

**Regulation on Review of Nonreappointment Decisions
Under Section 604 of *The Code***

- I. The Purpose of the Review Process under Section 604 of *The Code*
 - A. Within the University, important faculty personnel decisions are based on evaluations of performance rendered by a candidate's 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 job performance. 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. The academic review process seeks to obtain the collective good faith professional academic judgment of the candidate's colleagues and responsible university administrators, as the basis for personnel decisions. These decisions are entitled to great deference and weight and, as such, must be based on considerations that are relevant to the candidate's performance and potential to contribute to the good of the institution.
 - B. The purpose of reviewing decisions not to reappoint is to determine whether the decision was materially flawed, in violation of applicable laws, policies, standards, or procedures. A review is not to second-guess professional judgments based on permissible considerations. The purpose of the campus-based review process in Section 604 C(1) of *The Code* 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.
 - C. The purpose of appellate review by the board of trustees is to determine whether (1) the campus-based process for making the decision was materially flawed, so as to raise questions about whether the faculty member's contentions were fairly and reliably considered; (2) the result reached by the chancellor was clearly erroneous; and/or (3) the decision was contrary to controlling law or policy.
- II. Nonreappointment Decisions Under Section 604 of *The Code*
 - A. **Basis for Review.** 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 604 B of *The Code*, are: (1) 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; (2) forms of discrimination prohibited under policies adopted by the University; or (3) personal malice. A faculty member who asserts that the decision not to reappoint was based on impermissible reasons may file a request for review 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. However, a faculty member's

inability or incapacity to relate constructively to his or her peers, in a necessarily collegial environment, may warrant a decision not to reappoint. Disposition of such a case requires a determination as to whether the faculty member's lack of collegiality or other attitudinal considerations 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 is an improper basis for making decisions.

C. Role of the Faculty Committee. The primary role of a faculty committee is to provide, through the established campus process, the opportunity for a formal hearing to review the decision not to reappoint. Such faculty committees provide an opportunity for both parties to present relevant evidence and provide a recommendation to the chancellor on the merits of the faculty member's contentions. The faculty committee creates a clear, permanent record of the evidence presented at the hearing and advises the chancellor whether or not the faculty member has demonstrated, by a preponderance of the evidence, that the decision not to reappoint was materially flawed or was based in significant part on an impermissible reason. The faculty member has the burden of proof. The faculty committee does not have authority to render a decision or any part of a decision. The chancellor has the authority to render the final decision.

1. Training. Because hearings in matters of non-reappointment 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 decisions related to the matter will be based, chancellors, in consultation with campus counsel, should ensure that faculty committee members have access to appropriate training materials and that relevant administrators and aggrieved faculty members have access to information regarding the hearing process.

2. Election Procedures. The faculty council or senate of each constituent institution should consider whether to establish election procedures for the faculty committee so as to extend the length of service of appropriately trained committee chairs in order to make it more likely that each hearing has an experienced member to oversee a faculty committee. Election procedures may permit the establishment of a pool of trained faculty from which hearing committee members and a chair may be drawn for each hearing.

3. Counsel. 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. Constituent institutions are discouraged from allowing attorneys to participate during the hearing. If, however, an attorney will be permitted to participate during the hearing on behalf of the faculty member, then the campus should provide legal counsel for the respondent administrator. Legal counsel for the respondent administrator may be provided by in-house campus counsel, counsel from another constituent institution, a member of the Attorney General's Office, or outside counsel.

D. Preservation of Evidence. It is essential that all testimony and other evidence received by a faculty committee be preserved for review by the parties to the proceeding, the chancellor, and, if applicable, the board of trustees. Both the chancellor, in making the final decision, and the board of trustees in reviewing any appeal, must have access to a complete record of the evidence

received at the hearing. The chancellor is responsible for determining whether the competent evidence in the record supports the faculty committee's recommendation. Similarly, the board of trustees, when considering an appeal from a chancellor's decision, must be able to determine whether the competent evidence in the record supports the chancellor's decision.

A professional court reporter, or a similarly reliable means, should 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 faculty committee. Any such record shall be considered part of the faculty member's personnel file and is confidential. Access to such materials is only allowable as provided by law.

E. The Chancellor's Decision. The chancellor must base his or her decision on a thorough review of (1) the record evidence from the hearing, and (2) the recommendation of the faculty committee. While the chancellor should give appropriate deference to the advice of the faculty committee, the final decision is the chancellor's. If the chancellor is considering taking an action that is inconsistent with the recommendation of the hearing committee, the chancellor should consult with the hearing committee, either in person or in writing, before making a decision. The chancellor shall notify the faculty member and relevant administrators of the chancellor's decision in writing. In addition, the notice of the decision is to be conveyed to the faculty member by a method which produces adequate evidence of delivery.

F. Notice of Appeal Rights. 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 permissible grounds for appeal; (2) of the time limit within which the faculty member may file a notice of appeal through the chancellor requesting review by the board of trustees; (3) that a simple written notice of appeal with a brief statement of the basis for the appeal is all that is required within the 14-day period; and (4) 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.

G. Time Limits for Appeal. The campus policies, faculty handbook, or other informational document which addresses procedures for review of faculty nonreappointment decisions shall indicate the time limits for appeal of such decisions.

III. Appeals to the Board of Trustees

A. Schedule. If the board determines that the faculty member has set forth appropriate grounds for an appeal, the board will notify the parties of a schedule for perfecting and processing the appeal. If the faculty member fails to comply with the schedule established for perfecting and processing the appeal, the board may extend the period for complying with the schedule for good cause shown or it may dismiss the appeal. The board of trustees will issue its decision on appeal as expeditiously as is practical.

B. Review on Appeal by the Board of Trustees. Consistent with *The Code*, deference is given to the chancellor's decision; the board of trustees will exercise jurisdiction under Section 604 C of *The Code* in a manner that assures the integrity of campus procedures.

The first step in any appeal to the board of trustees will be an evaluation of the faculty member's written grounds for appeal to determine whether the issues raised on appeal fall within one of the three grounds for appeal as set out in this regulation and Section 604 of *The Code*. If

the appeal does not present issues that fall within the established grounds for appeal, the board may dismiss the appeal without further proceedings.

The three grounds for appeal to the board of trustees are as follows:

1. **Material procedural error.** A faculty member may allege on appeal that the hearing conducted by the responsible faculty committee or the process followed by the chancellor included a material procedural error that, but for the error, could have resulted in a different decision. The Board may review allegations that the faculty committee and/or the chancellor did not follow its own procedures and such failure materially affected the credibility, reliability and fairness of the process. A faculty member must demonstrate that, because of a material procedural error, he or she did not receive a fair hearing or fair review by the chancellor such that, but for such error, a different decision may have been reached.
2. **Clearly erroneous.** A faculty member may allege on appeal that the competent evidence in the record established that the decision not to reappoint was based on an impermissible reason. A clearly erroneous decision is one that a reasonable person could not have reached, based on the competent evidence in the record taken as a whole and the relevant controlling laws or policies. To demonstrate that a decision was clearly erroneous, the faculty member must show that a reasonable person could not have reached the conclusion that the chancellor reached. Such an appeal constitutes a request that the board of trustees review the entire record of evidence to determine whether a reasonable person could have arrived at the decision in question. The issue is not whether the board of trustees 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 competent evidence.
3. **Contrary to law or policy.** A faculty member may allege on appeal that, in disposing of the request for review, controlling law or University policy was disregarded, misinterpreted, or misapplied to the facts of the case.

During its review, the board of trustees considers whether the campus-based process or decision had material procedural errors, was clearly erroneous, or was contrary to controlling law or policy.

In reviewing whether a decision was clearly erroneous, the board of trustees considers whether the evidence introduced at the hearing and reviewed by the chancellor is such that a reasonable fact finder could find the applicable burden of proof, preponderance of the evidence, was met by the faculty member. When conducting its review, the board of trustees does not reweigh the evidence, express its independent judgment on the factual issues, determine credibility of witnesses, or otherwise conduct the same review that would be conducted by the chancellor. Instead, the board of trustees views the record in the light most favorable to the judgment below and decides if the evidence in support of that decision is reasonable, credible, and of solid value, such that a reasonable fact finder could find that nonreappointment is appropriate based on a preponderance of the evidence.

After review on appeal, the board of trustees may affirm the chancellor's decision; or, if the board finds that the campus-based process or decision had material procedural errors, was clearly erroneous, or was contrary to controlling law or policy, the board may remand the matter to the chancellor to provide for a new hearing or a supplemental review inquiry. The remedy available on appeal is never an award by the board of trustees of the conferral of tenure, reappointment or promotion.

IV. Other Matters

A. Effective Date. The requirements of this regulation shall be effective for any non-reappointment decision effective on or after July 1, 2019.

B. Relation to State Laws. The foregoing regulations as adopted by the president are meant to supplement, and do not purport to supplant or modify, those statutory enactments which may govern or relate to faculty personnel decisions.

