

Discussion Outline

Meeting with Provost Nielsen

Notes from Brenda Killingsworth and Judith Wegner, Faculty Assembly Representatives

July 17, 2007

Note: The responses written here were made by Larry Nielsen, August 16, 2007, with the assistance of Charles Waldrup, UNC system attorney and committee member, or behalf of the committee. Several of the concerns cited below relate to issues that the committee did not address. However, I believe that three recommendations are major—(1) addition of a fourth reason for discharge, (2) elimination of BOT review of appeal, and (3) addition of an option for an administrative post-tenure review. I have surrounded my responses regarding these three issues with a box, so readers can find them easily. – Larry Nielsen

1. Overall: major, major level of concern by faculty for range of reasons; will need much more time before taking to BOG

RESPONSE: I am very interested in hearing the responses from a broad range of faculty regarding these ideas. I hope that the intervening month has allowed for some of that. Our intention is to get a set of recommendations to the BOG sometime this fall. Since we met, I have conducted two telephone conference calls with the system's CAOs (almost all of them), and several had had discussions with faculty at their institutions.

2. Initial questions:

- a. Charge and goals of the committee?

RESPONSE: Senior Vice President Martin and Vice President Winner delivered the charge to the committee orally. The attached document, drafted by GA Legal Affairs, was a summary of potential matters to consider, but was not intended to be limiting.

- b. Coverage of post-tenure review when that has been dealt with by BOG in June and FA had spent considerable time and expressed grave concerns re shift to administrative rather than peer review (unanimously opposed by FA Exec. Comm., Academic Freedom Committee, Faculty Development committee; resolution opposing from FA in May 2007)

RESPONSE: We decided to consider post-tenure review issues in the committee because they are relevant to the discharge procedures. I also personally felt that we should address this because it is related and because our faculty and administrators have expressed concern about the current post-tenure review procedures.

I was surprised to learn of the objections to an administrative review, as these were never conveyed to our committee. Upon my request to receive a copy of the resolution that is cited here, Brenda sent me what exists—a vote by one of the FA committees opposed to administrative review.

Because of the work that our committee had been doing on this, the proposals that GA had put forward for consideration by the BOG were removed from the June BOG agenda, and

have not been moved forward since. I believe that Vice President Martin is interested in considering the work of our committee before making any further proposal to the BOG (but that is my uninformed assessment).

- c. Reason for blending appeals with grievances when these are separate for good reason now on most campuses? (e.g. for ECU, grievances apply to matters directly related to employment status or institutional relationships; shall also be limited to remedial injuries attributable to violation of a right or privilege based on a federal or state law, university policies or regulations, or commonly shared understandings within the academic community about the rights, privileges and responsibilities attending university employment or wrongful conduct that deprived the faculty member of an advantage that he or she apparently otherwise would have received) (grievance is not about "a formal proceeding for the suspension, imposition of serious sanction, discharge, or termination of a faculty member's employment, or that is within the jurisdiction of some other committee)

RESPONSE: The Committee was obviously aware of the language in the Code sections about appeals and grievances. We understand that some campuses view any hearing on their campus as a "grievance," and certain matters that leave their campus for Board of Governors' review to be "appeals." In deference to those institutional differences, we tried to make the documents accommodate however an institution approached these hearings.

Questions had arisen in the past about details of several types of hearings, such as burden of proof and evidentiary standards. By setting these out in most Code sections discussing a hearing, we were seeking to clarify these issues. (Note that Code section 607 on terminations still lacks detail. Since we were not aware of questions or problems that had arisen under that Section, we did not recommend changes to it.)

- d. Review of impact on existing BOT tenure policies and grievance policies on campuses?

RESPONSE: We have not reviewed campus BOT policies, but assume that if the proposed revisions are adopted that some changes will be required at the campus level. We do not expect major changes to be needed. We were trying to accommodate campus differences in terminology but retain the substantive nature of each type of hearing.

- e. Level of participation by faculty? (have tried to reach faculty appointees but not successful given summer schedules); would be surprised if they gave full support without any misgivings (which is what the cover memo suggests)

RESPONSE: The 3 faculty appointees had been suggested by the Chair of the Faculty Assembly. One of them only attended the charge meeting. The other 2 faculty appointees regularly attended and provided suggestions/ feedback. They and all other members of the committee had many opportunities to discuss, refine and object to the findings of the group.

I see no reason why you should doubt what the report says about the level of agreement that the faculty representatives or other members have with the recommendations.

- f. Intent for mesh with BOT tenure regulations on the campuses and Faculty Code provisions regarding grievances? Why supplant these?

RESPONSE: Except for trying to work discharge for unsatisfactory performance reviews (under the Post-Tenure Review Policy) into Code section 603, and speed up the process, we did not seek to make significant changes to Code 603. Thus, we assume that most campuses will have to make some changes if our proposed changes are adopted, but believe that the detail we added, such as the burden of proof and evidentiary standard, is already being practiced at campuses and should be expressly stated,

### 3. Policy 101.3.1 Comments

- a. Title: "Appeals or grievances of non-reappointment decisions" makes no sense since grievance process relates to topics other than non-reappointment

RESPONSE: As indicated in the Response to 2.C. above, the addition of "grievances" was intended to accommodate those campuses that, at the campus level, call these matters grievances.

- b. Basis for appeal: several campuses include discrimination on the basis of sexual orientation in current BOT tenure regulations; some probably also cover age; is this provision intended to curtail campus-based policies? Why?

RESPONSE: Policy 101.3.1 presently covers age. The changes proposed were made to bring this policy into conformity with Code section 103 as to color and creed. The intent of Legal Affairs at GA is to amend Code section 103 to change the language about the military to what is proposed in 101.3.1. This general statement of bases for appeal has been in place for many, many years. No change was made with any intent to place any more limit on campuses than presently exists.

I understand from GA's Legal Affairs that the State Personnel Commission has recently added sexual orientation to its list of protected classes under Chapter 126. GA's Legal Affairs and Human Resources have begun discussions internally about proposing the addition of sexual orientation to the protected groups in Code 103 and other Code sections/policies that discuss protected groups. This issue has not yet been raised with the Board of Governors, so there is no indication how its members will respond to such a proposal.

- c. Definition of "personal malice": concerns re ambiguity re collegiality (a matter FA has been discussing as a concern)

RESPONSE: The Code 600 Committee did not make any proposed change in this subject matter.

- d. Reference that institution should consider extending service of appropriately trained committee chairs (the committee memberships are elected)?

RESPONSE: The Code 600 Committee did not make any proposed change in this subject matter.

- e. Use of professional court reporter will be very expensive; most campuses currently use taped evidence?

RESPONSE: The Code 600 Committee did not make any proposed change in this subject matter.

- f. Removal of BOT from appeals process on tenure denials?

RESPONSE: The Code 600 Committee did not make any change in this subject matter.

- g. Procedural flaws: what is meant by "institutional requirements"?

RESPONSE: We assume this means policies, regulations, guidelines, or whatever a campus calls its controlling documents. The Code 600 Committee did not make any change in this subject matter.

- h. Sufficiency of the evidence: "clearly erroneous" definition appears to preclude any challenge at all, but then a later reference to whether the decision reached was a "reasonable one" seems to apply a different test and is confusing

RESPONSE: The Code 600 Committee did not make any change in this subject matter.

4. Code 609 and policies 300.1.1 and 300.2.1 (relating to EPA non-faculty )  
a. Have any EPA non-faculty representatives been consulted?

RESPONSE: As of this time, they have not yet been consulted. Such a consultation has been discussed within General Administration.

- b. Confusion between grievances and appeals? Why?

RESPONSE: See the above answers about trying to accommodate different campus practices in nomenclature.

- c. Language about when appeals permitted: many campuses (or at least UNCCH and ECU?) use "at will" appointments for many EPA non-faculty positions; this policy refers to reappointment, and might be read as conferring a right to reappointment; many EPA non-faculty positions may be for researchers on soft money

RESPONSE: The intent in the proposed Code section 611 was to retain the same level of grievance/appeal rights for non-faculty EPA employees as now exists in Policy 300.1.1 and 300.2.1. A word search has been performed on the Code 609/611 proposal document, and it does not show any use of the word "reappointment." We sought to be careful about using the word "reappointment" in this section because we were sensitive about not creating any notion of entitlement to another appointment. But, under present policy, one can appeal not receiving a new appointment. While we did not seek to enlarge appeal rights for EPA non-faculty, we did not seek to reduce them either.

- d. This policy is confusing because it references appeals to the Board of Governors or Board of Trustees; it's really clearer and better for all concerned to have a separate codified section relating to GA rather than trying to blend everything together

RESPONSE: We are not certain if you refer to a specific section, or mean in general. There are other policies in the UNC policy manual that include the two as we have done, such as current Policy 300.1.1.

- e. Change in references about dates (under paragraph 4): why elimination of reference to "final" decision? "Final" is important for purposes of triggering time frames for appeals to the courts

RESPONSE: "Final" decision was retained later in that section. We thought the change improved comprehension.

- f. How much of the change is related to handling of GA employees v. those on campuses? The blending here is confusing and difficult for users to understand;

RESPONSE: The change was an attempt to set out more details in the Code so as to answer questions that had arisen in the past and provide clarity. It was not concerned with any particular set of EPA non-faculty employees.

5. Proposed Changes to Code 603, 604, 605, new 610 and post-tenure review policy

- a. This is really a matter of very, very grave concern
- b. Grounds for discharge or sanction have been significantly expanded and raise significant questions of vagueness for purposes of legal enforcement, as well as significantly infringing understandings of academic freedom
  - i. Many campus policies (e.g. ECU's) allow discharge 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
  - ii. The policy expands the meaning of incompetence (what is a "poor teaching technique" or "outdated" knowledge of the subject matter?)

RESPONSE: The code currently has no definitions for the reasons for discharge, and we discussed how the various members have had seen the terms used differently (in my subsequent discussions with CAOs, we talked about the same thing). Thus, we thought that adding definitions of key undefined terms would be useful in limiting grounds for discharge. We are eager for your help if you have better suggestions for these terms.

For this term, we were envisioning someone who was teaching in such a manner as consistently not to convey the subject matter to the students as using a poor teaching

technique. We were envisioning someone who was many, many years behind on teaching current knowledge in his/her field as teaching outdated knowledge.

- iii. The policy defines "neglect of duty" as "insufficient attention"; what does that mean?

RESPONSE: It means, to us, that someone is not being attentive to their job duties.

- iv. "Unsatisfactory performance" is a very different standard and is poorly defined

RESPONSE: This is one of the most significant changes that we are proposing. Because the current reasons for discharge are generally construed narrowly, discharge for unsatisfactory performance does not easily fit into any one of them (this perspective is illustrated by my discussions with others, who variously suggest that unsatisfactory performance belongs in either incompetence or neglect of duty). Thus, we thought that it would be appropriate and useful to add a new category regarding unsatisfactory performance. This seemed especially relevant because we have a post-tenure review process that can result, in the most extreme cases, in discharge.

My subsequent discussions with CAOs have verified that they believe that addition of unsatisfactory performance is appropriate and useful. Some suggest that we might do better by explicitly defining that unsatisfactory performance is covered under either incompetence or neglect of duty, but all felt that we needed the addition.

Of course, the explicit addition of unsatisfactory performance into these other causes for discharge will not solve the issue of unsatisfactory performance being acknowledged as a cause for discharge. If that is the issue, then where the words are placed is irrelevant.

At the recent summer meeting of the Academic Council of NASULGC, we had a session on university legal matters, led by Dr. Beverly Lee of Rutgers University, a specialist in university law. In the Q and A session, I explained our situation and asked Dr. Lee if she thought the addition of unsatisfactory performance was appropriate. She agreed that it was, and, she added, that if the university had a post-tenure review process that fed into the discharge procedure, then it was particularly appropriate and useful.

- v. "Misconduct" has historically referred to significant criminal or research misconduct; the definition refers to "mismanagement" and "professional expectations" which are not well defined

RESPONSE: Again, we thought by defining key terms that we were improving the situation. We perceive ethical misconduct in the faculty member's field to be misconduct that comes within this term. Likewise, mismanagement of a program, grant, or whatever, that is significant would seem to us to be misconduct—such as misuse of grant money.

- c. The statement that hearings shall be concluded within 90 days not counting summer may well mean that there's a longer time for getting hearings completed and may run up against AAUP notice rules; in addition, delays are likely to arise due to availability of administrators or securing of court reporter transcripts

RESPONSE: Since there is presently no time limit set out for campus hearings, we thought we were improving the situation by trying to set a general time limit, realizing that faculty are often not available for conducting such matters during the summer. The inclusion of a time limit should not change any behavior that is now getting hearings completed in less than this time, but only assure that they don't drag on. This time limit should motivate administrators to make themselves available—that was the intent. A court reporter's transcript is usually available about 2 weeks after the hearing. Our experience indicates that faculty prefer to have the transcript to consult as they finalize the committee report and recommendations.

- d. The inclusion of counsel in the hearings on both sides will make the process much more adversarial

RESPONSE: The Code 600 Committee did not make any change on this subject matter.

- e. The use of "preponderance of the evidence" standard is confusing when applied to some of the definitions above; is this standard drawn from places with experience in its application?

RESPONSE: We understand that the general evidentiary standard in most civil matters is the preponderance, or greater weight, of the evidence. We are therefore not clear from the above questions what the concern is in relation to making the evidentiary standard explicit.

- f. The stated "impermissible grounds" don't coincide with practices on many campuses (which may reference sexual orientation)

RESPONSE: See 3.b.

- g. The statement that campuses are to have policies (604D) is important but the changes in other parts of this policy undercut the discretion and shared governance traditionally exercised at the campus level

RESPONSE: The intent in the additional details in Code 604 was to provide a general structure similar to Code 603.

- h. There seem to be confusing statements regarding the burden of proof; saying that the review process "is not to second-guess professional judgments based on permissible considerations" seems to apply an additional standard; "material deviation from prescribed procedures such that doubt is cast on the integrity of the decision not to reappoint" is unclear

RESPONSE: We were seeking to resolve the present ambiguity between Code section 604 and Policy 101.3.1 interpreting that Code section.

- i. Why is there no more review by the BOT?

RESPONSE: This is the second major recommendation, as it relates to Section 603. There are several reasons why we are recommending the change to remove the appeal to the BOT.

First, a policy change years ago removed the campus BOTs from the non-reappointment cases. GA and campus attorneys tell us that this has worked well and generally moves those cases along faster.

Second, one of the GA attorneys did research on policies at 8 large university systems, and did not find any that had two sets of boards. He sent out a query to other university attorneys around the country about systems that have multiple levels of boards, and asked how many levels of those boards are involved in reviewing personnel matters. Of the 3 systems identified to him by the responses (Oklahoma, Florida and Utah), all only had one level of board review. Hence, we thought that removing a step in this process was consistent with national practice and would help the case move faster.

Third, the experience of the legal staff on the committee was that the BOT is very reluctant to overturn a chancellor's decision, and, they could not remember a case in which this had happened. Hence, the BOT review does not seem to be a useful step in the process.

Fourth, the inclusion of a review by the BOT creates a logistical legal problem. Because campus attorneys are the legal advisors to the chancellor in such matters, they cannot advise the BOT in their deliberations. Thus, we need to borrow an attorney from another campus or GA to advise the BOT. This is hard to manage.

So, we consider that the appeal to the BOT not useful, cumbersome, time-consuming and out of step with common practice at other universities.

- j. Special faculty provision is problematic; lecturers are on contract and are vulnerable if dismissed at will without reason or appeal

RESPONSE: The only substantive change here is making explicit that a special faculty member may not grieve or appeal the decision of the university not to give them a new appointment. We believe that this is good practice and only wished to make it explicit.

- 6. Performance review of tenured faculty
  - a. This policy is of great concern

- b. The added purposes appear to be punitive; the focus is on sanctions

RESPONSE: This assertion is not true. The added purposes cover a range of circumstances and explicitly add the need for a review of an unsatisfactory performance finding, much in the faculty members favor.

- c. There's a reintroduction of "administrative review" rather than requiring collegial peer review in all cases; that creates significant potential for arbitrariness

RESPONSE: This is the third major recommendation in the report. We have added the option of an administrative review in response to the general feeling that post-tenure review is burdensome and not needed in the vast majority of cases (I note, for example, that in approximately 140 post-tenure reviews done this year at NC State, 2 were found to be unsatisfactory—and we tend to have more negatives than most campuses!).

Please note that the recommendation says that a campus may grant the option for an administrative review; it does not require a campus to adopt this option. So, each campus could decide to allow it or not, depending on its own conception of the relative importance of faculty ownership of the process versus doing the process with the least imposition on the time and resources of the faculty.



We believe that an administrative option would allow most faculty to go through a review that is both efficient and effective, and that it would not be arbitrary. In order to assure that a faculty member was not being arbitrarily judged to have performed unsatisfactorily by an administrator, the recommended procedure requires all subsequent reviews to be peer reviews.

There remains the problem—a rare one, I believe—that an administrator would give an arbitrarily positive review to a faculty member who is actually performing satisfactorily. In such a case, the other faculty in the unit should make the dean aware that this is going on, so that the department chair/head can be assessed and, if necessary, sanctioned or removed.

My discussions with CAOs showed that they favored this idea, as being both efficient and effective.

However, I received an interesting idea from one provost that may resolve all issues and remaining arbitrariness, as well as allowing faculty ownership of the process, if desired. So, I propose adding a step after a faculty member requests having an administrative review. If the faculty member does wish to have an administrative review, the appropriate faculty group would need to vote in the affirmative to allow such a review. This would allow the faculty to allow administrative reviews that they thought were deserved (that is, for faculty who were generally acknowledged as being productive). This would allow the faculty to reject an administrative review if they thought the review would be a whitewash of an unsatisfactorily performing faculty member. This would also allow a faculty group to decide that they would not allow any administrative reviews, if they wished to expend their time and resources conducting all the scheduled reviews.

d. The provisions regarding repeated reviews are confusing

RESPONSE: No, they aren't. Note that we were deliberately vague about what happens after a second negative review so as to provide campuses flexibility in how they handle such situations. So, if that vagueness is a concern, it was deliberate.

e. Many of the statements here seem to be at a level of detail best left to the campus as was done in the June 2007 policy on post-tenure review

RESPONSE: We added the additional detail because the addition of an optional administrative review seemed to warrant it.

## SUMMARY OF CODE 600 COMMITTEE RECOMMENDATIONS

### Code Section 602 [Tenure]

Changes are only proposed for sub-section (6), to bring it into conformity with proposed changes to Code 603. "Unsatisfactory performance" is added as a ground for discharge, and the grounds for suspension/demotion are revised to make clear those options are only available for lesser forms of misconduct.

### Code Section 603 [Discharge and Sanctions]

Definitions of the grounds for discharge are proposed for Code 603. A new basis for discharge for unsatisfactory performance is added (to include unsatisfactory post-tenure reviews). The changes proposed in Code 602 are also proposed for 603. This section will explicitly address suspension/demotion in more detail than in the past. The burden of proof is explicitly placed on the university, and the standard of proof is stated as the preponderance of the evidence. Several changes will move the appeal process along much faster. A notice of intention to discharge a faculty member would include the specification of reasons. A fixed time limit of 90 days within which the faculty hearing should occur is proposed. Appeals would go from the chancellor directly to the Board of Governors, removing the Board of Trustees from the appeals since we are not aware of any university system in the country that has two different governing boards involved in reviewing employee appeals. The time limit for the Board of Governors' decision is deleted, in part to allow the BOG to remand cases without concern about the time limit and to recognize that currently it takes approximately 45 days to establish the record on appeal and receive statements from the parties, often leaving the BOG a 30 to 45 day period in which to meet and decide the appeal. Since the BOG does not meet every month, this creates a need for a change. Authority to reassign a faculty member to other duties is added to the right to suspend with pay. Other changes generally seek to make the language consistent and parallel with other provisions.

### Code Section 604 [Non-reappointment]

It is proposed that this section be revised to apply only to tenure track faculty. The sub-section on special faculty is moved to new Code Section 610. Minimum standards for the campus appeal/grievance process are set out, leaving opportunity for campus policies to contain differences (much like the discharge requirements in Code 603). More detail is set out concerning appeals to the Board of Governors.

### Code Section 605 [Termination]

An erroneous restatement of a sentence at the end of the section is deleted.

Code Section 609 [Appellate Jurisdiction]

We propose that the section on non-faculty appeals be deleted from this section and placed in a new Code Section 611.

Code Section 610 [Special Faculty]

A new section for special faculty is proposed, containing the prior Code 604 language. Special faculty could be appointed on an at-will basis, not just for a fixed term. It is clarified that there is no expectation of a new appointment, and there are no grievance/appeal rights.

Code Section 611 [Non-Faculty Appeals]

Minimum standards for campus appeals/grievances are set out, leaving opportunity for campus policies to contain differences. The standard of proof and burden of proof are set out. Appeals from the campus end with the Board of Trustees. No new appeal rights are provided beyond what the Code/Policies presently permit.

Policy 101.3.1 [Non-reappointment]

Changes are proposed to make this section consistent with its companion Code Section 604 and to delete language about the appeal that was placed in Code 604.

Policy 300.1.1 [SAAO II]

Sub-section III. is amended to be consistent with the new Code 611 and to improve language and consistency of usage. Salary payment ends after the decision by the chancellor/president.

Policy 300.2.1 [EPA Non-Faculty]

Sub-sections III.- VI. are amended to be consistent with new Code 611 and to improve language and consistency of usage. Salary payment ends after the decision by the chancellor/president.

Policy 400.3.3 [Post-Tenure Review]

Material about the original study and historical information have generally been deleted. Additional purposes have been stated, including that these reviews be conducted on a regular basis; that an administrative review, rather than an original faculty peer review, may be substituted at the request of the faculty member, but subsequent to finding a deficiency, reviews must be by faculty; and faculty members will have an opportunity to respond to post-tenure reviews. Contents of the post-tenure review dossier are set out.

More detail is provided concerning procedures subsequent to an unsatisfactory review, including creation of development plans and additional reviews.

In a discharge hearing, peer judgments by the faculty conducting the post-tenure review are to be given deference by the faculty hearing panel. The unsatisfactory findings of the post-tenure review committee are presumed to establish the grounds for discharge. The faculty member may offer evidence to rebut that presumption to show impermissible reasons for the unsatisfactory review (same as for non-reappointment) or material procedural flaw. The university may then offer evidence to rebut the faculty member's evidence. It is explicitly stated that the university has the burden of proof and that the standard of proof is preponderance of the evidence. The prior statement about not abrogating the criteria and process for discharge is deleted.