

## Explaining UTFA's Proposed Revisions to Tenure Policies

September 29, 2011

### Summary

In this document, we respond to some of the Administration's characterizations of UTFA's proposed use of interest arbitration in negotiations over policy matters (including tenure policies), as well as to the proposed use of a third party neutral professional chair in tenure appeals. We also clarify and explain the rationale for some of the other specific changes we have proposed to the policies. UTFA welcomes negotiation of these proposed changes with the Administration in the context of a bargaining process that is fair, rigorous, and responsive to the voices of faculty and librarians. We also welcome members to read and consider our proposed changes for themselves. The UTFA proposal on changes to tenure policies and a proposal on governance in academic planning is posted on our website at [www.utfa.org](http://www.utfa.org).

Members should take note of the following claims which are explained in more detail in the document:

- **Nothing we have proposed would alter the grounds for tenure, nor are the proposals aimed at altering the success rate for tenure at the University of Toronto.**
- **Our goal is to improve and ease implementation of the policies for all involved, including chairs and administrators, faculty members who sit on tenure committees, and candidates.**
- **Claiming that we are proposing essentially to contract out the drafting of policies on tenure to a third party is simply misleading.**
- **We have proposed interest arbitration because our members have expressed support for it as a preferable alternative to strikes and lockouts as a way to resolve impasses in negotiations.**
- **We are proposing that the chair of the University Tenure Appeals Committee (UTAC) be "a legally trained person external to the University with experience and expertise in university matters, mutually agreeable to the University and the Association"**
- **UTFA is not proposing that the independent, neutral chair of UTAC have the power to award tenure, nor under our proposed changes would any arbitration panel – whether via grievance arbitration, tenure appeal or interest arbitration – come anywhere close to doing so.**
- **The adequacy of our tenure policies should not be judged by whether we grant or deny tenure, but by whether we have been fair in doing either. The issue here is whether our policies provide for due process and procedural fairness given that they lead to decisions that can profoundly affect careers, lives, and livelihoods. The answer affects us all, including those who participate in the tenure process as candidates but also as members of committees evaluating candidates.**

## Introduction

During negotiations, UTFA proposed important procedural changes to tenure policies at the University of Toronto. These changes are specific but significant. They are aimed at making the process more clear, transparent, and internally consistent, while also improving fairness. Our goal is to improve and ease implementation of the policies for all involved, including chairs and administrators, faculty members who sit on tenure committees, and candidates.

Despite the Administration's recent claims, ***nothing we have proposed would alter the grounds for tenure, nor are the proposals aimed at altering the success rate for tenure at the University of Toronto.*** Reading our proposal should verify this for all concerned.

In this document, we provide additional explanation and rationale for the changes we have proposed. But members should also bear in mind that these changes are the result of extensive consultation in the lead-up to negotiations, combined with an accumulation of evidence gathered over many years that speaks to important shortcomings in the current policy. We seek a reasonable and collegial dialogue with the Administration concerning these changes in the context of a bargaining process that is fair, rigorous, and responsive to the voices of faculty and librarians.

## Clarifying the Role of a Third Party Neutral Professional

We would like to begin by squarely addressing the references to “arbitration” in the Provost’s September 19 email. There are two distinct types of arbitration in question vis-à-vis our proposals: interest arbitration and grievance arbitration.

### Interest Arbitration

Interest arbitration refers to a phase in negotiations when the parties, having failed to reach agreement in earlier, often quite lengthy bilateral negotiations (and possible mediation), have either agreed to substitute professional neutral adjudication for the right to strike or lockout, or are required by law to make recourse to a third party neutral, as in the case of essential services. In such circumstances, the third party neutral professional will settle outstanding issues based on the submissions and evidence of both parties and usually in light of other settlements in the same or related sectors.

To be sure, in future updates to members, UTFA will be offering its perspective on the use of interest arbitration in our negotiations more generally. For now, suffice it to say that, for many years, UTFA and the University of Toronto Administration have made use of neutral third party professional mediation and (when necessary) arbitration in negotiating compensation settlements. We now also use this mechanism, prescribed in Article 6 of the MoA, for workload policy negotiations. The process is familiar and it is the only fair, rigorous, mature, and responsive negotiating process available to UTFA under the current Memorandum of Agreement. We are now proposing to make broader use of this process to apply to all non-compensation matters (beyond workload) that shape the conditions under which we do our work, including in negotiations over changes to tenure policies.

In her September 19<sup>th</sup> email, the Provost claimed that “UTFA...would have external arbitrators, not academics, be the drafters of policies and procedures for the University of Toronto including the standards, criteria and process for deciding awards of tenure”. This is a highly misleading characterization of interest arbitration. Interest arbitrators do not “draft policies and procedures” independently of the two sides; rather the arbitrator resolves outstanding differences by adjudicating within the boundaries set by and based on the information and arguments provided by those two sides. Since both sides in an interest arbitration involving tenure policy are academics, the policy outcome will necessarily be consistent with academic principles as an extension or combination of the proposals tabled by the parties. Where appropriate, arbitrators also make recourse to relevant norms and standards in the same sector, in this case, tenure policies at other universities. ***Claiming that we are proposing essentially to contract out the drafting of policies on tenure to a third party is simply misleading. It flies in the face of how interest arbitration actually works, and simply ignores the fact that UTFA directly authored and tabled proposed changes to tenure policies in the current round based on extensive input from members, and now seeks to negotiate these fairly with the Administration.***

At the same time, and it bears repeating, the Provost’s email is entirely silent on what other dispute resolution mechanism would be appropriate, if, as we are told, interest arbitration is not. As we explained in our FAQ dated September 23, the antiquated frozen policies/unilateralism approach does not provide for a fair, rigorous, responsive or meaningful negotiating process when it comes to matters vital to faculty and librarians, including governance and appointments policies. We have proposed interest arbitration because our members have expressed support for it as a preferable alternative to strikes and lockouts. ***Given that the status quo is not working, what would the Administration propose as an appropriate, fair and independent dispute resolution mechanism?***

### Grievance Arbitration

The other form of arbitration in question in this discussion is grievance arbitration. This refers to the use of a neutral professional enlisted to adjudicate an individual grievance, group or policy grievance about a breach of an agreement, or established policies or practices. We (UTFA and the Administration) now have access to this form of arbitration via an independent chair of the Grievance Review Panel. This is a change agreed to during the mediation phase of the previous round of negotiations.

In our tenure policy proposals, we have embraced a modified type of grievance arbitration. Specifically, ***we are proposing that the chair of the University Tenure Appeals Committee (UTAC) be “a legally trained person external to the University with experience and expertise in university matters, mutually agreeable to the University and the Association”.*** Contrary to the suggestion made by the Vice Provost, Faculty and Academic Life, that our proposals involve “...movement towards tenure decision adjudication by external legally trained arbitrators”, UTAC is composed of a five member panel appointed to hear each tenure appeal. The independent chair we have proposed would be one member of this panel, and, in any event, the panel cannot award tenure but can only order referral to an additional tenure committee. Nowhere have we proposed to change this fundamental feature of peer review.

The tenure appeals process is, however, subject to the Statutory Powers and Procedures Act and is already a formal, legal process. It only makes sense to have a member of the tenure appeals panel

with professional competence in legal processes and in the application of the law, and who is independent of all parties. Members of UTAC have in fact requested as much. The chair we have proposed will help ensure fairness and clarity for everyone involved. ***But this is a far cry from the Administration's suggestion that we are proposing that this independent, neutral chair have the power to award tenure, nor will any arbitration panel – whether grievance arbitration, tenure appeal or interest arbitration – come anywhere close to doing so.***

### Why is UTFA proposing changes in the tenure process?

Our proposal for changes in the tenure process is rooted in the wish to guarantee fairness for everyone. Owing to the excellence of their work, and the goodwill of their colleagues, the process for most tenure candidates is relatively smooth and, as has been noted, the rate of success is quite high. But these facts disguise significant problems. Existing policies lack clarity and detail and are in places internally inconsistent. As a result, we have depended too much on the good will of participants in the process to make ad hoc adjustments in the face of ambiguity or inconsistency. A policy firmly guaranteeing fairness is essential both to the actual process and to the perception of the process. UTFA believes that a great university merits a tenure process that cannot be impugned on grounds of unfairness.

In our view, ***merely citing the rate of success in tenure as evidence of the adequacy and fairness of the process amounts to textbook spurious reasoning.*** The adequacy and fairness of our proposals is best tested not by the experiences of that majority for whom it works well, but rather by the experiences of those for whom it does not. Many of these people come to UTFA. And many of the people who have been involved in tenure committees also bring their concerns about the process and the policies to UTFA because they see the problems. We must all keep in mind that, as much as we wish to retain rigorous standards of excellence, a tenure denial is a life-changing event for the candidate. Even the suggestion of a denial can fundamentally alter a career. We all bear responsibility for ensuring that such deliberations are conducted in a rigorous and fair way. ***The adequacy of our policies should not be judged by whether we grant or deny tenure, but by whether we have been fair in doing either. Our proposals in no way seek to increase or decrease the success rate of tenure.*** In truth, if UTFA's proposed changes were adopted, colleagues who serve on tenure committees could, if they felt it were warranted, recommend that tenure be denied, more confident that the procedural rights of the candidate had been protected. These rights include the right to an unbiased evaluation, the right to see evidence, and the right to respond. These rights should be fundamental pillars of our tenure policies.

### UTFA's Proposals Involve Strengthening the Role of Academic Peer Review.

Establishing standards and evaluating candidates for tenure must remain firmly grounded in peer review. Members should carefully read our proposal on tenure policies to verify that, if anything, ***we have proposed to strengthen and facilitate peer-review by local and external scholars.***

As noted above, we are not proposing that the tenure appeals panel award tenure. That said, our Grievance Review Panel (GRP) ruled that there can be no appeal of a decision by the President of

the University of Toronto in a second tenure review process. This means that neither the second tenure committee, nor the senior Administration is accountable via appeal in a second tenure review. At this point the candidate's only recourse is to the courts, an expensive and decidedly un-collegial process. We believe it is consistent with upholding the sanctity of collegial peer-based evaluation that the ruling of the President always be subject to review. The President of the University of Toronto cannot be an expert in all academic and professional fields and so by definition is seldom a peer in the sense the process prescribes. ***So it is simply not fair or accurate for the Administration to seek to dismiss UTFA's concern to extend principles of peer review and accountability as merely "adding potentially unlimited appeals from second, third and more tenure committees."***

We have proposed other changes which also clarify and strengthen the role of peer review. We have, for example, proposed yearly meetings between tenure candidates and chairs to discuss the candidates' progress toward tenure. These meetings will allow collegial dialogue between the chair and the candidate, ensuring that the necessary advice and guidance are relayed to tenure candidates regularly and will, we believe, mitigate problems at a later stage. ***Annual meetings will also allow chairs to convey the standards of achievement for tenure which have applied in recent years, one of the grounds for tenure which we have affirmed in our proposal.***

***We have also proposed restrictions on the consideration of irrelevant information (e.g. statements about demeanor, ethnicity, gender, accents, etc.) in both the third-year and tenure review processes*** that are meant to ensure the consideration of candidates for renewal and for tenure are peer-based deliberations of relevant evidence of competence and excellence in teaching and research. This is not, as the Administration claims, about censorship, and it is not about placing a burden on chairs! It is about ensuring that only relevant information makes it into the candidate's dossier. Clarity on what belongs in the dossier and what does not should make life easier for chairs, for the candidate, and also for those who sit on committees evaluating the candidate's performance. This is just common sense.

## **The High Cost of the Current Tenure Policy**

The current tenure policy needs reform because it is very costly. The stress that it engenders in tenure candidates each year, which no doubt impacts negatively on faculty productivity, can be mitigated by a fair, clear and transparent process. But this is not the only cost. Unclear, vague and contradictory provisions in our current tenure policy consistently generate questions, concerns and complaints from tenure candidates who call upon UTFA to assist them in resolving various issues with their chairs, deans, or the Vice-Provost. Dealing with these questions takes time, money, and institutional resources.

***Changes to the current policy could save significant amounts of money, stress, and time.*** For example, we have proposed greater flexibility in extending the time to tenure. In part, changing human rights laws have prompted our proposal. But in addition, we have encountered problems (particularly in the sciences, engineering and some professional or clinical research settings) where promised laboratory equipment does not materialize in a timely manner for reasons that cannot be attributed to any failing on the part of the candidate. Our experience is that candidates with good reasons for needing more time either are unreasonably denied or wait too long to apply because they have not been properly advised. Costly stops and starts during the probationary period can produce

confusion, which in turn can lead to bias. No one benefits from these kinds of problems. We are not seeking to make tenure easier to obtain in these instances. We are seeking to avoid problems that are avoidable.

### What is the role of professional neutrals at Other Universities?

By the standards of Ontario Universities, our proposal for the involvement of a professional neutral with legal expertise and university experience in the tenure appeals process is quite modest.

Of the 17 unionized Ontario universities to which the Administration has referred, 16 (all except Algoma) have recourse to final and binding arbitration by an independent neutral (in one case, in conjunction with a panel of academics) in order to adjudicate tenure grievances. While some collective agreements have no restrictions on the grounds on which a tenure grievance can proceed to arbitration and/or on the authority of the arbitrator to award tenure, some restrict the grounds (e.g., to procedural errors only and/or procedural errors plus academic freedom and /or discrimination) and some restrict the powers of the arbitrator (e.g. the arbitration board cannot award tenure).

Moreover, at the other two non-unionized universities, some independent or quasi-independent review of a tenure denial is provided. McMaster provides recourse to review by a Senate committee (and note that, as a unicameral university, U of T has no Senate). At Waterloo, although the faculty association is not unionized, there is provision for access to an independent arbitrator in tenure appeals.

Given this reality across all other Ontario universities, the simple fact is that the rights of candidates in the tenure process at U of T, including in the appeals process by way of recourse to some form of independent grievance arbitration or appeal, are starkly inferior. We should be concerned with more than whether candidates are deserving of tenure, as merely referring to the 96 percent success rate of tenure cases suggests.<sup>1</sup> ***Whether the tenure rate is 50 percent, 96 percent, or 100 percent is in fact irrelevant to our proposals. The issue here is whether our policies provide for due process and procedural fairness given that they lead to decisions that can profoundly affect careers, lives, and livelihoods. The answer affects us all, including those who participate in the tenure process as candidates but also as members of committees evaluating candidates.*** We should be judged not only by our achievements, but also in how we judge others. We must do so fairly and properly or the entire enterprise is compromised. On this, we believe, we are all in agreement.

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<sup>1</sup> For the record, UTFA has long contested whether this figure captures the whole story. It is clear some people leave before coming up for tenure. Some leave for personal reasons, some leave for professional reasons, and some leave because they believe or have been given cause to believe they will not secure tenure at the University of Toronto. If these people are included, the percent of tenure stream hires who ultimately secure tenure at the U of T would be considerably lower.