



FACULTY HEARING COMMITTEE OF THE UNIVERSITY SENATE

2007-2008 Annual Report, Professor Ken Lee.133, Chair

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FACULTY HEARING COMMITTEE MEMBERS AND SERVICE IN FY08.

This is an academic year annual report of the hearing committee established under rule 3335-5-4810 comprising 24 regular faculty members who serve four year terms. As such the number of 3-year senators on this committee varies. In fy08 we met as a whole twice on 11/30/07 and 2/11/08, formed three subcommittees that met several times, concluded one hearing referred from CAFR and started one hearing referred from OAA. The prior fy07 annual report contained several “lessons” and possible remedies, so subcommittees were formed in fy08 to advance these conversations. This table shows fy08 members, affiliations, email, ending 4 year terms, service on subcommittees or panels, special assignments, and an approximation of annual activity.

#	<i>M</i> members of Faculty Hearing	<i>C</i> ollege	<i>E</i> mail address	<i>T</i> erm ends	<i>S</i> ervice: # See footnotes	<i>S</i> ub-committee	<i>R</i> eplies / attend
1	Bruce Biagi	MED	Biagi.1@osu.edu	11		POD	6/1
2	Suzanne Damarin	EHE	Damarin.1@osu.edu	11	Panel	NFI	5/1
3	Robert DePhilip	MED	Dephilip.1@osu.edu	11		04	1/1
4	Barbara Polivka	NURS	Polivka.1@osu.edu	11		POD	0/0
5	Yael Vodovotz	FAES	Vodovotz.1@osu.edu	11	Chair 1	NFI	10/2
6	Ken Lee	FAES	Lee.133@osu.edu	10	Chair 2	Ex officio	**
7	Douglas E. Crews	SBS	Crews.8@osu.edu	10	Chair 3	NFI	13/1
8	Robert G. Parker	ENG	Parker.242@osu.edu	10		04	2/1
9	Gerald S. Frankel	ENG	Frankel.10@osu.edu	10	Chair 4	POD	6/1
10	Altaf A. Wani	MED	Wani.2@osu.edu	09	Panel	04	4/1
11	Terrence P. Walker	MAPS	Walker.33@osu.edu	09		NFI	0/0
12	Kenneth Jones	MED	Jones.4@osu.edu	09		POD	3/1
13	Phoebe S. Spinrad	HUM	Spinrad.1@osu.edu	09	Panel	POD	8/1
14	David A. Padgett	DENT	Padgett.11@osu.edu	08		04	0/0
15	Stephen P. DiBartola	VET MED	Dibartola.1@osu.edu	08		POD	0/0
16	Randolph L. Moses	ENG	Moses.2@osu.edu	08		04	1/0
17	Robert G. Lundquist	ENG	Lundquist.1@osu.edu	08		NFI	9/2
18	David A. Odden	HUM	Odden.1@osu.edu	08	Chair 5	04	14/2
19	Julie A. Holloway	DENT	Holloway.3@osu.edu	08	Minutes 6	04	6/2
20	Lynne E. Olson	VET MED	Olson.3@osu.edu	08	Past Chair 7	POD	17/2

#	Members of Faculty Hearing	College	Email address	Term ends	Service: # See footnotes	Sub-committee	Replies / attend
21	Gideon A. Fraenkel	MAPS	Fraenkel.1@osu.edu	08		NFI	1/1
22	William W. Muir	VET MED	Muir.1@osu.edu	08	8	NFI	0/0

Service Column Footnotes

- 1 - Chair of a faculty hearing panel with several members serving as panelists or alternates indicated by “panel” in this column. This panel deliberated a case of an assistant professor who questioned procedures in the College of Dentistry.
 - 2- Hearing chair was ex-officio to all subcommittees and panels.
 - 3- Served as subcommittee chair to recommend rules for new, fair and impartial re-review, abbreviation above NFI. See also observer rule proposal attached.
 - 4- Served as subcommittee chair to provide guidance to procedure oversight designees, with the above abbreviation of POD.
 - 5- Served as subcommittee chair for suggested revisions to faculty rule 3335-5-04 abbreviation above is (04). See also these three attachments: *04 Faculty Hearing Panel Guidelines*, *Sample Letter from FHC Chair to Parties Regarding Panel*, and *Proposed simple revisions to 04 language*.
 - 6- Recorded the attached meeting minutes.
 - 7- Provided much needed wise advice to all as the past faculty hearing chair.
 - 8- Dr. Muir is no longer employed at Ohio State University.
- ** The replies/attend column is the total number of e-mail replies and total committee meetings attended during the year. It is a snapshot of committee activity sought by senate offices.

SUBCOMMITTEE ACTIONS

1. Subcommittee on POD. We began a one-page question and answer page for procedure oversight designees. This group sought to complete the one page and figure out how to make it effective, with the help of Vice Provost Carole Anderson.³² A final document is pending.
2. Subcommittee on NFI. Under active discussion in Senate is the language for 3335-5-05 that defines the "new fair and impartial" procedures. This group sought to improve the rules language and figure out how to ensure new, fair and impartial hearings with the help of [former faculty secretary] Susan Fisher.¹⁴ A final document is pending.
3. Subcommittee on 04. There are several identified problems in the current 04 rules. This group studied the problem and proposed revised rule language and an accompanying procedure document as a guideline to future hearings. The inclusion of clinical faculty is an active discussion and Associate General Counsel Jan Neiger.⁴ provided legal guidance in these documents. The attached “proposed revisions to the 04 language” and the “04 Faculty Hearing Panel Guidelines” are included in this report for ease of reference.

CHANGES IN COMMITTEE COMPOSITION

We thank these individuals for their conscientious service as their term ends with this report:

- David A. Padgett, Associate Professor DENT 2008
- Stephen P. DiBartola, Associate Dean VET MED 2008
- Randolph L. Moses, Professor ENG 2008

- Robert G. Lundquist, Associate Professor ENG 2008
- David A. Odden, Professor HUM 2008

We look forward to working with these individuals whose terms are starting fy09:

- Barbara Lehman MANS - 2012
- Karen Bruns FAES - 2012
- Mohamed Yousif LIMA - 2012
- John Blackburn BUS - 2012
- Judy Villard FAES - 2012
- Philip Binkley MED - 2009

BUSINESS IN PROGRESS

- Discussion of the role of clinical faculty, if any, on this committee is pending, as clinical faculty are now able to serve the senate and our rules specify tenured faculty only.
- Instructions for the procedures oversight designee are pending.
- New fair and impartial re-review is an ongoing discussion.
- Changes in the 04 rules are pending with draft suggestions attached to this report.
- Appeal of an Associate Professor in the School of Music is pending.

HEARINGS

Hearing Complete

The Committee on Academic Freedom and Responsibility of the University Senate forwarded a complaint of improper evaluation of an assistant professor in the College of Dentistry on 3/6/2008. This was based on University Rule 3335-5-48.9 B3 "*Hear and investigate complaints by individual faculty members concerning alleged improper evaluation under procedures of rule 3335-5-05 of the administrative code.*" A panel composed of Drs. Vodovotz, Frankel, Spinrad and Wani (alternate) convened. Dr. Vodovotz was chosen to chair the panel that met several times. Frankel was unable to continue so Wani took his place and Dr. Damarin joined as alternate. The panel carefully considered all evidence and the conclusion that the complaint be dismissed was sent to the Provost on 5/17/2008.

As this is a personnel matter the letter is confidential and remains on file in the senate office. The Panel determined that a correct procedure was followed in both the committee and annual evaluations. The interim Dean and Provost correctly reassigned her authority to another in OAA removing potential bias.

The Senate Faculty Hearing Committee respectfully submitted the finding to dismiss the complaint as there was a proper evaluation in the fourth year review. As required in faculty rule 3335-5-05 *Procedures*, this confidential letter was sent to the Provost, the President, the Dean and the complainant. Courtesy copies were also sent by email to CAFR, OAA and the Panel. The professionalism exhibited by all involved in this deliberation was very much appreciated.

Hearing Pending

A sexual harassment case from the School of Music is pending as of August 2008.

ATTACHMENTS

Faculty Hearing Committee Meeting Minutes 11/30/07

Present: Julie Holloway, Randy Parker, Gerry Frankel, Suzanne Damarin, Dave Odden, Bob DePhilip, Ken Jones, Bruce Biagi, Bob Lundquist, Yael Vodovotz

Actions:

A) Revise -04 rules with the intent of plugging the loopholes that increase outside attorney activity (most of these will be clarifications).

To do list: -Contact Jan Neiger.4 (2-0611), University Counsel, for his assistance with rule change verbage. p.s. Jan returned Ken's voice mail saying he would like to help us.

B) Generate a hearing procedure document for adoption, especially for use when an outside attorney is invovled.

*Julie has attached the one we used when an outside attorney was present. It is a distillation of the hearing procedure used by COAM, the College of Dentistry's Professionalism Committee, and amended by Jan Neiger.

C) Increase awareness of P.O.D. procedures and training. Find out what there is available now and where it is located. If necessary, produce a best practices list or presentation and make it available on the website. p.s. POD instructions are on page 143 of the OAA handbook: http://oaa.osu.edu/documents/Handbook_III_Final_AUG_2007.pdf

To do list: -Contact Carole Anderson.32 (2-9755) to increase awareness

D) Send chairs information via the list-server regarding the availability and location of POD training materials for 4th year reviews.

E) Dave Odden will draft wording regarding rereview (external party) to be forwarded to Faculty Counsel. p.s. Dave sent this language earlier via email and is now under discussion.

F) Records retetention: where do records go and retain for how long?

To do list: Contact Carole Anderson in regards to who is the custodian of -04 hearing materials.

G) Level of remand, must it always go back to the Department level? p.s. We have proposed wording to rectify this; further comment welcome.

Future actions:

A) Clinical faculty issues: where do appeals go and should they have representation on the Faculty Hearing Committee? This issue may be hypothetical unless clinical faculty are given seats on senate.

B) Associate Professors sitting on Full Professor hearings. OAA has called this a "time honored tradition" to not do this; but there are no clear rules. So this may end up in our procedures that pass from chair to chair.

C) Ensure the rules for Colleges agree with the Departments

a. Contact Senate Chair Bob Perry.6 re: POA changes

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Respectfully submitted,

Julie A. Holloway, DDS, MS

Associate Professor and Prosthodontist

04 Faculty Hearing Panel Guidelines

The Faculty Hearing Committee (FHC) hears two kinds of cases, complaints by faculty members against university units made under rule 3335-5-05 alleging that they received an improper evaluation for tenure or promotion, and complaints made against a faculty member under rule 3335-5-04 filed by another faculty member, student, post doctoral and post-professional fellows and in some instances employee. Because the latter 04 hearings may have grave consequences for the faculty member (detenuring and dismissal), they must be treated with caution and attention to procedural detail, since disregard for proper procedure can have legal consequences and may result in an injustice. Since 04 hearings reaching the FHC are rare, it is important to express in written form the best practices for conducting such hearings across time, so as to develop a system of institutional memory. This document sets forth procedural recommendations for the more formal 04 hearing panels, aimed to avoid legal disputes arising from not following procedures of this nature. These are recommendations, and should be revised when necessary to bring about the effective conduct of 04 hearings. It is important that this document not contradict or usurp existing university rules, and as a public record, must be provided to any person who requests it.

1. Status

The FHC portion of the 04 hearing process is a faculty process that follows any action by the provost, but is not controlled by the office of the provost, nor the college, nor department. An 04 hearing is not just a procedural review, and the panel is not obligated to restrict consideration to materials in the record of the matter or to accept the factual conclusions of previous bodies having made recommendations on the matter, if the facts do not clearly support the conclusion. The panel must only consider allegations specified in the original complaint. It is important to be impartial with respect to the interests and requests of the provost and the respondent. The final determination of the case will be made by the president of the university and ultimately the Board of Trustees.

2. Impanelment

Creation of a hearing panel must operate consistent with the rules pertaining to challenges to panel composition, the procedure for selecting a presiding officer, and challenges to that selection. The respondent and provost must be notified of the panel composition and selection of presiding officer (PO), but this should be done by a person having standing to give such notification. The chair of the FHC is such a person: the selection of panel and PO should be completely conducted under the supervision of the FHC chair.

The chair of the FHC should convene a meeting of all available members within one week of receipt of an actual appeal; three members should be identified as constituting the panel, and two alternates should also be identified. The chair should notify the provost or designee and the respondent in writing and by email of the proposed panel and alternates, and state a firm deadline of 5 calendar days for exercising the right of challenge. It is important to state clearly that a party has a right to a single peremptory challenge to a panelist, and according to rule 3335-5-48.10(C)(2) may challenge a panelist if there is an existing prejudicial relationship but they should be reminded that the final determination whether the relationship is prejudicial is made solely by the chair. See Appendix 1 for a suggested letter informing the parties of the proposed panelists. It is also important to remember that there is no process of voir dire whereby prospective panelists are cross-examined by the parties, and that an objection by counsel that they have had no opportunity for such an examination is not a valid objection.

Any challenged panelists will be replaced by an alternate: the panel is now formed, and a PO is selected by the panel. It will ordinarily be unnecessary and not recommended to have a PO who is not a panelist and who does not vote or participate in substantive discussions, but in case the PO is

not a member of the committee per rule 3335-5-48.10(C)(2), that selection should be communicated by the chair to the provost and the respondent with a firm deadline of 5 calendar days to exercise the right of peremptory or prejudicial-relationship challenge. Because of the open-ended right to challenge for existing prejudicial relationship, it is recommended to also list the alternate non-panelist POs, so that the right can be exercised or forfeited in a single step.

As of February 2008 the existing rules also allow a peremptory challenge to the selection of the PO. We are proposing a revision of the rules such that a further peremptory challenge is allowed only if the PO is not a panelist. If this rule is not adopted, the Chair of the FHC will write a second letter to the parties once a PO has been identified, with the same 5 day challenge period. It is important, in this case, to clearly state in the letter, that challenging the selection of a PO does not also remove that person from the panel.

At this point, the panel is fully constituted, and the obligations of the chair of the FHC with respect to the panel are discharged.

3. Legal Assistance and Communication with Attorneys

The panel should avail itself of the services of the Office of Legal Affairs, by requesting assistance from a university attorney. This attorney would advise the panel on matters of law and procedure, and also handle communications with attorneys. All communication with the respondent should be with the respondent, and all communication with the provost's office should be with the provost or designee. Communication from attorneys for the provost or the respondent addressed to the panel should be directed to the Legal Affairs attorney assisting the panel, who will forward that communication and advise the panel regarding the communication. Communication from the panel to the provost's attorney or respondent's attorney should be conducted through the attorney advising the panel. There should not be direct communication between panelists and the provost's attorney or respondent's attorney, except that during the hearing in accordance with 3335-5-04(H)(3), the respondent may be represented by counsel who would have the right to directly address the panel, and by 3335-5-04(H)(4), the provost's designee could in principle be general counsel who, in the role of provost's designee, may address the panel. The latter situation would be undesirable, but not prohibited by university rules.

In all cases, instructions to parties should be explicit, and if action is required or allowed by the party, the panel's communication should state a firm deadline for action and state the consequences of non-action.

4. Delays

In trials at law, the court has the power of subpoena to compel attendance, thus avoiding protracted delays. The panel has no subpoena power, and cannot compel attendance. Therefore, to avoid unnecessary protracted delays, the panel must make it clear that it will ultimately conduct the hearing, with or without the participation of particular individuals. Thus a party's right to be present at the hearing does not mean that they have the unlimited power to delay the hearing.

The panel should abide by the timeline stated in the university rules as much as possible. According to (H)(1), the panel should "convene" within 30 days of receipt of the appeal, which means the panel should be formed, and according to (H)(10) the proceedings should be complete within 60 days of receipt of the appeal. Committee members should be apprised of the timeframe of these hearings before they consider serving on an 04 hearing panel. The parties should be informed that the panel intends to hold the hearing within 60 days of receipt of the appeal.

The panel should establish a fixed date for the hearing as soon as it is feasible to do so, and should schedule an entire day for the hearing. That specific date should be communicated to the parties, and while some element of flexibility is appropriate, it is important that the parties understand that this matter should be their highest priority. Priority is given to truly irreconcilable scheduling conflicts involving the respondent and the provost (note that the provost has the right to

select any person to serve as provost's designee), but if a particular person is unavailable to serve as observer for a party, the party may exercise their right to bring a different observer, and they have no right to delay the proceedings on the basis of the observer's schedule. Parties may request postponement for reasonable cause, but since the matter will have been ongoing for some time, has already gone through previous hearings at lower levels, and therefore the parties should be presumed to be prepared, requests for extra time to prepare should not be granted without compelling reason.

5. The Hearing

Unlike 05 hearings, it is inappropriate to have meetings with the parties prior to the formal hearing, either separately or together. The hearing should be scheduled on one day, and the parties should be informed of the structure of the meeting as soon as possible. Please refer to Appendix 2 which outlines a suggested structure of the hearing, expressed as a transcript of the instructions read by the PO.

6. Participants

The respondent has a right to be present and to speak at the hearing. As specified by rule 3335-5-04(H)(3), the respondent may be represented by anyone, and that representation may be an attorney. The right to have an attorney present is the same as the right to be represented by someone else, and is not an additional right. The respondent also has the right to an observer as specified by rule 3335-5-04(H)(2). The provost has a right to be present and to speak at the hearing, and may designate another person to act in the provost's stead, 3335-5-04(H)(1,4). The provost or designee may also be advised by university counsel; however, the rules do not specify a right of provost's counsel to address the panel. Unless the provost's designee is also university counsel, the panel should not allow provost's counsel to address the hearing (except if called as a witness). The panel has the right to restrict attendance, and should not allow additional attendants other than witnesses, except if it is necessary to do so in order to conduct a fair hearing. It will be useful to explicitly remind both parties in writing of these rights to attendants: to the respondent, the right to have the respondent, respondent's representation and an observer present; to the provost, the right to have the provost or designee but not both, university counsel, and an observer present.

7. Communication of rules

The panel should firmly set rules and specify procedures as will be relevant to the conduct of hearings, they should apply equally to the two parties, and they should be communicated in writing to the parties as soon as is feasible.

Sample Letter from FHC Chair to Parties Regarding Panel

January 17, 2008

To: Dr. A, Professor, Department of Q, Ohio State University
Dr. B, Provost, Ohio State University

This is to notify you that the Faculty Hearing Committee has received a written appeal of the decision by Dr. B to ____ Dr. A. In accordance with university rule 3335-5-04(H), a panel of the Faculty Hearing Committee is being formed to hear this matter. Under rule 3335-5-04(H)(1), each party has a right to a single peremptory challenge to the seating of a panelist. In addition, according to rule 3335-5-48.10(C)(2), either party may challenge the seating of a panelist if there is an existing prejudicial relationship that would prevent that panelist from rendering a fair and impartial judgment in the matter. The final determination whether there is such a prejudicial relationship is made solely by the chair of the Faculty Hearing Committee.

The proposed panelists for this hearing are as follows:

Dr. C, Professor, Department of R, Ohio State University
Dr. D, Professor, Department of S, Ohio State University
Dr. E, Professor, Department of T, Ohio State University

The alternates, who are not subject to peremptory challenge, are as follows:

Dr. F, Professor, Department of U, Ohio State University
Dr. G, Professor, Department of V, Ohio State University

You have 5 calendar days to exercise your right to challenge. If you wish to make a peremptory challenge, you must notify me in writing by 5:00 pm on January 23, 2008, and if you wish to challenge on the grounds of existing prejudicial relationship, you must notify me in writing and state the basis for the challenge by 5:00 pm on January 23, 2008. If you do not exercise these rights by the deadline, they will be considered to have been waived. It is also your responsibility for ensuring that this notification be communicated to your designee or legal counsel.

Sincerely,

Dr. H
Chair, Faculty Hearing Committee

Appendix 2: Sample Hearing

This meeting of the Hearing Panel of the Faculty Hearing Committee has been called to order at approximately ____ a.m. on _____ for the purpose of hearing the case of Dr. Y, who is here today for appeal of the Provost's decision to uphold ____ (the sanction) at The Ohio State University.

1. We will be following the format laid out in our letter of DATE to Dr. Y.
2. These proceedings are being recorded. Attendance at this hearing is restricted to those requested by Dr. Y or his counsel, Dr. X as the Provost's designee or his counsel, or those summoned by the Panel. I am going to ask that each person present state their name, and purpose at this hearing.
3. The Panel may take reasonable measures to assure an orderly hearing, including removal of persons who impede or disrupt proceedings. Time for each portion of the hearing will be displayed for all to see on this laptop computer.
4. The Presiding officer, _____, will direct the hearing proceedings and rule on all matters involving introduction of evidence. Only evidence that the Presiding Officer or the Hearing Panel believes is material and relevant to the hearing shall be received and heard. Only allegations stated in the initial complaint shall be considered during the hearing.
5. I will review the procedures for everyone's information. First, the Provost's designee, Dr. X, will be given 10 minutes for an opening statement. Following Dr. X's statement, Dr. Y (or counsel), will be given 10 minutes for an opening statement.
6. Next, the Provost's designee, Dr. X, will be allowed 90 minutes to present the evidence and witnesses. The presentation and witness statements must adhere to the allotted time frame. No

additional time will be given to introduce material. Following Dr. X's presentation, there will be a 5 minute recess.

7. Next, Dr. Y, (or counsel), will be allowed 90 minutes to present the evidence and witnesses. The presentation and witness statements must adhere to the allotted time frame. No additional time will be given to introduce material. Following his presentation, there will be a 5 minute recess.

8. Following the recess, new witnesses cannot be introduced. Dr. X will have 30 minutes to ask questions of the witnesses. Then Dr. Y will have 30 minutes to ask questions of the witnesses.

9. Finally, the Provost's designee, Dr. X, will be given 10 minutes to for a closing statement. Following Dr. X's statement, Dr. Y (or counsel), will be given 10 minutes for a closing statement.

10. Following all presentations, the hearing panel will adjourn the proceedings and if time permits, immediately begin deliberations.

11. Dr. X, would you please present your opening statement.

12. Dr. Y, would you please present your opening statement.

13. Dr. X, could you please present your evidence and summarize the charges?
Thank you, Dr. X.

14. Dr. Y, would you please present your evidence and summarize the charges?
Thank you, Dr. Y.

15. Dr. X, would you like to question any of Dr. Y's witnesses?

16. Dr. Y, would you like to question any of the Provost's witnesses?

17. Dr. X, would you please summarize your case.

18. Dr. Y, would you please summarize your case.

Dr. Y, you are free to leave and you will be receiving written notification of the Panel's decision soon

Proposed simple revisions to 04 language

Important note: This proposal was discussed extensively at our 2/11/08 meeting and by email exchange. It has not advanced beyond discussion. It is included here for ease of reference and to help further evolution of the ideas. None of these proposed changes were forwarded for consideration.

Strikethrough indicates deleted words and double-underline indicates inserted words,
3335-5-04(A) (11) Allegations of gross or serious incompetence shall be judged by a faculty member's failure to meet obligations with respect to teaching, service, ~~and~~ or research.

3335-5-04(A) (12) Allegations of grave misconduct shall be judged on the basis of acts or omissions which seriously impair a faculty member's effectiveness in meeting teaching, research, ~~and~~ or service obligations.

Rationale:

The current wording requires there to be proof of failure or serious impairment of effectiveness in meeting all three types of obligations, in teaching, in service, and in research. Incompetence or misconduct in only two areas, or only one area, would therefore not be sufficient grounds for dismissal. This would allow the absurd result that a faculty member could refuse to teach or do research at all, but could perform satisfactorily in service assignments and thus not be incompetent in all three areas (thus not subject to dismissal). The language of 3335-04(B)(3) "A complaint shall state facts to support an allegation that a faculty member has failed to meet his or her teaching, service, **or** research obligations" supports the conclusion that the original intent was to establish incompetence in any one of these areas as grounds for dismissal.

3335-5-04(G) (4) An appeal by the respondent must be in writing and must be filed with the chair of the faculty hearing committee within twenty-one days after notice of the provost's decision was mailed.

Rationale:

The faculty hearing committee is an abstract body of 24 faculty members, not a specific individual, and has no email, campus mail, office or phone number that a respondent can refer to in physically filing an appeal. A respondent may delay the process by failing to file a written appeal as required by the rules, on the grounds that the rules do not specify what individual specifically the appeal is filed with, and leaves open the inference that the appeal is filed with the provost. This clarification states to which person the appeal must be given.

3335-5-48.10(C) (2) At the judgment of the chair of the hearing committee, a member shall be replaced on a hearing panel if there is a relationship to one of the parties or a prior involvement with the issues which may introduce prejudice.

Rationale:

The current rules do not state who makes the final determination whether such a prejudicial relationship exists, allowing for open-ended disputes over alleged prejudicial relationships; nor do they state to whom such an alleged prejudicial relation is to be reported. This revision corrects this by stating a final arbiter of this question.

3335-5-48.10(C) (3) A hearing panel shall select a person, who need not be a member of the faculty hearing committee, to serve as presiding officer. The presiding officer shall direct the proceedings, rule on matters involving the introduction of evidence, and advise the panel members on such issues of law and procedures as they may deem necessary. The presiding officer, if not a member of the ~~committee panel~~, shall not participate in substantive deliberations with the panel nor vote on decisions by the panel.

Rationale:

The current language conflicts with the intent expressed in 3335-5-48.10(C) (1) (“The chair shall select three members of the committee to sit on each hearing panel”) that the panel, the body which deliberates and decides the individual case, be composed of three committee members. Ordinarily, the presiding officer would be one of those three panelists. The final sentence of 3335-5-48.10(C) (3) allows the situation where a fourth member of the committee could function on the panel as presiding officer and may participate as a deliberating and voting member. The proposed language change corrects this by allowing a non-panelist to (exceptionally) function strictly as presiding officer, and uniformly not gain deliberative and voting rights thereby.

3335-5-04(H) (1) Within thirty days of receipt of an appeal from a respondent the faculty hearing committee which is established by rule 3335-5-48.10 of the Administrative Code, shall convene a hearing panel to consider the complaint. The respondent and the provost or designee may each make one peremptory challenge to the seating of one person on the hearing panel and one peremptory challenge to the selection of a presiding officer if that presiding officer is not a member of the panel. A peremptorily removed panelist may not serve as presiding officer on that matter.

Rationale:

The current rule which allows independent peremptory challenges to panel membership and presiding-officer selection has been misinterpreted as meaning that a challenged presiding officer is then removed from the panel. The multiple challenges seriously impedes the panel’s ability to hear a case by introducing significant delays the sequence of challenges, and does not result in a more impartial panel or otherwise serve the purpose of justice. The revision allows parties to additionally challenge the presiding officer if the opportunity did not exist to challenge participation as a panelist, and otherwise allows the parties a single peremptory challenge (separate from the “prejudice challenges” allowed by 3335-5-48.10(C)(2)).

3335-6-08(B) These standards of notice need not apply in cases of termination for cause pursuant to rule 3335-5-04 of the Administrative Code.

Rationale:

The addition clarifies what constitutes “for cause”, limiting the exceptions to standards of notice to dismissals “in demonstrated cases of gross or serious incompetence, grave misconduct or nontrivial financial fraud” as specified in 3335-5-04. “For cause” is a specialized legal expression, and faculty should understand that it is not equivalent to “for a reason.”

Observer Rule Proposal

At the Faculty Hearing Committee meeting, it was agreed that language should be added to the university rules so that if a case is remanded, as part of the procedure of assuring a new, fair and impartial evaluation, a participant from the remanding panel (normally the chair) would serve as an observer for the re-evaluation. The salient university rules at present are:

3335-5-05 (C) (6) At the conclusion of a hearing, the hearing panel shall:

(a) Dismiss the complaint if it determines that there has been no improper evaluation.

(b) When it has found that an improper evaluation has been made, submit its findings to the dean of the college in which the complainant is a member and to the executive vice president and provost. The executive vice president and provost, in consultation with the hearing panel and the chair of the faculty hearing committee, shall take such steps as may be deemed necessary to assure a new, fair, and impartial evaluation. A copy of the hearing panel's findings shall also be sent to the president.

(7) If a decision is remanded under paragraph (C)(6)(b) of this rule, it shall be reconsidered promptly. Within thirty days of the receipt of the hearing panel's decision, the executive vice president and provost shall respond in writing to the hearing panel and the president, stating what action has been taken and the reasons therefor.

(D) The president.

(1) Upon receipt of a report under paragraph (C)(7) of this rule, the president shall review the matter and take whatever action the president deems appropriate.

Comment 1: I had not previously focused on what this says, nor had I noticed that the rules are written in ungrammatical English. Notice that (b) states that if the panel finds improper evaluation, "The executive vice president...shall take such steps ... to assure a new, fair, and impartial evaluation", that is, the language presupposes that there shall (not may) be a re-review, and then describes its nature. My understanding of the wording is that (D) is not directly relevant to the hearing committee, thus 3335-5-05 (C) (6) (b) is the paragraph needing modification. My first proposal for suggested change in wording is as follows:

3335-5-05 (C) (6) (b): revision 1

"When it has found that an improper evaluation has been made, the panel shall submit its findings to the dean of the college in which the complainant is a member and to the executive vice president and provost. The executive vice president and provost, in consultation with the hearing panel and the chair of the faculty hearing committee, shall take such steps as may be deemed necessary to assure a new, fair, and impartial evaluation. Such steps shall include the presence of a member of the hearing panel, normally the presiding officer of the panel, as a non-voting observer, at any meetings of the tenure initiating unit, College and University Promotion & Tenure Committees which reconsider the case. A copy of the hearing panel's findings shall also be sent to the president."

Comment 2: The notion of an "observer" for re-evaluation by a chair, dean or provost is nonsensical, and I think it is wise to explicitly ward off inferences that we are proposing something nonsensical. This change cannot address the problem of unfair evaluation by deans or chairs; it also mandates an observer on TIU, College and University committee re-reviews even when the particular committee was not found to have conducted an improper evaluation. The alternative wording below fixes that:

3335-5-05 (C) (6) (b): revision 2

When it has found that an improper evaluation has been made, the panel shall submit its findings to the dean of the college in which the complainant is a member and to the executive vice president and provost. The

executive vice president and provost, in consultation with the hearing panel and the chair of the faculty hearing committee, shall take such steps as may be deemed necessary to assure a new, fair, and impartial evaluation. Such steps shall include the presence of a member of the hearing panel, normally the presiding officer of the panel, as a non-voting observer, at any meetings of the tenure initiating unit Promotion & Tenure Committee which reconsider the matter in case that committee has been found to have conducted an improper evaluation, of the College Promotion & Tenure Committee in case that committee has been found to have conducted an improper evaluation, and of the University Promotion & Tenure Committee in case that committee has been found to have conducted an improper evaluation. A copy of the hearing panel's findings shall also be sent to the president.

Because, in my experience, the University committee provides virtually no information on their evaluations other than a very brief executive summary and a decision, I would be surprised if it is possible to find that a University committee engaged in improper evaluation, but I included that possibility for completeness. I personally would suggest the second revision, but this may be a point needing discussion.

Endnote from the chair:

Please consider the simpler text below. This says the hearing panel reports its findings in all cases; proper or improper. It makes it clear that reconsideration only takes place if there was an improper review at that level. Finally, it enables us to add more important points to the list for improper cases.

3335-5-05 (C) (6) At the conclusion of a hearing, the hearing panel shall either dismiss or remand the complaint if it determines the evaluation was proper or improper, respectively, and submit this finding to the provost with copies to the dean of the affected college and to the president.

"When it has found that an improper evaluation has been made, the provost, in consultation with the hearing panel and the chair of the faculty hearing committee, shall assure a new, fair, and impartial evaluation. This new evaluation includes:

(a) Reconsideration by any P&T committee that conducted an improper evaluation. A member of the hearing panel must be present or video linked as a non-voting observer during any reconsideration meetings. The written response must address the findings of the hearing panel and explain how the new evaluation is fair and impartial.

(b) Reconsideration by any administrator who conducted an improper evaluation. The written response must address the findings of the hearing panel and explain how the new evaluation is fair and impartial.

(c) Reconsideration by any committee or administrator who originally acted based upon an improper evaluation. [For example, if an improper review occurs in a college P&T committee, the dean, provost and university P&T committee must reconsider, but not antecedent department levels where proper review occurred].

(7) If a decision is remanded under paragraph (C)(6) of this rule, it shall be reconsidered promptly. Within thirty days of the receipt of the hearing panel's decision, the provost shall respond in writing to the hearing panel stating both actions and reasons.

(D) The president.

(1) Upon receipt of a report under paragraph (C)(7) the president shall review the matter.

2008 annual report respectfully submitted,

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