

### **Interpreting Code Provisions Prohibiting “Personal Malice” in Reappointment Decision-making**

In connection with its consideration of an appeal of a faculty member who alleged “personal malice” in a decision not to reappoint, the Board of Governors provided clarification of the definition of the term “personal malice.” The following is an excerpt from the board’s report:

*Both parties to this appeal acknowledge that neither the Code of The University of North Carolina nor the tenure regulations define “personal malice.” Thus, in responding to this appeal, we are called upon to provide an interpretation of the relevant section of the Code.*

*Section 604B of the Code provides:*

*In no event shall a decision not to reappoint a faculty member be based upon (a) the exercise by the faculty member of rights guaranteed by the First Amendment to the United States Constitution, or by Article I of the North Carolina Constitution, or (b) discrimination based upon the faculty member’s race, sex, religion or national origin or (c) personal malice.*

The tenure regulations of the constituent institutions, as approved by the Board of Governors, incorporate that prohibition verbatim. Those regulations also state, uniformly, that the decision whether to reappoint may be based on any factor considered relevant to institutional interests. Thus, institutional discretion in such decisionmaking is limited only by the board requirement that the decision not be based on one or more of the three specifically identified impermissible considerations.

The three prohibited grounds for decision are identical in their basic rationale. Each deals with a cause-and-effect relationship between an improper motivation and the denial of an employment opportunity. Each deals with decisionmaking based on considerations that are not relevant in evaluating employee performance. Thus, a nonreappointment decision shall not be used to retaliate against an employee for exercising constitutional rights of free speech; a nonreappointment decision shall not be used to discriminate on the basis of race, sex, religion or national origin; and a nonreappointment decision shall not be used as the medium for expressing feelings of personal malice.

As used in the Code, the term “personal malice” means dislike, animosity, ill-will or hatred based on personal characteristics, traits or circumstances of an individual that are not relevant to valid University decisionmaking. Having separately dealt with matters of race, sex, religion and national origin, this particular Code provision simply goes on to state that other personal factors similarly may be outside the scope of proper consideration. Thus, to identify but a few possibilities, personnel decisions based on negative reactions to an employee’s anatomical features, marital status or social acquaintances are intrinsically suspect.

While the terms “ill-will,” “dislike,” “hatred” and “malevolence” may connote different degrees of antipathy, such distinctions make no difference in applying the fundamental rationale of the board’s prohibition. Any degree of negative feeling toward a candidate based on irrelevant personal factors, regardless of the intensity of that feeling, is an improper basis for decisionmaking.

***(Effective January 1, 2004, this policy will be repealed.)***