malice" as follows:

II.B. Definition of "personal malice": As used in *The Code*, the term "personal malice" means dislike, animosity, ill-will or hatred based on personal characteristics, traits or circumstances of an individual that are not relevant to valid University decision making. For example, personnel decisions based on negative reactions to an employee's anatomical features, marital status or social acquaintances are intrinsically suspect. If reappointment is withheld because of personal characteristics that cannot be shown to impinge on job performance, a wrong likely has been committed. On the other hand, if personal characteristics can be shown to impede a faculty member's capacity to relate constructively to his or her peers, in a necessarily collegial environment, withholding advancement may be warranted. For example, the undisputed record evidence might establish that the responsible department chair declined to recommend a probationary faculty member for reappointment with tenure because of the faculty member's "unpleasant personality and negative attitude." Disposition of such a case requires a determination of whether the personality and attitude impeded the faculty member's job performance. While the terms "ill-will," "dislike," "hatred" and "malevolence" may connote different degrees of antipathy, such distinctions make no difference in applying the fundamental rationale of the prohibition. Any significant degree of negative feeling toward a candidate based on irrelevant personal factors, regardless of the intensity of that feeling, is an improper basis for making decisions

¹¹ As amended, the proposed language would read:

604D. *Review of Non-Reappointment Decisions* [~~Appeals and Grievances~~]

- (2) Campus Based *Review Appeal*. Subject to limitations contained in this Code and the Policies of the Board of Governors, each constituent institution shall have a procedure whereby a tenure track faculty member may seek review of the decision of the constituent institution not to reappoint the faculty member. Such procedures shall at a minimum provide for the following:
 - (a) A reasonable time *of no less than 14 calendar days* within which after receiving the notice of non-reappointment, the faculty member may request review of the decision by the appropriate faculty committee and administrative officers.. If the faculty member does not request review the notice of non-reappointment *in a timely fashion as specified by campus tenure policies*, the non-reappointment is final without recourse to *any further review by faculty committees, the institution, or the Board of Governors*.
 - (b) If the faculty member files *a request for review* in a timely fashion, ~~timely files an appeal or grievance~~, the chancellor shall ensure a process is in place so that a hearing is timely accorded before an elected standing committee of the institution's faculty.

- (f) Slightly refine language relating to appeals to the Board of Governors to clarify that the basis for such an appeal relates to procedural problems in connection with the institutional review process (rather than the initial departmental decision).¹²

E. Proposed New Code Section 610 ("Special Faculty Appointments")

a. Code 603/604 Committee Proposal.

As noted previously, current Code Section 604 includes language regarding "Special Faculty Appointments" (appointments of "visiting faculty, adjunct faculty, or other special categories of faculty such as lecturers, artists-in-residence, or writers-in residence"), specifying that the review rights applicable to tenure-track faculty under Code Section 604 do not apply to those in positions such as these.¹³ The Code 603/604 Committee has recommended the following proposal:

SECTION 610. SPECIAL FACULTY APPOINTMENTS.

Appointments of visiting faculty, adjunct faculty, or other special categories of faculty such as lecturers, artists-in-residence, or writers-in-residence may be for a specified term of service or at-will, as set out in the letter of appointment. Any term shall be set forth in writing when the appointment is made, and the specification of the length of the appointment shall be deemed to constitute full and timely notice that a new appointment will not be granted when that term expires. The provisions of Sections 602 (4) and 604 shall not apply in these instances.

A special faculty member may not grieve or appeal the decision of a constituent institution not to grant a new appointment to the special faculty member.

This proposal thus

- (a) places provisions relating to "special faculty appointments" in a separate (new) section of the University Code;
- (b) changes existing policy that had specified that such appointments must be for specified fixed terms, and instead specify that such appointments may be either for a specified term or "at will"; and
- (c) specifies that special faculty members have no rights to seek review of decisions not to reappoint, either through campus review processes or through the Board of Governors.

b. Faculty Assembly Executive Committee Proposal.

The FAEC has no objection to (a) (moving the provisions relating to special faculty appointments to a separate section) or to (c) (specifying that there is no right to review on decisions not to reappoint).

The FAEC has significant concerns about provisions permitting either fixed-term or at will appointments as summarized in (b), however. Universities across the country have increasingly moved to short-term and part-time

¹² The purpose of appeal to the Board of Governors is to assure (1) that the campus-based process for ~~making~~ reviewing the decision was not materially flawed, so as to raise questions about whether the faculty member's contentions were fairly and reliably considered, (2) that the result reached by the chancellor was not clearly erroneous, and (3) that the decision was not contrary to controlling law or policy

604 C. Special Faculty Appointments. All appointments of visiting faculty, adjunct faculty, or other special categories of faculty such as lecturers, artists-in-residence, or writers-in-residence shall be for only a specified term of service. That term shall be set forth in writing when the appointment is made, and the specification of the length of the appointment shall be deemed to constitute full and timely notice of non-reappointment when that term expires. The provisions of Sections 602 (4) and 604 A shall not apply in these instances.

instructional personnel as a means of saving money. Faculty members in such positions have little job security, even when serving in fixed-term positions. Moreover, special faculty who serve as lecturers, artists-in-residence or writers-in-residence are already constrained in terms of the freedom with which they can express their opinions for fear that unpopular opinions or use of innovative teaching techniques may cause these faculty members not to be reappointed. The Code 603/604 Committee's proposal that such appointments need no longer be for fixed terms, but can instead be "at will" further weakens any assurance that faculty members in such positions will be accorded even that limited job security associated with a specified term. The effect of such a policy change is to put an increased proportion of faculty members in positions in which they are at risk of being treated in arbitrary ways, and to erode well-established traditions that link educational quality to job security, intellectual integrity, peer review, and academic freedom. The FAEC therefore believe sthat the reference to "at will" appointments should be removed rather than added as the Code 603/604 Committee has proposed. In addition, the FAEC believes that, if a separate section is to be used in order to specify the limited rights of special faculty members, that section should at least be clear and complete in stating the extent to which these faculty members may seek review of adverse actions other than non-reappointment.

The FAEC accordingly recommends that proposed section 610 be revised as follows:

Section 610. Rights of Special Faculty Members.

- (1) *Faculty members who are appointed as visiting faculty members, adjunct faculty, lecturers, artists-in-residence, writers-in-residence or other special categories are regarded as "special faculty members" for purposes of the University Code.*
- (2) *Special faculty members shall be appointed for a specified term of service, as set out in writing in the letter of appointment. The term of appointment of any special faculty member concludes at the end of the specified period set forth in the letter of appointment, and the letter of appointment constitutes full and timely notice that a new term will not be granted when that term expires. Special faculty members are not covered by Section 604 of the University Code and may not seek additional review of a decision by a constituent institution not to grant a new appointment at the end of a specified fixed term.*
- (3) *During the term of their employment, special faculty members are entitled to seek recourse under Section 607 of the University Code (relating to faculty grievances). They are also entitled to protection under any other applicable policy or law.*

F. EPA Non-Faculty (new Code Section 611)

a. Proposal by the Code 603/604 Committee.

The Code 603/604 Committee proposes adding a new section 611 to the University Code to address review rights of EPA non-faculty personnel who are subject to adverse personnel actions. The proposal provides minimum procedural rights to covered EPA non-faculty personnel on individual campuses and those employed by General Administration. The proposal in some respects accords such employees more rights than are given to "special faculty" as discussed in the previous section, since covered EPA non-faculty personnel can seek review in narrow instances with regard to non-reappointment (when notice requirements are not met), even though special faculty may not seek such review (assuming that they are on fixed term contracts with definite ending dates). The proposal also calls for establishment of a review committee (similar, apparently to existing faculty hearing or grievance committees) but makes no provision for the membership or character of such committees.

b. Faculty Assembly Executive Committee Proposal.

The FAEC generally believes that fair process should be accorded employees and commends the Code 603/604 Committee for attending to the circumstances of EPA non-faculty personnel. Apparently no consultation has yet been had with affected employees and the FAEC urges that such consultation take place. The FAEC also believes that it will be important to address the composition of review committees and how they are chosen. The FAEC found that the basis on which review might be sought was somewhat unclear, and suggests that language similar to that used in Section 604 ("review" rather than "appeal and grievance") be employed. For the convenience of the Code 603/604 Committee,

the FAEC has developed proposed revised language for this section, but suggests that the Faculty Assembly itself not take action on a matter that is outside its province, given that it represents only faculty members, not EPA non-faculty employees.

G. Post-Tenure Review (Proposed Policy 400.3.3)

a. Code 603/604 Committee Proposal.

The Code 603/604 Committee presented a proposal for substantial modification of the existing Policy on post-tenure review, set forth in the University Policy Manual (not the University Code) at Section 400.3.3. The Policy Manual also includes "Guidelines" that interpret the underlying policy (Section 400.3.3.1(G)). The University's current policy and guidelines on post-tenure review (Policy 4.3.3) are included in Appendix D, along with revised guidelines on post-tenure review submitted to the Board of Governors' Personnel and Tenure committee in June 2007.

The Code 603/604 Committee's proposal¹⁴ would modify existing policy in a number of important ways including:

- (a) Emphasizing efficiency in post-tenure processes by including options for administrative rather than faculty peer review;
- (b) Specifying details about compilation of post-tenure review dossiers rather than leaving those details to individual institutions, and emphasizing compilation of yearly reviews as a means of satisfying post-tenure review requirements;
- (c) Emphasizing possible imposition of serious sanctions in the event of continuing unsatisfactory performance;
- (d) Limiting the scope of review by the elected university-wide faculty hearing committee based on the assumption that any proposed sanction would reflect the widely-held judgment of department peers, and specifying that an administrative recommendation of discharge would presumptively be upheld unless the faculty member could demonstrate by a preponderance of evidence that the recommended sanction stemmed from prohibited forms of discrimination, First Amendment violations, personal malice or material procedural irregularities that cast doubt on the integrity of the decision to seek serious sanctions.

b. Faculty Assembly Executive Committee Proposal.

The FAEC recommends that this proposal be rejected for a number of reasons. Quite apart from the merits,

- (a) review of section 400.3.3 of the Policy Manual was not within the mandate of the Code 603/604 Committee;
- (b) the Board of Governors Personnel and Tenure committee approved a revision of the guidelines on post-tenure review (Policy Manual Section 400.3.3 (G) in June 2007, based in part on feedback provided throughout spring 2007 by the Faculty Assembly, and the proposal is inconsistent with this revision;
- (c) provisions relating to discharge or other serious sanction are addressed in proposed revisions of Section 603 of the University Code as previously discussed, so need not be addressed here.

As to the merits, the Code 603/604 Committee's proposal

- (d) erodes the core principle that both decisions to award tenure and decisions to impose serious sanctions relating to inadequate performance must fundamentally rely on principles of peer review in order to assure sound judgments based on disciplinary expertise and accountability within the professoriate;

¹⁴ Because of the length of the Code 603/604 Committee's proposal, it is attached in Appendix E to this memorandum.

- (e) mistakenly assumes that recommendations for serious sanction reflect the views of a substantial portion of departmental faculty rather than primarily the departmental chair; and
- (f) inappropriately limits review by the elected university faculty hearing committee and directing that recommendations for discharge be reviewed not with an eye to the legitimacy of judgments regarding inadequate performance but instead with regard to discrimination, First Amendment concerns, and personal malice.

The FAEC nonetheless recognizes that two modifications in the University Policy Manual and Code may be appropriate to address limited aspects of the post-tenure review process:

- (g) Some provosts and faculty at constituent institutions may wish to incorporate provisions for faculty to request that their department chair or head review their dossier before it is reviewed by a faculty post-tenure review committee. The FAEC wishes to go on record as interpreting the language of Policy Manual Section 400.3.3(G)(6) (guidelines on post-tenure review) to permit individual faculty members to request this review procedure from the faculty post tenure committee itself, which would consider and vote whether to give permission in individual cases for the department chair or head to review the dossier before it is submitted to the faculty post-tenure review committee.
- (h) There should be greater clarity regarding the institutional review procedures through which a faculty member may challenge findings and conclusions regarding the adequacy of their performance in connection with post-tenure review processes. In the FAEC's view, requests for review of departmental or institutional findings and recommendations are most appropriately raised pursuant to Section 607 of the University Code (relating to faculty grievances).
- (i) The FAEC therefore recommends that the following amendments to Section 607 of the University Code (relating to faculty grievances) be adopted:
 - (3) "Grievances" within the province of the committee's power shall include matters directly related to a faculty member's employment status and institutional relationships within the constituent institution, *including matters related to post-tenure review*. However, no grievance that grows out of or involves matters related to a formal proceeding for the suspension, discharge or termination of a faculty member, or that is within the jurisdiction of another standing faculty committee, may be considered by the committee.

III. Summary and Conclusions

The FAEC has carefully reviewed the Code 603/604 Committee's proposals to revise portions of the University Code and related policies. The FAEC believes that the proposed revisions are vague in important respects and create significant risks of compromising the academic freedom of tenured and "special" faculty. The FAEC has accordingly developed alternative language that it believes effectively addresses these potential problems. The FAEC requests that the Faculty Senates of constituent campuses, and delegates to the Faculty Assembly support the alternative language it has developed as a means of constructively addressing the substantial deficiencies in recommendations advanced by the Code 603/604 Committee constituted by the University of North Carolina General Administration as a means of developing possible revisions of the University Code and related policy statements.