Report of the Grievance Review Panel in the matter of a Grievance by the University of Toronto Faculty Association against the University of Toronto relating to a number of denials of tenure by the President after positive recommendations by tenure committees

Panel Members: Professor Emeritus Martin Friedland, Chair; Professor Lorna MacDonald; and Professor Wayne Sumner

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Appearing for the University of Toronto Faculty Association, Michael Mitchell and Emma Phillips, with Professor George Luste, UTFA President; Cynthia Messenger, UTFA Vice-President, Grievances; Alison Warrian, counsel, UTFA; and Aleisha Stevens, student-at-law

Appearing for the University of Toronto: John Brooks, with Professor Edith Hillan, Vice-Provost, U of T

This Grievance was brought by the University of Toronto Faculty Association in its own name against the University under Article 7 of the Memorandum of Agreement between the University and UTFA. The Grievance alleges that the University breached Article 2 of the Memorandum of Agreement by the actions of President David Naylor in denying tenure to a number of persons who had been recommended for tenure by their tenure committees. The University, it is alleged, "conducted itself in a manner inconsistent with and in violation of the Policy and Procedures on Academic Appointments" – one of the so-called "frozen" policies that cannot be changed without the concurrence of UTFA. The individual faculty members who were denied tenure are not parties to this hearing.

The President, the Grievance states, "has exceeded the powers and role assigned to him in the tenure process as set out in the Policy and Procedures on Academic Appointments by substituting his general evaluation of the evidence respecting the candidate's scholarship and creative professional achievement, teaching and future intellectual and professional development for that of the relevant Tenure Committees composed of experts in the candidate's field, and by altering the standards generally applied in the division in recent years without notice to the divisions or the candidates."

The University objects to the hearing of this Grievance by the Grievance Review Panel, arguing that the University Tenure Appeal Committee is the proper body to deal with cases in which the President has not accepted positive recommendations for tenure.

We will first examine the background of the cases and the framework concerning the presidential power in tenure matters. There were four such reversals by President Naylor – one in 2005 and three in 2006. Three of the cases arose from different departments in one large professional faculty and one in another professional school.

The right of the President not to accept a positive recommendation that tenure be granted has rarely been exercised by presidents. As far as counsel could determine, President Robert Prichard was the first President to do so and he reversed positive recommendations in at least one case. President Robert Birgeneau did not accept three positive tenure recommendations during his term in office, and President Naylor has done so in the four cases that are the subject of this Grievance.

The presidential power to approve or reject tenure recommendations is a power delegated to the President by the Governing Council, which had been given the power relating to tenure by the University of Toronto Act 1971. Section 2(16)(b) of the Act states that the Governing Council has the power to "appoint, promote, suspend and remove the members of the teaching and administrative staffs of the University" and section 2(16)(d) of the Act states that Governing Council can delegate this power to the President. Governing Council has done so in section 7 of its Policy on Appointments and Remuneration, which states: "Academic appointments with tenure, at any rank, shall be made by the President and reported to the Academic Board for information."

The presidential power to reject positive tenure recommendations is, it is argued by counsel for the University, implicit in the Policy and Procedures on Academic Appointments. Section 16 of the Appointments Policy states: "As soon as practicable after the tenure committee's decision, the head of the division should inform the candidate whether or not tenure has been recommended and so inform the President…After the President has made his or her decision on the recommendation of the tenure committee he or she shall notify the head of the division and the candidate." The right to overturn a positive tenure recommendation is not as clearly spelled out in the Appointments Policy as one might expect. The principal concern of those developing the policy in the 1970s was to ensure that persons denied tenure received a fair hearing and it may be that the possibility of the reversal of positive tenure recommendations was not given careful consideration at the time. The language of the relevant provisions, discussed below, suggests that the drafters probably did not direct their minds to the issues raised in this Grievance. Nevertheless, it is accepted by the university community and UTFA that the President does have such power.

The presidential power in tenure matters was dealt with in detail by the Grievance Review Panel (GRP) in its major report of 1995 relating to the Tenure Review Process. The Appointments Policy was then essentially the same as is today relating to the presidential power. The GRP devoted six pages in its 46 page report to the role of the President in tenure matters, stating (on page 41) that President Prichard was the first President to reverse a positive tenure recommendation where "the case for tenure has not been made out." "While such instances are unusual," the GRP went on to say, "the President has declined to accept the recommendation in these circumstances."

The 1995 GRP Report concluded that "the President does have effective authority to decide to grant or to deny tenure." The GRP relied (page 42) on what the panel said was "the plain-language interpretation of the Policy and Procedures on Academic

Appointments, in which the tenure committee is consistently said to 'recommend' and the President, although he or she is referred to infrequently, is consistently said to 'decide'."

According to the 1995 GRP Report, the President should not substitute his or her decision for that of the tenure committee. The test, the panel stated, should not be whether the President would have denied tenure if he or she was deciding the question, but rather whether the tenure committee's recommendation "is plausible considering the evidence available to the tenure committee." In assessing "plausibility" the President can "weigh the evaluations written by others." He or she can consult with the tenure committee and "provide the candidate an opportunity to respond, either orally or in writing, before he or she makes the decision."

The 1995 Report's final paragraph dealt with the candidate's right to appeal the President's decision to the University Tenure Appeal Committee. The panel stated in the final paragraph of its report: "A candidate can appeal the President's decision to the University Tenure Appeal Committee (UTAC). Because the President decides while the tenure committee recommends, every appeal to UTAC is in a sense an appeal of a Presidential decision. Further, the Policy and Procedures on Academic Appointments at section 23(d) provides a ground for appeal that we find includes Presidential decisions that do not accept tenure committee recommendations."

Let us turn to the University Tenure Appeal Committee, provided for in Part IV of the Academic Appointments Policy (sections 22 to 26). Section 22 of the Policy states that the "Tenure Appeal Committee shall consist of a chair and four other members drawn from a Panel of up to eight members. The members shall be appointed by the President after consultation with the University of Toronto Faculty Association." Section 23 sets out the grounds of appeal, such as "irregularity or unfairness in the procedure" or "improper bias" and concludes with the following ground of appeal, 23(d): that "the decision is unreasonable in the light of the evidence which was available or should have been available to the committee and in light of the standards that were generally applied in the division in recent years."

The Tenure Appeal Committee has only two options under the Appointments Policy: to dismiss the appeal or remit the case to a second tenure committee to be set up by the President for consideration of the question of tenure.

All four persons denied tenure by the President after positive recommendations for tenure appealed their denial of tenure to the Tenure Appeal Committee. We were told that three of the cases were subsequently settled by the candidates and the University before hearings by the Tenure Appeal Committee and negotiations for a settlement are underway in the fourth case. Counsel for UTFA stated in advance of the present Grievance hearing that UTFA is not "seeking a remedy affecting the four individual faculty members who were denied tenure."

The preliminary motion brought by the University concerning the Association Grievance was heard by us on April 25, 2008. Counsel for the University argued that we do not have

jurisdiction to hear the Grievance because it could and should be dealt with by the Tenure Appeal Committee. Counsel for UTFA argued that the GRP has jurisdiction to hear the cases and should do so because the Tenure Appeal Committee deals with individual Grievances and not with a pattern demonstrating the possible improper exercise of the power of the President. UTFA accepts that the President has a role to play in tenure decisions and does not challenge the 1995 GRP Report. Indeed, the Grievance in the present case states that UTFA "relies on" the 1995 GRP Report "as support for its interpretation of the powers of the President in the tenure process." Nevertheless, counsel for UTFA points to difficulties in the interpretation of the 1995 Report and its application by the President.

A considerable portion of the hearing was devoted to the interpretation of the GRP's 1995 Report. What is the meaning of the word "plausible", the test to be used by the President? How does it differ from "reasonable", the test to be used by the Tenure Appeal Committee? What test should the Tenure Appeal Committee use in an appeal from a presidential denial of tenure in a case where the tenure committee had recommended tenure? Why should the Tenure Appeal Committee set up a second tenure committee and not simply affirm the original tenure recommendation if the appeal committee disagrees with the President's rejection of the recommendation for tenure?

We have concluded, for the reasons that follow, that we should not hear this Grievance, but that the University and UTFA should work together to revise the Appointments Policy to deal with some of the gaps and inconsistencies in the Policy relating to the issue that is the subject of this Grievance.

We believe, as counsel for the University has argued, that on the facts of this Grievance the Tenure Appeal Committee is the appropriate body to deal with the denial of tenure by the President. That committee has the expertise that a panel of this committee might not necessarily have. The Tenure Appeal Committee deals with standards for granting tenure across the University. It can assess better than the GRP whether the President assessed the material properly. Moreover, the Tenure Appeal Committee sits in a panel of five members, whereas we sit in a panel of three members. So, all in all, it has more expertise and a longer institutional memory concerning the issues than we are likely to have. Further, it should be noted that the Tenure Appeal Committee is designed to have the same objectivity as we are likely to possess. Its members are appointed after consultation with UTFA, just as are members of the GRP.

The fact that the four persons denied tenure did not choose to continue with their appeals to the Tenure Appeal Committee is not a good reason for us to hear the Grievance. If appeals had been pursued in the four cases, the Tenure Appeal Committee could likely have found a way of consolidating the hearings so that there would not necessarily be a multiplicity of individual hearings. There are precedents in the University for such a consolidation of cases in tenure matters.

The decision on whether the GRP should hear a case relating in some manner to tenure requires a careful balancing of interests. In a hearing by a panel of the GRP in March

2008, the panel concluded that they should deal with a case relating to tenure because it involved a question of the interpretation of the Appointments Policy and not with whether the tenure decision was properly reached. As we said in that report (page 4), the latter "is the task of the Tenure Appeal Committee." We believe that in the present case the determination of whether tenure should have been denied by the President is properly a matter for the Tenure Appeal Committee. This is not a case of a change in the Appointments Policy, but rather, it is the interpretation and application of the Appointments Policy (along with the 1995 GRP decision) to the four cases that are the subject of this hearing.

There may well be cases in the future dealing with tenure matters that involve changes in policy that should be heard by the GRP. This case is not one of a President clearly changing the University's standard for tenure. In the years 2004 to 2006, President Naylor dealt with 194 tenure cases and in four cases in two different faculties did not accept the tenure committee's recommendation in favour of tenure. We were not told whether he has exercised the power in subsequent years.

The presidential role in helping ensure that tenure is properly granted or denied is, in our view, an important one for the University community. It is, of course, crucial to the person seeking tenure because a negative decision can have a devastating effect on a scholar's career and ambitions. A positive decision in a case where tenure should have been denied is also serious because it can have a demoralizing effect on the department, particularly a small department where every appointment affects the life of every other member of the department. A tenure decision that should not have been granted also affects the students that the academic will continue to teach.

Review by the President provides a second look at the decision and a safeguard against undesirable decisions. Persons from outside the candidate's department also play such a role. Tenure committees in multi-departmental divisions are normally composed of seven persons, five from the person's department or a cognate department, a representative of the head of the division, and someone from the graduate school. The persons from within the candidate's department – particularly in a small department – and those from a cognate department will normally know the candidate well and will naturally be inclined to want the candidate to succeed. The representative from the graduate school may not know the person as well and thus may provide some counterweight to the understandable sympathy for the plight of a marginal candidate.

So, like the 1995 Grievance Review Panel, we support the role of the President in reviewing both positive and negative tenure recommendations. The policy as a whole should, however, be reexamined by the University and UTFA. Perhaps the President should not, for example, be able to overturn a decision of a unanimous committee. We were told that the committee was unanimous in two of the four cases that were the subject of the present Grievance. (In the two other cases – where the vote was 5-2 – it is not known how individual members voted because no record is kept of such votes.) The presence of a representative from the graduate school should play a key role in protecting

the interests of the University. If the graduate school is not providing that safeguard now, then its role should be examined by the University.

The test of "plausibility" should also be examined. It is not a term that is used by courts or tribunals. It would seem to provide a standard which assists the candidate more than would a test of reasonableness. A decision, it seems, can be unreasonable, but still plausible – or can it? Perhaps one wants to avoid the language of "plausibility" which has a variety of meanings and instead have the President apply a variation of reasonableness, such as "clearly unreasonable" or "patently unreasonable." The concept of reasonableness is not without its problems, but it is probably clearer than the word "plausibility." Whatever the standard, it should be mentioned in the current version of Provostial Memo 134, which had been the subject of the Grievance which resulted in the 1995 GRP Report. Perhaps it should also appear in the Appointments Policy. The test is, however, dealt with in detail in a helpful memo dated October 7, 2004, prepared by the Vice-President and Provost.

Another issue that needs clarification is the remedy that can be granted by the Tenure Appeal Committee. It seems to us that to order a new tenure hearing in a case where the Tenure Appeal Committee disagrees with the President's reversal of a positive recommendation by the tenure committee is unfair to the candidate. The Tenure Appeal Committee, we believe, should be permitted to direct the President to award tenure to the candidate.

We are grateful to counsel for their helpful submissions.

I certify that this is the decision of the Panel

"M.L. Friedland"

Martin Friedland, Chair