

# PROCEDURES FOR UNC CHARLOTTE HEARINGS IN NONREAPPOINTMENT AND NONPROMOTION CASES

*Revised June 13, 2011*

The Hearing Committee is a public body under North Carolina law, and its meetings must therefore be open to the public, as set forth in UNC Charlotte Policy Statement #53, "Open Meetings." However, any meeting of the Hearing Committee or a Hearing Committee panel that is a nonreappointment or nonpromotion hearing is by definition related to personnel matters, and must be conducted in closed session. Hearings shall be called to order in open session, and a proper motion to go into closed session must be made prior to any discussion of any confidential or privileged information (see Section 5(a) below). The panel must make a motion to go back into open session prior to adjourning a hearing.

## 1. Purposes of the Hearing

Hearings in nonreappointment and nonpromotion cases serve several important purposes. The primary purpose of the hearing is to give the faculty member (hereinafter "Petitioner") the opportunity to prove his or her contention that the decision not to reappoint or not to promote was improperly made. Conversely, the hearing provides an opportunity for the decisionmaker or decisionmakers (hereinafter "Respondent") to answer the Petitioner's allegations. Another important purpose of the hearing is to create a record of testimony and documentary evidence for review by the parties, the Board of Trustees and the Board of Governors, should the Petitioner seek further review of the nonreappointment or nonpromotion decision.<sup>1</sup>

## 2. The Scope of Review

The scope of review by the Hearing Committee (hereinafter the "Committee") in nonreappointment and nonpromotion matters is limited as provided in [Section 7.2. of UNC Charlotte's \*Tenure Policies, Regulations, and Procedures\*](#) (hereinafter the "Tenure Policies"). Review is limited to determining whether the decision not to reappoint or not to promote was based upon any of the grounds stated to be impermissible or upon "material procedural irregularities," as specified in [Section 1.11 of the \*Tenure Policies\*](#). [Section 1.8](#) defines the "impermissible grounds" for nonreappointment or nonpromotion decisions as follows: The decision not to reappoint or not to promote may not be based upon:

- (1) The faculty member's exercise of rights guaranteed by either the First Amendment to the United States Constitution or Article I of the North Carolina Constitution (protecting freedom of speech, religion and association),
- (2) Discrimination based upon the faculty member's race, sex, disability, sexual orientation, religion, age or national origin; or
- (3) Personal malice.<sup>2</sup>

[Section 1.11](#) defines the term "material procedural irregularities" and provides a method for determining those procedures that were applicable to a particular nonreappointment or nonpromotion decision. "Material

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<sup>1</sup>The preservation of evidence in a form that will permit later review is mandated by the Board of Governors in Policy 100.3.1 (repealed effective January 1, 2004) and Policy 101.3.1 of the UNC Policy Manual (effective January 1, 2004).

<sup>2</sup>The UNC Charlotte [Tenure Policies](#) define personal malice as follows: "A decision not to reappoint or not to promote a faculty member is based on 'personal malice' if the decision maker permits that decision to be made because of dislike, animosity, ill-will, or hatred based on the faculty member's personal characteristics, traits, or circumstances not relevant to valid university decision making."

procedural irregularities” means departures from prescribed procedures governing reappointment or promotion that cast reasonable doubt upon the validity of the original decision not to reappoint or not to promote.

The Committee's role is not to “second-guess” the professional judgment of administrators and colleagues responsible for making the nonreappointment or nonpromotion decision. In other words, the Committee does not reexamine the merits of the Petitioner's candidacy for reappointment or promotion. Its sole function is to determine if the decision was based on one of the three impermissible reasons, or resulted from a failure to comply with required procedures.<sup>3</sup>

### **3. The Burden and Standard of Proof**

A faculty member bringing a nonreappointment or nonpromotion case has no constitutionally protected expectation of reappointment, promotion, or tenure.<sup>4</sup> Thus, in contrast to cases involving dismissal or the imposition of serious sanctions, in a nonreappointment or nonpromotion case the *burden of proof* rests with the Petitioner and not with the Respondent. The hearing begins with the presumption that the nonreappointment or nonpromotion decision was properly made. That presumption continues unless and until the Committee is satisfied that the Petitioner has proven otherwise.

The *standard of proof*, i.e., the degree of proof required, is characterized in the *Tenure Policies* by providing that the faculty member must “clearly establish” his or her allegations of impropriety. Because that standard is not further defined in the *Tenure Policies*, the Committee will interpret it as requiring that the degree of proof required is proof by a preponderance of the evidence. This means that the Petitioner must prove that his or her allegations of impropriety are more likely true than not true. The Committee determines whether this burden of proof has been met by weighing all of the evidence and the demeanor and credibility of the witnesses, in the light of experience and common sense judgments.

### **4. Pre-Hearing Procedures**

#### **a. Initial evaluation of written request from Petitioner**

Upon receiving a written request for a hearing from the Petitioner, the Committee chair will determine if the written request meets the requirements specified in [Section 7.3 of the \*Tenure Policies\*](#), i.e., that it specifies the grounds upon which the Petitioner contends that the decision was impermissibly based or improperly arrived at, identifies the administrator(s) alleged to be responsible, and includes a summary of facts that the Petitioner believes support the contention. The written request for a hearing itself should not include the actual exhibits, which should be submitted to the Committee only as set forth in Section 5(d) below. If the chair determines that the written request does not meet those requirements, he or she will permit the Petitioner to modify the written request to meet them. . The time limitations on initiation of the hearing specified in [Section 7.4 of the \*Tenure Policies\*](#) (i.e., written request must be submitted within fourteen days after receiving written notice from the Provost) do not begin until the Committee chair has determined that the Petitioner's written request has met the requirements specified in [Section 7.3 of the \*Tenure Policies\*](#). When he or she accepts the written request, the Committee chair will send a copy of that request to the Respondent.

#### **b. Decision by Committee whether to grant the request for hearing**

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<sup>3</sup>See UNC Board of Governors’ Policy 100.3.1 (repealed effective January 1, 2004) and Policy 101.3.1 of the UNC Policy Manual (effective January 1, 2004).

<sup>4</sup>See e.g., *Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981).

If the Committee chair determines that the written request for a hearing meets the requirements of the *Tenure Policies*, the chair will convene the Committee in order to consider the request. As specified in [Section 7.4 of the \*Tenure Policies\*](#), the request for a hearing will be granted if the Committee determines by a majority vote<sup>5</sup> that:

- (1) The request contains a contention that the decision was based on an impermissible reason or based material procedural irregularities as those terms are defined in [Section 1.11 of the \*Tenure Policies\*](#), and
- (2) The facts suggested, if established, will support the contention.

A denial of the request finally confirms the decision not to reappoint or not to promote, and the Committee chair will write a simple statement to the Petitioner denying the request. A copy of that letter will be sent to the Respondent. If the request is granted, the Committee chair will select from the Committee a hearing panel of five members who will hear and decide the case. The panel selected will elect its own panel chair. The panel chair will send the Petitioner and Respondent a written notice of the decision to conduct a hearing, a list of the names of members of the panel, and a copy of these procedures. The notice shall include a statement of the date, time, and place of the hearing, which shall begin from seven to twenty-one days after notification from the chair of the Hearing Committee that it will conduct a hearing..<sup>6</sup> If the written request for hearing includes a claim of discrimination on the basis of race, sex, disability, sexual orientation, religion, age, or national origin, and a request for access to confidential records as evidence of discrimination, the procedures set forth in Appendix A shall apply.

**c. Substitution of panel members for conflict of interest**

A Committee member who has a conflict of interest, bias, or appearance of bias, or who appears to be unable for any reason to assess the evidence fairly, impartially, and without prejudice, is disqualified and shall not participate as a panel member in the proceedings.

Within five days after receiving the written notice, if such panel member does not recuse himself or herself from the proceedings, the Petitioner or the Respondent may request that the Committee chair make a substitution for any member of the panel selected for the hearing believed to have a conflict of interest or bias and of the reasons for that belief. The Committee chair shall notify the Petitioner and Respondent in writing of any substitutions made, and of any schedule change necessitated by the substitution. If the disqualified member is the Committee chair, the remaining Committee members shall elect one of the members to serve as acting Committee chair while these conditions exist.

**d. Witnesses and exhibits**

In the spirit of avoiding unfair surprise, and to facilitate the hearing process, at least two days before the hearing Petitioner and Respondent will provide to each other and to the panel chair a list of witnesses and copies of exhibits they intend to introduce at the hearing. At the hearing, the panel will accept as part of the record only those exhibits that it considers fair and reliable. The Petitioner and Respondent shall make copies of the exhibits for the court reporter and, unless voluminous, for each panel member. The failure to list a witness, or to provide advance copies of all exhibits, will not preclude a party from calling the witness or from introducing a document. However, the opposing party may be granted a temporary adjournment of the hearing if the panel deems a delay necessary in order for that party to respond adequately to the new evidence. It is important to note that the panel has no authority

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<sup>5</sup> “Majority vote” means the vote of a simple majority of members of the committee present and voting at a meeting at which a quorum is present. A “quorum” is present if a simple majority of members of the committee is present at a meeting of the committee.

<sup>6</sup>According to the *Tenure Policies*, except as otherwise provided herein, any reference to the word “day” or “days” means calendar day or calendar days, respectively. In computing any period of time, the day in which notice is received is not counted but the last day of the period being computed is to be counted. When the last day of a period falls on a Saturday, Sunday, or an institutional holiday, the next working day is the last day of such period.

to compel the attendance of witnesses. However, the panel chair may request the assistance of the Chancellor to obtain the attendance of witnesses affiliated with the University.

**e. Arrangements for court reporter and transcript**

The panel chair will work with the Office of Academic Affairs to arrange for the hiring and payment of a court reporter through the Office of General Counsel. The court reporter will be present and will make a verbatim record of the hearing. At the hearing, the panel chair should instruct the court reporter to collect and mark all documents accepted by the panel as part of the record, and shall include them as exhibits with the transcript. The documents should be forwarded to the General Counsel's Office at the conclusion of the proceedings. Any party desiring a transcript may obtain one from the court reporter at his or her own cost.

**5. The Hearing**

**a. Call to order**

The chair of the panel selected to conduct the hearing will call the hearing to order in open session, determine whether the entire panel is present, introduce the members of the panel, introduce the Petitioner and Respondent and the individual each has selected to assist them at the hearing (if any), and explain procedures. The chair of the panel shall admonish all witnesses that the proceedings are confidential and shall ensure that all witnesses are sequestered so that they are not present for and do not have access to the testimony of any other witnesses. The panel shall then go into closed session by making a proper motion using the following language: "I move that we go into closed session to hear or investigate a complaint, charge, or grievance by or against a public officer or employee under N.C. General Statute 143-318.11(a)(6)." The chair of the panel has responsibility for keeping a verbatim record of the testimony and preserving all documents accepted as evidence at the hearing.

**b. Opening remarks**

Starting with the Petitioner, each party will be given the opportunity to make uninterrupted opening remarks limited to five minutes each. The purpose of opening remarks is to orient the panel to the nature of the case and to the facts the party intends to establish. Opening remarks are not evidence. Therefore, there will be no questioning by either party or by the panel following the opening remarks.

**c. Presentation of Petitioner's case**

At the conclusion of opening remarks, the Petitioner will present uninterrupted evidence (witnesses, documents, his or her own testimony, etc.) in support of his or her allegations. Other than objections to questions, all witnesses shall be questioned first by the Petitioner on an uninterrupted basis, then by the Panel, and finally by the Respondent. Questions by the Respondent shall be limited to questions within the scope of the evidence presented by the Petitioner and not for the purpose of presenting the Respondent's rebuttal. The Hearing Committee expects that the Petitioner normally will present the case within three hours, although the panel may grant additional time in its discretion. Petitioner may reserve a portion of the three-hour presentation time and use it for rebuttal time at the conclusion of Respondent's evidence. If the Petitioner wishes to reserve rebuttal time, Petitioner must notify the Committee of that fact at the beginning of the hearing, and the Chair of the panel shall have the discretion to set limits on the amount of rebuttal time permitted.

**d. Determination whether rebuttal or explanation by Respondent is necessary**

After the Petitioner concludes his or her presentation, the panel will recess the hearing and withdraw into closed session to determine whether Petitioner has established a *prima facie* case. A *prima facie* case is established if the Petitioner's evidence, standing without rebuttal and with the most reasonably favorable inferences to be drawn from that evidence, establishes his or her contention. The panel's decision will be by majority vote. If the panel

determines that the Petitioner has not established a *prima facie* case, the panel chair will orally notify the parties of that decision and thereby end the hearing. That decision confirms the decision not to reappoint or not to promote and will be confirmed in writing to both parties. If the panel determines that Petitioner has established a *prima facie* case, it will resume the hearing. The respondent shall have a maximum of five days to prepare the rebuttal.

**e. Respondent's case**

The Respondent may present evidence (witnesses, documents, his or her own testimony, etc.) in support of his or her allegations. The order of questions and limitation on interruptions shall be the same as for Petitioner's case. The Hearing Panel expects that the Respondent will present his or her case within three hours, although the panel may grant additional time in its discretion.

**f. Petitioner's case in rebuttal**

If Petitioner has reserved rebuttal time as provided in Section 5.c. above, at the close of the Respondent's case the Petitioner may submit evidence limited to rebuttal of Respondent's evidence.

**g. Closing remarks**

At the conclusion of all the evidence, Petitioner may make closing remarks to the panel, followed by the closing remarks of Respondent. Closing remarks shall not exceed fifteen minutes per side. Since Petitioner bears the burden of proof, Petitioner may also make brief final remarks in response to Respondent's closing, not to exceed five minutes.

**h. Panel deliberations and decision**

After closing remarks are concluded, the panel will remain in closed session, excuse all persons present who are not panel members, and commence deliberations. Deliberations shall not be recorded by the court reporter. If the panel wants to see the transcript, the panel chair will go back into open session, adjourn the hearing, and reconvene the panel in closed session after the transcript is available. Otherwise, the panel may begin its deliberations immediately. The panel must make a motion to go back into open session prior to adjourning the hearing. The panel's decision will be by majority vote. As discussed in Section 3 above, the Petitioner bears the burden of proving, by a preponderance of the evidence, his or her contention that the nonreappointment or nonpromotion decision was impermissibly based or based on material procedural irregularities.

**6. Post-Hearing procedures**

If the panel decides that the Petitioner has not established his or her case, it will immediately notify Petitioner and Respondent by indicating so on the Decision Sheet (see Appendix B) and sending a copy of the Decision Sheet to each party.

If the panel determines that the Petitioner has established his or her case, it shall indicate on the Decision Sheet the grounds upon which the case is established and attach a report containing a summary of the facts upon which the decision was based and its recommendation for appropriate action to resolve the matter. The panel shall request a meeting with the Respondent's immediate superior(s) and shall, in advance of the meeting, submit to the immediate superior of the Respondent, the Respondent, and the administrator(s) copies of the Decision Sheet including its report and recommendation. Each copy of the Decision Sheet must be signed and dated by the panel chair. A verbatim transcript of the meeting shall be maintained as part of the case file.

Upon receipt of the hearing panel report and recommendation, the immediate superior is required to notify the Petitioner and the chair of the hearing panel of his or her decision within five days after the later of the date of the immediate superior's receipt of the report or the date of the meeting. This notification should provide the rationale for

the supervisor's decision and the subsequent course of action. The immediate supervisor may: 1) accept the decision of the hearing panel and provide the plan for implementation of the recommended action; or 2) reject the decision. If the Respondent's immediate supervisor rejects the decision of the hearing panel, the panel through its chair shall submit a report to the Chancellor, Board of Trustees, or Board of Governors (as appropriate) that contains the panel's findings and recommendation.

The chair of the hearing panel will assemble the case file consisting of all documents and correspondence received, sent, or accepted by the panel as part of its consideration of the case, including but not limited to the Petitioner's initial statement, the hearing transcript and documents introduced as evidence, and any report and recommendation. The chair will deliver the case file to General Counsel within five days after all the foregoing procedures are complete.

## **APPENDIX A**

### **Requests for Access to Confidential Information**

If the request for hearing includes a contention that the decision not to reappoint or not to promote was based on discrimination on the basis of race, sex, disability, sexual orientation, religion, age, or national origin, and a request that records concerning the Petitioner be compared to the record of another individual, the panel chair will ask that the Petitioner, if he or she has not already done so, seek the written consent of the other individual to permit the Petitioner to have access to and copy specified portions of that record. If such consent is granted, Petitioner may introduce such records as evidence at the hearing to the extent that permission is granted to do so.

If consent is not granted, the Petitioner shall notify the panel chair. The panel may, in its discretion and depending on the circumstances, request that the Chancellor authorize the panel only to review the record in question to determine its relevance to the proceeding. Whether the panel decides to make the request will depend on the panel's assessment of whether the proposed comparison is appropriate. That assessment will depend on the panel's judgment as to whether the Petitioner and the proposed comparator are sufficiently "similarly situated" so that the comparison, if permitted, would be a meaningful comparison (see Exhibit D, "Proving Discrimination").

If the request is granted, then after such confidential inspection, the panel will decide whether the record reviewed, or any portion of it, is relevant evidence to the Petitioner's claims. If the panel concludes that the record is not relevant, it will proceed with the hearing on the basis of such other evidence and contentions as the Petitioner may offer.

If the panel concludes that all or a portion of the record is relevant, it shall file a written request with the Chancellor that the Petitioner be permitted to inspect, but not copy the record, including a written justification of the request for such inspection. The request shall identify the specific records to be disclosed, and shall set forth the panel's justification for permitting such access, including an explanation of the relevance of the document to the hearing process and a statement of the reasons for the panel's conclusion that the evidence cannot be obtained by less intrusive means.

If the Chancellor does not grant the request, the panel will proceed with the hearing on the basis of such other evidence and contentions as the Petitioner may offer.

If the request is granted, the Petitioner will be permitted to inspect the record as provided by the Chancellor.

The Petitioner will, at the time of such inspection, designate those records or portions thereof to be available for the hearing. If the Chancellor decides that the designated records should not be available at the hearing, the hearing will proceed on the basis of such other evidence and contentions as the Petitioner may offer. If the Chancellor decides that use of the requested documents at the hearing should be permitted, then the Chancellor or a designee will make the originals and one copy of those documents available at the hearing under the control of the panel chair. If at the hearing the Petitioner introduces those documents or portions thereof, the copy of documents so introduced will be available for inspection by the Petitioner and the Respondent, then submitted to the court reporter to become part of the transcript of the hearing. The panel chair shall be responsible for returning to the Chancellor at the conclusion of the hearing the original records and all pages of the copy set not submitted to the court reporter.

**APPENDIX B**

**University of North Carolina at Charlotte**  
**Nonreappointment or Nonpromotion Hearing Decision Sheet**

Petitioner: \_\_\_\_\_

Upon consideration of all the evidence presented, the hearing panel has made the following determination:

1.     \_\_\_    The Petitioner has not established his or her case on any of the grounds alleged.
2.     \_\_\_    The Petitioner has established his or her case based upon each ground indicated below:
  - \_\_\_    Material Procedural Irregularities
  - \_\_\_    Personal Malice
  - \_\_\_    Retaliation
  - \_\_\_    Discrimination
3.     If any one or more of those grounds listed in item 2 has been established, the Panel has attached its report containing a summary of the facts upon which its decision is based and its recommendation for appropriate action to resolve the matter.

Signed this \_\_\_ day of \_\_\_\_\_, 20\_\_\_,

\_\_\_\_\_  
Panel Chair



## **Exhibit A**

### **PROVING MATERIAL PROCEDURAL IRREGULARITIES**

The tenure document provides a straightforward definition of “material procedural irregularities” which lays out the allegations that must be included in the faculty member's written statement and subsequently proven in order to warrant full consideration by the Hearing Committee. In proving a “material procedural irregularities” claim, the faculty member should be expected to:

1. Identify the particular written procedure governing reappointment or promotion that is the subject of the claim.
2. Provide evidence that the procedure identified was in effect at the time the decision on reappointment or promotion was made.
3. Identify a particular departure from that written procedure that occurred in the faculty member's case, and provide evidence that the departure from that procedure actually occurred.
4. Provide evidence that the departure was “material”--that the departure identified was of sufficient importance that it “casts reasonable doubt upon the validity of the original decision not to reappoint or not to promote.”

The tenure document thus makes it clear that not every deviation or departure from the written department or college document governing reappointment or promotion is a basis for the original decision to be set aside. The committee must be convinced that the departure was substantial enough that it calls the validity of the decision into question and thus warrants setting that decision aside.

In such cases, a dispute may occasionally arise as to which written procedures were actually in effect at the time the decision concerning reappointment or promotion was being made. The tenure document provides that in case of such a dispute, the Hearing Committee refers the matter to the Chancellor, who is responsible for certifying to the committee the procedures that were in effect at the time the decision concerning reappointment or promotion was made.

## Exhibit B

### PROVING PERSONAL MALICE

The faculty member's burden is to clearly establish that the negative decision was based upon--caused by--personal malice. The UNC Charlotte *Tenure Policies* define personal malice as follows: "A decision not to reappoint or not to promote a faculty member is based on 'personal malice' if the decision maker permits that decision to be made because of dislike, animosity, ill-will, or hatred based on the faculty member's personal characteristics, traits, or circumstances not relevant to valid university decision making." If such personal malice caused the nonreappointment or nonpromotion decision, it must be set aside.

In proving a personal malice claim, the faculty member should be expected to

1. Identify the individual(s) who bore such personal feelings of ill-will toward him or her.
2. Provide evidence to support the contention that such individual(s) had such personal feelings against the faculty member.
3. Provide evidence to show that these feelings were "based upon personal characteristics, traits, or circumstances of the faculty member that are not relevant to valid University decisionmaking."
4. Provide evidence to show that the ill-will based on those factors caused the negative reappointment or promotion decision.

It is not enough for the faculty member to assert that personal feelings of ill-will were present merely because the faculty member was not reappointed or not promoted. The faculty member must present other evidence that clearly establishes that such personal feelings were present in the individual(s) identified. Such evidence might consist of personal interchanges, oral or written, directly between the person identified and the faculty member, statements made to third parties by that administrator, or other behavior by the person identified which the committee believes indicate "dislike, animosity, ill-will, or hatred."

Moreover, even if the committee concludes that such personal feelings were present, it must also conclude that they were based on personal traits, characteristics, or circumstances that, in the committee's judgment, are not relevant to valid University decisionmaking. There may be situations in which the feelings of dislike are associated, for example, with characteristics such as illegal or unethical conduct, which may be relevant to University decisions.

Finally, the faculty member must establish that these negative personal feelings were the cause of the nonreappointment or nonpromotion decision. For example, after hearing all the evidence the committee might conclude that negative feelings were present and were based on matters not relevant to valid University decisions. However, it might also conclude that the individual kept such feelings out of the decisionmaking process. If the committee so concludes, there is no basis for setting the decision aside based upon "personal malice," because the decision was not "based upon" that motivation.

## Exhibit C

### PROVING RETALIATION

Another improper basis for University decisions on reappointment or promotion is reacting negatively to the faculty member's exercise of freedoms guaranteed under the First Amendment of the U.S. Constitution or Article I of the North Carolina Constitution. These fundamental rights are numerous, encompassing freedom of speech, religion, assembly, and petition as well as several others. For purposes of this discussion, the right to freedom of speech in a nonreappointment case is used as an example, but similar principles would apply with respect to other enumerated rights in a nonreappointment or nonpromotion case.

EXAMPLE: A faculty member claiming that a nonreappointment decision was the result of her exercise of freedom of speech must allege and prove that

1. The faculty member engaged in “protected” speech. Not all “speech” is protected under the cited constitutional provisions. It will probably be necessary for the Hearing Committee to seek legal advice on whether the speech alleged by the faculty member is speech which is protected. The faculty member must allege the speech claimed to be protected specifically. It is not enough for the claim to be “I engaged in protected speech.” The initial statement must identify the particular article, statement to the press, speech, or other communication which constitutes the protected speech.
2. After the specified protected speech, and because of that speech, the negative decision was made. The phrase usually used to describe the cause-effect relationship here is that the nonreappointment decision was made “in retaliation for” the protected speech. Obviously, the decision might have been negative whether the faculty member engaged in protected speech or not, so the faculty member's task will be to clearly establish the causal connection--that the exercise of the speech right caused the nonreappointment decision.

Where the faculty member's case successfully establishes those propositions, the respondent administrator presents evidence which either directly rebuts the faculty member's evidence or explains the reasons for the negative decision. After hearing both sides of the story, the Hearing Committee must answer the ultimate question: Has the faculty member clearly established that the nonreappointment decision was made because the faculty member engaged in the protected speech?

## Exhibit D

### PROVING DISCRIMINATION

Discriminating on the basis of race, sex, disability, sexual orientation, religion, age, or national origin means subjecting a person to different treatment because of that characteristic. Each of those characteristics is irrelevant to making decisions about reappointment, promotion and tenure. Decisions which are based on those considerations are defective, and must be set aside. For purposes of discussion, this paper uses the example of sex discrimination in a nonreappointment case. The purpose here is not to describe in technical detail how sex discrimination must be proved in a court of law. Rather, the focus is on providing a nontechnical discussion of concepts useful in analyzing usual kinds of discrimination claims to be considered by the Hearing Committee in a nonreappointment or nonpromotion case.

In some cases, a faculty member may allege sex discrimination in a nonreappointment case and present direct evidence of different treatment on the basis of sex. For example, a nonreappointed male faculty member may have evidence that the department chair has said to one or more other members of the faculty: "I won't reappoint him because we need more tenured women faculty members in our department and reappointing him will reduce our future opportunities to achieve that goal." Usually, however, cases in which sex discrimination is claimed will not be based on direct evidence. The committee will be asked to draw the inference of sex discrimination based on circumstantial evidence.

The ultimate issue before the Hearing Committee in cases where improper discrimination has been alleged is: Has the faculty member clearly established that the decision not to reappoint or not to promote was based upon different treatment of that faculty member because of a proscribed irrelevant characteristic? Remember that in deciding whether to grant a hearing based on the information in the written statement, the question before it is: Does the written statement (1) contend that the decision not to reappoint or not to promote was based upon one of the impermissible grounds or upon material procedural irregularities, and (2) allege facts which, if true, might support the contention. If the answer to both questions is yes, then a hearing is granted.

If the committee has granted a hearing, the first portion, presentation of the faculty member's case, is the opportunity for the faculty member to offer proof of the facts alleged in the written statement. It is also an opportunity for the committee and the respondent to question the truthfulness, accuracy, and completeness of those allegations.

In this first (and perhaps only) phase of the hearing, the faculty member has the burden to prove to the satisfaction of the committee that (in the words of the tenure document) "the proof [of sex discrimination] offered [by the faculty member] would establish the contention unless it be rebutted or unless the decision not to reappoint be otherwise explained." The tenure document requires the committee to answer the question; Based on what we have heard and seen so far, do we conclude that the faculty member's evidence has proven that the decision not to reappoint was caused by ["based upon"] different treatment ["discrimination"] of this faculty member and that the faculty member's sex was a reason for the negative decision ["based upon the . . . sex . . . of the faculty member"]? If the contention would be established as a result of the evidence presented in the first phase of the hearing, that means that the committee has concluded that the faculty member has proven that the nonreappointment decision

- (1) was caused by ("based upon")
- (2) discrimination (different treatment of this faculty member)
- (3) because of her sex ("based upon the . . . sex")

and is therefore entitled to relief, unless the respondent can otherwise explain or rebut that evidence.

The faculty member may present statistical evidence to assist in proving illegal discrimination in a nonreappointment or nonpromotion decision. It is important to remember that generally statistical evidence does not prove either intentional discrimination against the particular faculty member or past or present discriminatory reappointment or promotion practices.

Statistical evidence may, however, help the faculty member meet the burden of proof in the initial phase of the hearing. In turn, the respondent may explain, rebut, or devalue that evidence at a later phase of the hearing. A rebuttal or explanation may show that the alleged discrimination, even if it existed generally, was not a substantial motivating factor in the negative reappointment or promotion decision for this particular faculty member. The respondent may also offer other evidence tending to show a basis for the decision other than illegal discrimination.

In weighing the evidence on both sides of the issue, the Committee should bear in mind that the faculty member has the “burden of proof.” That is, to be successful, the faculty member's statistical evidence, taken with whatever other evidence he or she has offered, must convince the Committee that the negative decision was caused by illegal discrimination.

Remember that during this phase of the hearing the faculty member's evidence is subject to careful evaluation, through questions from the committee and the respondent which explore, or probe, its credibility, accuracy and completeness. The committee may conclude that some of the faculty member's allegations are not true, are inaccurate, or are more likely explained by reasons other than those alleged by the faculty member. All the same is true with respect to the evidence presented by the respondent if a second phase of the hearing occurs.

All those elements listed above must be supported by the faculty member's evidence in order for the hearing to proceed beyond that point. Thus, if the committee concludes that although the faculty member was treated differently because of her sex, that different treatment was not a causative factor in the nonreappointment decision, the faculty member has been unsuccessful. Likewise, if the committee concludes that the faculty member has not proven that she was treated differently from males similarly situated, then the discrimination element is missing and the case is over. Similarly, the faculty member's evidence may establish that the faculty member was treated differently and that that different treatment caused the negative decision on reappointment, but fail to establish that the different treatment was based upon sex. In that case, also, the proceeding is concluded and no explanation or rebuttal is required from the respondent.

Suppose, for example, that a female faculty member contends evidence that at least one male faculty member similarly situated received better travel funding than she received, and that this factor influenced her ability to attend conferences and therefore her ability to achieve status among her colleagues, which in turn affected her evaluation for tenure. The committee might conclude, based on their evaluation of the evidence available from the faculty member's presentation, that the faculty member did not establish the contention if it reaches any of the following conclusions:

- a. The evidence is insufficient that a male faculty member received “better” funding. (The difference between the amount of funding received by the faculty member and the male comparator she cites is negligible. Or in response to a question by a member of the panel or the respondent the faculty member has admitted that travel funds are assigned on the basis of seniority to males and females in her department, and that she had less seniority than the male comparators). Here, the committee might conclude that the faculty member has failed to establish different treatment.
- b. The evidence is insufficient that the nonreappointment decision was based upon her inability to attend conferences or her status among her colleagues. (The committee might conclude, based on the documents submitted by the faculty member, that the decision not to reappoint was based upon a consistent record of poor teaching which would not have been improved by attending more conferences, or that the sole reason for nonreappointment was the department's desire to use the faculty slot currently occupied by the faculty member, a specialist in Civil War history, with a

specialist in ancient history.) Here, the faculty member has failed to prove causation, i.e., the difference in travel funds did not cause the negative decision.

- c. The evidence is insufficient that the different amounts of travel funding received by the faculty member and a male comparator she cites were based upon sex. (As in [a] above, the faculty member's evidence, and questions during the hearing, may reveal that the different funding received is based upon seniority, not sex. Or that travel funds the department chair expected to be able to distribute to the female faculty member were unexpectedly made unavailable due to an unforeseen budgetary crisis.) Here, the faculty member has failed to establish that the faculty member's sex was the basis for the different treatment.

On the other hand, if the faculty member's evidence does provide sufficient credible evidence that clearly establishes each of those elements, the committee's conclusion must be that “the contention is established unless it be explained or rebutted.” That shifts the burden to the respondent to provide explanation or rebuttal.

The respondent's presentation of evidence in explanation or rebuttal is subject to the same careful evaluation by the committee and opposing party as was the case for the faculty member's presentation. If the respondent does not offer a credible explanation of legitimate non-sex- based reasons for the decision, of course, the faculty member is likely to prevail. That is because, logically, the committee has earlier concluded that the contention was established (by the faculty member's evidence) unless it is explained or rebutted, and the respondent failed to explain or rebut.

For example, in the case concerning travel funds, the respondent may assert that travel funds are distributed on the basis of seniority, not sex, only to be contradicted by a faculty member the respondent has brought in as a witness to verify that assertion. If that faculty member says that travel funds are not distributed based on seniority and cites examples, the committee may conclude that the respondent's explanation is not credible. If there is no other evidence on the point, the respondent has failed to explain or rebut the contention, and the faculty member prevails.

However, if the respondent has presented credible evidence to explain or rebut the contention, then, after the presentation of all the evidence (which may under the committee's procedures provide reserved rebuttal time to the faculty member), the committee must return to the ultimate issue in the case: Based on all the evidence presented at the hearing, is it more likely than not that the nonreappointment decision was based on the faculty member's sex as particularly alleged by the faculty member rather than exclusively on other permissible reasons as the respondent has asserted?

In some cases, the faculty member's claim of discriminatory treatment may be based on this claim: “My record of achievement is at least as good as that of a specific male faculty member (or members) who were reappointed. I was not reappointed. I have been required to meet a higher standard on the basis of my sex.” The faculty member's burden remains the same: Her evidence must establish that the nonreappointment decision was (1) caused by (2) different treatment (3) based upon sex. The committee will expect that evidence to:

1. Identify the specific individual(s) to whom her record is to be compared.
2. Establish that she and those individuals she has identified are “similarly situated”--that the circumstances related to the decision about her are sufficiently similar to those of the male comparator(s) that they can be compared. For example, if the tenure decision on the male was made in an earlier year when standards were lower, the comparison may not even be appropriate. Similarly, if the decision on the male concerned a first reappointment rather a second reappointment decision as is the case with the female, the comparison may not be appropriate. Unless the female faculty member's evidence shows that she was similarly situated to the male she selects, the committee will not allow the comparison. Comparisons to faculty member comparators from

different academic departments generally would not be permitted unless the faculty member first convinces the committee that the standards and procedures of the two departments are so similar as to warrant such comparison, or that college level standards identical for both departments influenced the decision in both cases.

3. Establish that she was subjected to different treatment. The committee does not sit as a “super tenure review committee” and will not spend time performing the function of a tenure review committee. Instead, its attention will be focused on evidence presented by the faculty member to demonstrate that the evaluation of her professional accomplishments--by those University committees and administrators charged with evaluating the case for tenure--was different from the male comparator's in specific ways. Thus it is not enough for the faculty member to invite the committee to compare her accomplishments to his and conclude that her record is similar to or better than his. Valuing of professional accomplishments is the function of faculty members in the same or related disciplines at the department and college level. The faculty member's evidence must point out to the committee how her accomplishments were treated differently from his.
4. Establish that the different treatment was because of the faculty member's sex. If the faculty member's evidence has established different treatment, the committee will evaluate her evidence that the different treatment was based upon her sex. Is it more likely than not that the faculty member's sex was the basis for different treatment in the evaluation of her case? What is the evidence on this point?
5. Establish that the different treatment based on sex caused the decision not to reappoint. Was the negative decision “based upon” that different treatment? Would that faculty member have received a negative decision whether or not the different treatment based on sex had occurred?