Appellate Review under Section 501C(4) of *The Code*

Experience suggests that there is widespread misunderstanding among members of the University community about the purpose and effect of appeals to the Board of Governors under Section 501C(4) of *The Code*. The consequences, too often, are wasted time and resources of petitioners, administrators and members of the governing boards; unnecessary and counterproductive prolongation of disputes; disappointment and disillusionment on the part of aggrieved employees; and diminished confidence in our capacity to resolve disputes within the University in an effective and timely manner.

Our focus on questions about the proper uses of appellate review should begin with a more general consideration of the nature of our internal University dispute-resolution mechanisms. Through various provisions of *The Code*, the Board of Governors has established a multi-faceted system designed to promote the expeditious and fair resolution of controversies that may arise among members of the academic community. The constituent campuses in turn have provided many of the details for implementing the board's requirements.

There are several obvious inducements to sponsor and use such a system. First, as a matter of good personnel practice, any employer ought to provide some credible and practical basis for addressing employee concerns within the workplace; promptly and fairly remedying legitimate complaints and resolving disruptive differences can enhance the effective performance of our mission as an educational enterprise. Second, when used effectively such internal processes permit all concerned parties to avoid the expenditure of valuable resources (both financial and human) that often attends resort to external dispute-resolution forums, such as courts of law and governmental enforcement agencies. Third, with respect to certain types of controversies (e.g., disciplinary proceedings that may entail depriving a person of property or liberty) we are required by law to provide an internal due process inquiry.

Thus, when framing our system of governance, the Board of Governors invested heavily in the idea that persons of intelligence and good-will ought to be able to work out many of their differences through relatively informal University-sponsored procedures.

There are three basic types of controversies involving faculty employment that are accommodated by the dispute-resolution system: (1) disciplinary proceedings that may lead to discharge or other major sanctions; (2) contested decisions not to reappoint probationary faculty members; and (3) general grievances, concerning matters such as promotion in rank, compensation, and assignment of employment responsibilities. All of these dispute-resolution procedures have several features in common. In each, an independent faculty committee is responsible for conducting an inquiry designed to identify the issues, determine the salient facts, and make recommendations concerning the proper resolution of the problem. In each, the committee is to share its views and advice with the responsible administrator (ultimately the chancellor, if necessary). The chief executive of the institution, or his or her delegate, is responsible for making the final decision, aided by the product of the faculty committee's efforts. Thus, resolution of disputes depends on the collaborative efforts of a committee consisting of peers of the employee or employees involved in the dispute and the sound exercise of insight and discretion by the responsible chief executive officer. All of the directions from the Board of Governors focus primary and critical attention on this campus-based process.

However, Section 501C(4) of *The Code* provides that an aggrieved member of the academic community "may have the right to appeal the disposition of grievances. . ." The first reference in the prescribed line of appeal is "to the chancellor." That reference is potentially misleading, since in most cases it is the chancellor (or the chancellor's delegate) who decides the case, and it is his or her decision that thereafter is subject to review on appeal, either by (in succession) the President and the Board of Governors or, alternatively, the Board of Trustees and the Board of Governors.

This brings us to the questions about the nature and purpose of appellate review, under Section 501C(4). Many petitioners who seek review on appeal to the President, to a Board of Trustees or to the Board of Governors appear to be proceeding under one or both of two serious misconceptions.

I. The purpose of the formal[1] grievance procedure

Too often, faculty members appear to invoke the grievance procedure, go through a hearing, petition the chancellor and then appeal to higher authorities with a mistaken understanding, throughout, about the purpose of the grievance procedure. For example, in a case involving a decision not to promote in rank, the affected faculty member often assumes that the grievance procedure presents an opportunity for another decision-maker independently to reexamine the merits of his or her candidacy, to supplant the conclusion reached by the party originally authorized to make the disputed decision, and to grant the benefit being sought. In short, the faculty member believes that his or her objective is to persuade the committee or officer hearing the grievance that he or she "earned" or was "entitled to" or "deserved" promotion and, if successful in the effort, that the benefit can and will be conferred by the grievance agency.

That perception is not correct. While it is true that the ultimate objective is to obtain the promotion, the function of the grievance procedure is not to second-guess the professional judgment of officers and colleagues responsible for making the promotion decision. Rather, its function is to determine whether the contested decision about promotion was materially flawed, in violation of applicable policies or standards or procedures.

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 evaluator draws on his or her knowledge, experience and perceptions to measure the candidate's qualifications and performance. Unavoidably and appropriately, such exercises to some extent are subjective and imprecise. Thus, it is the collective good faith judgment of one's peers that is sought, as the basis for decisions about advancement and reward within the academic community. Such conclusions are entitled to very great deference and weight.

The University grievance procedure provides an opportunity for a disappointed faculty member to raise questions about the integrity and validity of that decisional process. In order to prevail in the grievance process, a faculty member must prove that some identifiable wrongful conduct occurred to deprive him or her of an advantage which he or she otherwise apparently would have received. Were identifiable rights or interests of the faculty member violated by acts or omissions that call into question the integrity and validity of the decision, e.g., did the decision-maker disregard an established standard for evaluation, or rely on impermissible considerations such as race or sex, or fail or refuse to consult with or receive information from mandated advisory bodies?

When wrongdoing is established, a chancellor may be equipped, on the basis of the available record, to reverse the offending decision and grant the benefit sought. More often, the proper remedy is a new review of the candidacy, through a revised process that has been purged of any prejudicial or improper ingredients, with the promotion to hinge on the new review.

What we see, too often, are appeals from petitioners who are simply repeating, at the board level, the complaint which they already have presented, unsuccessfully, before a faculty grievance committee and a chancellor. Their plea amounts to little more than, "the quality of my performance warrants promotion." Such appeals are readily dismissed, because they have not focused on the proper objective of the grievance process, which is to determine whether the contested decision not to promote was based on any wrongdoing that violated the petitioner's rights or interests. Indeed, a complaint so styled typically should never have been entertained by the formal grievance process in the first place, much less made the subject of an appeal

[1]This discussion of University grievance procedures is limited to efforts at dispute-resolution that culminate in an adversarial hearing before a standing faculty committee. It does not cover less formal efforts, such as one-on-one conferences, voluntary mediation, or other alternative dispute-resolution techniques that a campus may make available to settle controversies.

to the governing boards.

II. The purpose of the appeals process

Once an ostensibly valid complaint has been presented to the grievance process, a hearing held, and findings and recommendations made, the chancellor or his delegate issues a final administrative ruling in response to the grievance. It is that decision which thereafter may be appealed, to the Board of Trustees or the President or the Board of Governors. For example, if the grievance process determines that the faculty member failed to establish his contention that the denial of a reappointment with tenure was wrongful, he may seek review on appeal. The nature and purpose of that appellate review frequently are not properly understood.

The purpose of appeals, under Section 501C(4) of *The Code*, is to equip Boards of Trustees, the President, and the Board of Governors to review and monitor those campus grievance processes, when appropriate, to insure that a particular campus dispute-resolution process worked as it was supposed to work. It is not the purpose of appellate review to relitigate (conduct a new hearing of) the grievance or to supplant a presumptively sound decision reached by the responsible agencies or officials who disposed of the grievance below. Thus, the questions properly presented on appeal, generally stated, are (1) was the prescribed procedure for addressing the grievance materially flawed, so as to raise questions about whether the grievant's contentions were fairly and reliably considered, and (2) was the result reached "clearly erroneous"; a clearly erroneous decision is one that a reasonable person could not have reached, based on the available evidence and the relevant controlling laws or policies.

To illustrate, the grievance process invoked to contest a decision not to reappoint with tenure might conclude that the faculty member failed to establish, by a preponderance of the evidence, his contention that the decision improperly was based on "personal malice." Three different assignments of error might be raised on appeal:

A. Procedural flaws**.** An allegation that the grievance hearing conducted by the responsible faculty committee did not comport with institutional requirements, e.g., contrary to institutional rules, the committee was not an "elected, standing committee of the faculty"; or identified members of the committee had demonstrably conflicting interests which precluded, or could have precluded, their objective and fair assessment of the evidence; or the committee improperly excluded relevant evidence that arguably would have established the grievant's contentions. Such allegations of shortcomings or errors in handling a grievance inquiry preeminently are the proper subject of an appeal. If a faculty member can demonstrate that he or she did not receive a "fair hearing," a remedy on appeal should be granted; typically, that would consist of remanding the case for a new, properly conducted hearing.

B. Sufficiency of the evidence. An allegation that the preponderance of the evidence available to the decision-maker (i.e., the faculty grievance committee, in the first instance, or the chancellor as the ultimate decision-maker) did establish that the decision not to reappoint was based on personal malice, and that the grievance committee or the chancellor therefore clearly erred (i.e., concluded unreasonably) in deciding otherwise. Such an appeal constitutes a request that the appellate authority review the entire record of evidence generated by the faculty hearing committee (or 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 appellate authority (either President or governing board) necessarily 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 actually reached was a "reasonable" one, in light of the available evidence. Appeals of this type are by far the most prevalent ones presented to the Board of Governors. In the majority of cases, the governing board has determined that the dispositions of such factual questions were not clearly erroneous, but there have been instances in which campus decisions were reversed.

C. Interpretation of applicable policy. An allegation that, in disposing of the grievance, controlling law or University policy was disregarded, misinterpreted, or misapplied to the facts of the case. For example, the undisputed record evidence might establish that the responsible department chairman 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 careful definition and precise use of the concept "personal malice," which is included in Section 604B of *The Code* as an impermissible reason for nonreappointment. What does the phrase denote? If an advantage 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 one's capacity to relate constructively to one's peers, in a necessarily collegial environment, withholding advancement may be warranted. The board has found it necessary in specific cases to impart clearer meaning to this concept, as well as interpret other relevant policies essential to the resolution of particular grievances.

Again, we receive entirely too many cases in which the apparent expectation of the grievant is that the Board of Governors will repeat the inquiry that was conducted below and will be persuaded to see the matter differently, to the grievant's benefit; that is, the board will conduct a new trial and supplant the result of the grievance inquiry conducted at the campus. As we have sought to make clear above, the proper appellate function in fact is quite different. Under our system, primary reliance is placed on the campus grievance apparatus; the successive levels of appeal are intended only to police the operation of that apparatus and to correct clear and material errors that have interfered with the proper working of the campus inquiry. If material errors are identified on appeal, 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 substantive benefit or reward being sought by the grievant; that is, the ruling on appeal will not consist of the conferral of tenure or reappointment or promotion, absent a positive recommendation from the campus.

We have concluded that the exercise of board jurisdiction under Section 501C(4) of *The Code* should be refined, to insure that primary emphasis remains properly focused on the campus grievance procedures. Requests for appellate review will be screened more closely in the future, to determine whether the board should consider the issue or issues raised in a petitioner's request for review. The following basic standards will guide that screening process:

1. 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 affect the credibility, reliability and fairness of such inquiries, thereby arguably depriving the grievant of a valid opportunity to establish his or her contentions (as illustrated in subsection A, above).

2. The board generally will limit its subject-matter jurisdiction to cases in which a substantial interest of the grievant is implicated, e.g., tenure, reappointment, promotion and compensation; conversely, it likely will not consider cases in which substantial terms and conditions of employment are not at issue.

3. The board will not routinely grant requests to review questions about the sufficiency of the evidence to sustain the conclusion reached below (as discussed in subsection B, above). 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[2]; any intervening ruling by the

[2] In every such case, it is assumed that the chancellor has satisfied his or her previously established responsibility to thoroughly review the record evidence in connection with receipt and disposition of a report from a faculty hearing committee.

institutional Board of Trustees will be taken into account when deciding whether to review such a case.

4. The board may grant requests to review University policy issues implicated by a particular grievance, when the question appears to require intervention by the governing board to clarify the definition, interpretation or application of such policies (as illustrated in subsection C, above).

Under the foregoing prescriptions, it will be necessary for prospective petitioners to evaluate their circumstances carefully, to understand the purposes of permissible appellate review, and to formulate clearly and concisely their statement of the one or more grounds on which they believe the board should exercise its appellate jurisdiction. Thus, the first step in any appeal to the Board of Governors will be an evaluation by the board, through a designated subcommittee, with staff assistance, of the grievant's written statement of grounds for appeal, to determine whether the issues sought to be raised warrant board attention, as judged by the four basic standards.

This more selective approach by the Board of Governors to its exercise of appellate jurisdiction also presupposes a more substantial role for the respective Boards of Trustees. They must assume primary responsibility for policing the campus grievance processes, including the careful review of any cases in which there are significant questions about the sufficiency of the evidence to support conclusions reached, respectively, by faculty hearing committees and chancellors, particularly if a committee and a chancellor reach different conclusions about whether a grievant has established his or her contentions of wrongdoing.

The President will issue appropriate instructions to the constituent institutions for effective implementation of these board guidelines.

(Effective January 1, 2004, this Policy will be repealed – see Code Section 501C(4))