

This version of this policy is effective until September 1, 2009

Appeals of Nonreappointment Decisions under Section 604 of *The Code*

I. The Purpose of the Appellate Process Under Section 604 of *The Code*.

Within the University, important faculty personnel decisions are based on evaluations of performance rendered by a candidate's immediate colleagues and supervisors, who are in the best position to make such judgments. These assessments are not the product of mechanically applied checklists, criteria or formulas; there is no simple litmus test for outstanding teaching, research or service. Rather, these decisions must reflect careful exercises of discretion, in which the faculty colleagues draw on their own academic knowledge, experience and perceptions to evaluate the candidate's qualifications and performance. Unavoidably and appropriately, such exercises to some extent are subjective and imprecise. Thus, the academic review process seeks to obtain the collective good faith judgment of the candidate's colleagues and responsible university administrators, as the basis for decisions about advancement and reward within the academic community. Provided that these conclusions are based on considerations that are relevant to the candidate's performance and the candidate's promise to contribute to the good of the institution, they are entitled to great deference and weight.

The purpose of reviewing decisions not to reappoint is to determine whether the decision not to reappoint was materially flawed, in violation of applicable laws, policies, standards, or procedures. It is not to second-guess professional judgments based on permissible considerations. The purpose of the campus based review process is to determine (1) whether the decision was based on considerations that *The Code* provides are impermissible; and (2) whether the procedures followed to reach the decision materially deviated from prescribed procedures such that doubt is cast on the integrity of the decision not to reappoint. The purpose of appeal to the Board of Governors is to assure (1) that the campus-based process for making the decision was not materially flawed, so as to raise questions about whether the faculty member's contentions were fairly and reliably considered, (2) that the result reached by the chancellor was not clearly erroneous, and (3) that the decision was not contrary to controlling law or policy.

II. Campus based decision

A. **Basis for Appeal:** A decision not to reappoint a faculty member may be made for any reason that is not an impermissible reason. The three impermissible reasons for a decision not to reappoint a faculty member, as stated in Section 604B of *The Code*, are, "(a) the exercise by the faculty member of rights guaranteed by the First Amendment to the United States Constitution, or by Article I of the North Carolina Constitution, or (b) the faculty member's race, sex, religion, national origin, age, disability, or honorable service in the armed services of the United States, or (c) personal malice." A faculty member who asserts that the procedure for determining whether to reappoint the faculty member was materially flawed or that the decision was based on an impermissible reason may file a notice of appeal from that decision in accordance with the procedure established by the constituent institution.

B. **Definition of "personal malice":** As used in *The Code*, the term "personal malice" means dislike, animosity, ill-will or hatred based on personal characteristics, traits or circumstances of an individual that are not relevant to valid University decision making. For example, personnel decisions based on negative reactions to an employee's anatomical features, marital status or social acquaintances are intrinsically suspect. If reappointment is withheld because of personal characteristics that cannot be shown to impinge on job performance, a wrong likely has been committed. On the other hand, if personal characteristics can be shown to impede a faculty member's capacity to relate constructively to his or her peers, in a necessarily collegial environment, withholding

advancement may be warranted. For example, the undisputed record evidence might establish that the responsible department chair declined to recommend a probationary faculty member for reappointment with tenure because of the faculty member's "unpleasant personality and negative attitude." Disposition of such a case requires a determination of whether the personality and attitude impeded the faculty member's job performance. While the terms "ill-will," "dislike," "hatred" and "malevolence" may connote different degrees of antipathy, such distinctions make no difference in applying the fundamental rationale of the prohibition. Any significant degree of negative feeling toward a candidate based on irrelevant personal factors, regardless of the intensity of that feeling, is an improper basis for making decisions.

C. Role of the faculty committee: The first responsibility for resolving a faculty member's claim of an improper decision not to reappoint is through the established campus process, which, if sufficient allegations are made, includes the opportunity for a formal hearing before a duly constituted faculty committee. Such faculty committees are responsible for receiving relevant evidence, making findings of fact, and providing advice to the chancellor on the merits of the faculty member's allegations. The role of the faculty committee is to create a clear, permanent record of the evidence presented at the hearing and to advise the chancellor whether or not the faculty member has demonstrated, by a preponderance of the evidence, that the decision not to reappoint the faculty member was materially procedurally flawed or was based in significant part on an impermissible reason. The chancellor has final administrative responsibility for deciding the issue, with the assistance of the faculty committee.

i. Because hearings in matters of non-reappointments can present complex and difficult questions of fact, policy, and law, and because of the central role of the faculty committee hearing in gathering and preserving the evidence upon which most subsequent decisions related to the matter will be based, it is important for the President and the chancellors to assure that faculty committee members, as well as relevant administrators and aggrieved faculty members, have access to appropriate training materials and guidance to enable them to perform their functions well.

ii. Each constituent institution should consider whether to extend the length of service of appropriately trained committee chairs, for example to four or five years, in order to assure that each hearing has a skilled person to manage it.

iii. Each constituent institution must decide whether to allow faculty members to have the assistance of an attorney or other advisor at the hearing and, if so, whether the advisor is permitted actively to participate in the hearing. The Board of Governors discourages constituent institutions from allowing attorneys actively to participate during the hearing. If, however, an attorney will be permitted actively to participate during the hearing on behalf of the faculty member, then the campus should provide legal counsel for the respondent administrator.

D. Preservation of evidence: It is essential that all testimony and other evidence received by a faculty committee be preserved in a form that will permit its later review by the parties to the proceeding, the chancellor, and the Board of Governors. Both the chancellor, in making the final campus decision, and the Board of Governors, in responding to requests for appellate review, must have access to a complete record of the evidence received at the hearing. While the conclusions and recommendations of the faculty committee are entitled to great deference, the chancellor is responsible for determining whether the evidence in the record supports the disposition that has been

recommended by the faculty committee. Similarly, the Board of Governors, when considering an appeal from a chancellor's decision, must be able to determine whether the available evidence supports the chancellor's decision.

The Board of Governors recommends that a professional court reporter, or a similarly reliable means, be used to enable the production of a verbatim written transcript of the hearing and properly to maintain a record of the documents received by the committee. Any such record is a part of the personnel inquiry and must be treated with appropriate confidentiality. Only the immediate parties to the controversy, the responsible administrators and attorneys, and the members of the University governing boards, and their respective committees and staffs, are permitted access to such materials.

E. The Chancellor's Decision: The chancellor must base his or her decision on a thorough review of (i) the record evidence from the hearing and (ii) the report of the faculty hearing committee. While the chancellor should give appropriate deference to the advice of the faculty committee, the final campus-based decision is the chancellor's. If the chancellor is considering taking an action that is inconsistent with the recommendation of the hearing committee, the Board of Governors encourages the chancellor to communicate or consult with the hearing committee, either in person or in writing, regarding the chancellor's concerns before making a decision. The chancellor shall notify the faculty member and relevant administrators of the chancellor's decision in writing.

F. Notice of Appeal Rights: A faculty member who has adequate grounds for appeal may appeal the chancellor's decision not to reappoint the faculty member to the Board of Governors. The chancellor's notice to the faculty member of the decision concerning the faculty member's case must inform the faculty member: (1) of the time limit within which the faculty member may file a notice of appeal with the President requesting review by the Board of Governors, (2) that a simple written notice of appeal with a brief statement of its basis is all that is required within the ten-day period and, (3) that, thereafter, a detailed schedule for the submission of relevant documents will be established if such notice of appeal is received in a timely manner. The notice of the decision is to be conveyed to the faculty member by a method which produces adequate evidence of delivery.

G. To ensure full understanding by all constituencies of the campus, the informational document regularly published by the institution containing faculty information (e.g., the faculty handbook) must include a summary statement of the time limits for appeal established by this policy and any other relevant time limits established by board of trustees' policy.

III. Appeals to the Board of Governors

A. Time Limits for Appeal A faculty member who wishes to appeal the chancellor's decision must file written notice of appeal with the Board of Governors, by submitting such notice to the President, by certified mail, return receipt requested, or by another means that provides proof of delivery, within 10 days after the faculty member's receipt of the chancellor's decision. The notice must contain a brief statement of the basis for the appeal. If the Board agrees to consider the appeal, it will do so on a schedule established by the President, subject to any instructions received from the committee or sub-committee of the Board which has jurisdiction of the subject matter of the appeal. If the faculty member fails to comply with the schedule established for perfecting and processing the appeal, the Board in its discretion may extend the period for complying with the schedule or it may dismiss the appeal. The Board of Governors will issue its decision as expeditiously as is practical.

B. Review by the Board of Governors: Under *The Code*, primary reliance is placed on the campus decision-making apparatus; an appeal to the Board of Governors is intended only to determine if the campus-based process or decision had material procedural errors, was clearly erroneous, or was contrary to controlling law or policy. The Board of Governors will exercise jurisdiction under Section 604D of *The Code* in a manner that assures that primary focus will be on the integrity of campus procedures. Three kinds of assignments of error may be raised on appeal to the Board of Governors:

1. Procedural flaws. A faculty member may allege on appeal that the hearing conducted by the responsible faculty committee or the process followed by the chancellor, in reviewing the recommendation of the faculty committee, did not comport with institutional requirements. Examples of procedural flaws could be that the committee was not an "elected, standing committee of the faculty" in contravention of institutional rules; that identified members of the committee had demonstrably conflicting interests which precluded, or could have precluded, their objective and fair assessment of the evidence; or that the committee improperly excluded relevant evidence that arguably would have established the faculty member's contentions. The Board normally will grant requests to review contentions that the grievance procedures followed by the campus in a particular case did not comport with University requirements that materially affected the credibility, reliability and fairness of such inquiries, thereby depriving the faculty member of a valid opportunity to establish his or her contentions. If a faculty member demonstrates that, because of a material procedural flaw, he or she did not receive a fair hearing or fair review by the chancellor, a remedy on appeal normally will be granted. Typically, that would consist of remanding the case for a new, properly conducted hearing or review.

2. Sufficiency of the evidence. A faculty member may allege on appeal that the evidence available to the decision maker, taken as a whole, established that the decision not to reappoint was based on an impermissible reason, and that the grievance committee or the chancellor clearly erred in deciding otherwise. A clearly erroneous decision is one that a reasonable person could not have reached, based on the available evidence taken as a whole and the relevant controlling laws or policies. To demonstrate that a decision was clearly erroneous, the faculty member must demonstrate that a reasonable person, viewing the evidence as a whole, could not have reached the conclusion that the decision maker reached. Such an appeal constitutes a request that the Board of Governors review the entire record of evidence generated by the faculty hearing committee (as augmented through any supplemental inquiries conducted by the chancellor) to determine whether reasonable persons could have arrived at the conclusion in question. The issue is not whether the Board of Governors would have evaluated the evidence the same way and reached the same conclusion as did the faculty committee or the chancellor; rather, the question is whether the decision reached was a reasonable one, in light of the available evidence. The Board will not routinely grant requests to review questions about the sufficiency of the evidence to sustain the conclusion reached below. However, the Board may entertain such appeals when the history of the case reveals a difference, with respect to ultimate conclusions of fact, between the responsible faculty hearing committee and the chancellor.

3. Interpretation of applicable law or policy. A faculty member may allege on appeal that, in disposing of the grievance, controlling law or University policy was disregarded, misinterpreted, or misapplied to the facts of the case. The Board

will grant requests to review University policy or legal issues implicated by a particular decision when the question appears to require intervention by the Board to clarify the definition, interpretation or application of such law or policies.

The first step in any appeal to the Board of Governors will be an evaluation by the Board, through a designated subcommittee, of the faculty member's written statement of grounds for appeal to determine whether the issues sought to be raised warrant Board attention, as judged by the three basic standards set out in this policy. If not, the Board may dismiss the appeal without further proceedings.

If the faculty member has made allegations that are sufficient to invoke the jurisdiction of the Board of Governors, and if the Board finds material errors in the campus decision, the case may be remanded to the campus for a new or supplemental grievance inquiry. The remedy available on appeal is never an award by the Board of Governors of the conferral of tenure, reappointment or promotion, absent a positive recommendation from the constituent institution.

IV. Regulations and guidelines

The President may issue appropriate regulations and guidelines for effective implementation of this policy.

Effective Date: This policy applies to appeals of all decisions not to reappoint made on or after January 1, 2004.

Process for Appeal of Non-Reappointments

