

## **Faculty Senate Response to Code 603/604 Review Committee Final Report**

*The content of this response originates from a conversation among the executive committee of the NCSU Faculty Senate and was drafted by Jim Martin, Professor of Chemistry and Chair of the NCSU faculty. 8/16/07*

Academic freedom and tenure are core values of the American academic system, and thus are of significant concern to faculty. The UNC system, being the oldest public university in the nation, has been and should continue to be a leader in best practices in academia. The UNC Code represents a sound document that provides for the privileges and responsibilities of members of this distinguished academy.

The "Code 603/604 Review Committee" was charged to review aspects of *The Code* in order to "strengthen and streamline these processes." As stewards of the public trust, it is our obligation to ensure effective processes. As faculty we support several of the committee's recommendations pertaining to efficiency. Nevertheless, the overall tenor of the review committee's recommendations appears to us to undermine the culture of faculty-driven scholarship in the academy, instead "strengthening" the ability to administratively discharge faculty, and defining faculty responsibility in ever increasing legal terms. While in no way do we seek to diminish faculty responsibility and accountability, we do not believe scholarship and education, the primary responsibilities of faculty, to be well-served by legalistic definitions of faculty responsibility.

We recognize that issues such as faculty discharge and non-reappointment (portions 603 and 604 of *The Code*) are matters of some legal concern. Thus we accept the goal to have legal, administrative and faculty representation on this review committee. As indicated by their report, there was active committee participation of four legal staff (1 from GA and 3 from campuses), three provosts, and only two faculty. This distribution of representation seems out of balance when dealing with matters that also significantly pertain to faculty. Furthermore, we are highly disappointed that this committee's charge expanded to consideration of post-tenure review guidelines—a process that the American Association of University Professors has specifically recommended should be a career development tool for faculty, not a dismissal and discharge tool.

It is our strong opinion that faculty must be afforded a much more significant voice and, in fact, leadership roles when developing and evaluating such policies and procedures.



That said we offer the following specific evaluations of the recommendations in the final committee report and corresponding documentation.

### **Section 602**

#### **Recommendation 1: Strongly oppose.**

The recommendation to include "unsatisfactory performance" as a fourth reason for discharge of a faculty member is at best redundant to the allowed possible causes of "incompetence" and/or "neglect of duty" and at worst administratively malicious. We particularly oppose the effort to include unsatisfactory PTR evaluations as a cause for dismissal, as discussed in more detail below.

### **Section 603**

Though not indicated in the summarized recommendations, we **strongly oppose** the policy revision stating that a faculty member may be demoted in rank for misconduct (also indicated in proposed revisions to section 602). Academic rank is granted as a result of an evaluation of scholarship and achievement. Thus the only grounds for demotion in rank should be as a result of matters such as misrepresentation of work or research misconduct that led to a false evaluation of scholarship and achievement. Rank must not to be associated with conduct.

We further **object** to including conduct that violates "professional expectations" and "moral turpitude" in the definition of misconduct as grounds for discharge of faculty. These terms are ill-defined, and are matters for which it is virtually impossible to establish any consistent metric by which performance can or should be judged. Their inclusion appears to provide an all-inclusive basis for discharge, which is unacceptable.

#### **Recommendation 2: strongly support**

We strongly support the recommendation to require that a specification of reasons for discharge is provided at the time notification of said discharge is given. This will both enhance efficiency and fairness.

#### **Recommendation 3: oppose specifics, but support modification**

We support the intent of this recommendation, which is to encourage any faculty appeal process be carried out in a timely fashion. However, we strongly object to placing any fixed time limit on the faculty appeal process. Evidence from the historical record of past faculty appeals at NCSU indicates that significant amounts of time (>90 days) may be required to ensure due process including coordination of grievant, respondent and faculty panel schedules; evaluation of appropriate evidence; scheduling and gaining testimony from witnesses, etc.



However, we do believe it is appropriate to place a finite limitation on the time by which any faculty appeal process must be initiated. Furthermore, as is afforded in NCSU's grievance policy, it is recommended that policies give any party the option to challenge the timeliness or responsible function of the faculty appeal panel to the Chair of the Faculty. The Chair of the Faculty evaluates the challenge and may replace a 'problematic' member or completely reconstitute the committee in order to ensure efficient and effective operation of the hearings process. Such an option for challenge, rather than a fixed time limit, ensures that due process is afforded but provides a mechanism to prevent needless stalling of a faculty appeal.

*Recommendation 4: **accept***

It is most critical that an objective body, external to an individual campus, review any decision that is appealed to a higher level. According to *The Code*, a higher-level appeal may occur if a Chancellor declines to accept the faculty committee's recommendation or if Chancellor and faculty committee agree but find in opposition to the faculty member. Thus we accept that the BOG, which represents the entire UNC system as opposed to individual campus' BOTs, is the most appropriate unit to fill the role of objective evaluator.

Furthermore, it is to be expected that a conscientious faculty appeal panel and the Chancellor should both be seeking the best interests of the University. Therefore, we recommend that when considering an appeal in which the Chancellor declines to accept the faculty committee's recommendation, the BOG be charged to seriously consider reconciliation of the recommendation of the faculty committee and the decision of the Chancellor, in addition to the considerations of 1. procedural flaws, 2. sufficiency of the evidence and 3. interpretation of applicable law or policy. Such a condition should be added to Policy 101.3.1 section III.B.

*Recommendation 5: **accept***

Like our recommendation for faculty appeal panel review we encourage timely review but agree that fixed time limits do not often serve due process. Thus we concur with the recommendation to remove time limits for BOG consideration. We further recommend clarification as to what should initiate "remanding the decision to additional review" and the nature of said review.

*Recommendation 6: **support***

*Recommendation 7: **support***



### ***Post-Tenure Review (PTR)***

We largely **oppose** the proposed revisions to the PTR policy because a majority of the proposed revisions clearly make the PTR process a tool to facilitate faculty discharge rather than a possible career development tool. In the final committee report it is specifically stated that discharge proceedings (603) "will emanate from post-tenure reviews if a faculty member is performing unsatisfactorily..." Rather we endorse the report on post-tenure review by the American Association of University Professors (AAUP) (approved in June 1999 by the Association's Committee A on Academic Freedom and Tenure, adopted that month by the Council and endorsed by the Eighty-fifth Annual Meeting). In that report, it is accepted that reasonable forms of PTR can be employed for accountability measures and as a career development tool. But they expressly state, "*Post-tenure review should not be undertaken for the purpose of dismissal. Other formal disciplinary procedures exist for that purpose. If they do not, they should be developed separately, following generally accepted procedures.*" It is of grave concern to us that any PTR policies and guidelines for the UNC system be consistent with nationally accepted faculty norms and best practices.

#### ***Recommendation 8: accept with caveats***

Given that the vast majority of faculty are performing at a level that "meets expectations" we accept the recommendation of an administrative review option. However, we recognize that current academic tenure policy already calls for annual and periodic comprehensive review of all faculty that is to be conducted by Department Heads (Chairs). Thus, an administrative PTR is simply redundant and inconsistent with the spirit of the PACE initiative.

#### ***Recommendation 9: support with caveats***

We support efficiency in preparation of any dossier for PTR review, thus are pleased with the recommendation that a primary component of the dossier be a compilation of past annual faculty activity reports. The brief faculty member statement is also reasonable. However, we caution against legalistically "writing goals and plans for the subsequent review period." Requiring too much 'planning and vision' to be committed to a legal-type review document that may be used as grounds for discharge, creates a culture where success is defined by simply "meeting expectations" as opposed to risking the pursuit of greatness. The purpose of tenure is to provide a safe context from which risk in the pursuit of ideas, discovery and thought is encouraged. Such creativity and originality has no simple accountability metric, but is fostered by a community culture of scholarship.

We do not agree that the proposed dossier "accomplishes the stated intention that previous annual reviews should be part of the PTR process." Further, while we strongly disagree with the use of the PTR process for discharge purposes, if it



is to be used in this fashion the actual annual reviews must be a part of the PTR dossier.

In addition, it is important that conditions be in place to require appropriate administrative units to have completed and complied appropriate supporting information such as annual reviews, peer review of teaching, etc. In the absence of these, a "does not meet expectations" action plan must be implemented for the supervising administrator before the faculty based PTR process can ensue.

*Recommendation 10: **support***

We strongly agree that in the event of an unsatisfactory PTR, subsequent reviews must be peer as opposed to administrative reviews. However, we again object to the emphasis on negative actions such as discharge in the event of unsatisfactory review. If a PTR process exists, then the actions from an unsatisfactory review should only focus on mechanisms to restore that faculty member's performance. As stated in the AAUP report, other disciplinary measures should be (and are) in place for the purpose of disciplinary action.

*Recommendation 11: **support with addition***

We support the recommendation that faculty be given the opportunity to respond to assertions in their post-tenure review. It is important that credibility be given to said faculty responses by ensuring that challenged assertions or alleged false statements or misrepresentations raised by a faculty member in response to his or her PTR report are administratively acknowledged. Thus, while the administrative unit may or may not agree with the challenge, at a minimum it should be expected that an administrative response would be provided explaining the basis on which the original statement or assertion was made.

*Revision to Policy 400.3.3 section 1f (not listed in summary of recommendations): **strongly object***

This section added to the PTR policy is directly addressing how PTR reviews should be use by a faculty appeal panel when hearing an appeal of a decision to discharge a faculty member. We strongly object to PTR being a direct part of disciplinary procedures, as is also consistent with the above referenced AAUP guidelines. But this clause further obviates due process in a performance-based dismissal case. A PTR dossier and evaluation provides an important, but limited, view of a faculty member's performance that is evaluated only at the departmental level. There is not, nor should there be, a structure to present, defend and cross-examine evidence in a PTR review. However, these are essential components of due process in any faculty appeal. Furthermore, the faculty hearing process is intended to be an extra-departmental evaluatory process to ensure fair and due process and to uphold a university culture and standard. Unfortunately, the stated clause "the findings of the post-tenure review



process shall be presumed to establish grounds for the imposition of discharge," codifies a principle of guilty until proven innocent, as opposed to the guidelines of *The Code* that establish the standard of a preponderance of evidence. PTR is only one piece, hardly a preponderance of evidence. It is imperative that this section be removed.

### ***Section 604 and proposed 610***

#### *Recommendation not in summary:*

In the revision to section 604 B, the list of impermissible reasons for non-reappointment was amended. We accept these modifications however recommend that 'sexual orientation' needs to be added to this list.

#### *Recommendation 12 and 14: oppose*

*The Code* already has specification for tenure-track faculty in its academic tenure policy. This policy is sufficient to deal with aspects of appointment, reappointment and requirements of notice and review that are unique to the tenure track. Thus, we see no need to create a new section of *The Code* to repeat virtually all of the same information for non-tenure track faculty. The two conditions that the committee recommendations appear to make to justify a new section 610, include the ability to make at-will appointments of special faculty and to state that "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.

Both these conditions create a problem because of the broad and apparently ill-defined term of special faculty. At NCSU special faculty may include lecturers, research faculty, clinical faculty, teaching faculty, etc., many of whom are permanent employees, albeit on renewable contracts as opposed to tenured. Alternatively, special faculty may include non-paid often visiting or adjunct faculty.

The latter non-paid category could potentially fill an at-will appointment. Though it would seem that reasonable planning on the part of the appointing unit should enable an assessment of a term of appointment. Herein term appointments also provide periodic assessment of the appointment, not required of an at-will appointment.

By contrast, good personnel policy should assume that permanent NTT-faculty, also special faculty, are provided reasonable and timely notification of reappointment, and are protected by reasonable due process via a grievance or appeal policy as are even non-faculty employees (see Code 610/proposed 611). The end of such employees' contract term should not constitute notification that their appointment expired. For that reason the existing *Code* 604 details the



basis for the timely notification of reappointment. Furthermore, even a lecturer hired to teach one course should not be hired as an at-will faculty, they must be hired for at least a term of one semester. Thus, we find no rationale for the hiring of faculty on an at-will basis.

*Recommendation 13: **accept with comment***

It is reasonable to include the process steps of section 604D to bring this portion of the policy in keeping with other portions of *The Code* discussing appeals and grievances.

Again it is important that any appeal and grievance process affords due process and is fair and effective. In this regard, we recommend removing the last proposed sentence to section 604 D.1.d that states "The review process is not to second-guess professional judgments based on permissible considerations." While this statement is true, and implied elsewhere throughout *The Code*, the term "second guessing" is a non-definable term. To have such a statement written into policy gives the appearance of creating a loophole that could be used to prevent a comprehensive consideration of facts.

Furthermore, as noted above in comment to recommendation 4, it is to be assumed that the Chancellor and any faculty grievance/hearings committee are both concerned for the best interests of the University. Thus we recommend that to section 604 D.2 be added a charge to the Board of Governors review to seriously consider reconciliation of the recommendation of the faculty committee and the decision of the Chancellor, if the Chancellor's decision is in opposition to the recommendation of the faculty committee.

**Section 609**

*Recommendation 15: **support***

Moving material from section 609C to the new 611 makes sense. However, we recommend that an appropriate EPA-staff body vet the new section 611 describing the appeals/grievances by non-faculty EPA employees prior to approval.

**Other findings and recommendations**

*Recommendation 16: **strongly oppose***

Our rationale for opposition to this recommendation is discussed above in comments to recommendation 12 and 14. We find the role of Faculty and the concept of an at-will appointment to be philosophically in opposition.

*Recommendation 17: **accept***



*Recommendation 18: **accept***

*Recommendation 19: **accept***

*Recommendation 20: **These policies are not generally ready for adoption by the BOG.***

We appreciate the opportunity afforded us by the Faculty Assembly to review these policies prior to their consideration by the Board of Governors. As detailed above, we have major concern regarding many of the proposed changes and believe that their adoption would have grave consequences with respect to the principles and practices of shared governance and good management. It is our opinion that the committee must reconvene, if not be reconstituted with co-equal administrative and faculty leadership and representation to reevaluate these matters.