

To: Academic Council

From: Ad Hoc Committee to Revise Faculty Hearing Committee Rules under Appendix F to the Faculty Handbook (Sam Buell (Law, Chair), Mara Becker (Medicine), Keisha Cutright (Fuqua), Kerry Haynie (Political Science), Tom Metzloff (Law), Larry Zelenak (Law))

Date: April 16, 2024

Re: Proposed Revisions to Appendix F Governing Faculty Hearing Committee

## 1. Introduction

In October 2023, ECAC appointed an ad hoc committee to revise the faculty handbook rules controlling the faculty hearing committee (FHC). Three members of the committee have chaired and/or served on the FHC. One member is the current chair.

A widespread view in recent years has been that the rules relating to the FHC were too complicated, that many terms in the rules were hard to understand even for panel members trained in law, and that the rules did not adequately address certain recurring issues, especially involving cases implicating OIE's process and/or Title IX.

The committee held a series of meetings between October and February to discuss issues and hear from stakeholders including Kim Hewitt (OIE), Pam Bernard and staff (University Counsel), and Abbas Benmamoun (Provost's office, speaking in his faculty advancement role). The committee asked Abbas Benmamoun to let it know if the Provost wished to meet with the committee separately.

Between February and April, the committee drafted the rules. While the committee worked from the existing rules, the intention was to draft on a clean slate. The changes are so substantial that a redline from the old rules would be unreadable and unhelpful.

## 2. Section by section analysis

### A. Purpose and selection

The committee added a simple statement of purpose in paragraph 1. We concluded that the omission of this in the current draft might leave a reader without prior FHC experience without any basis to know where the FHC fits within the university governance and personnel processes.

The committee did not make any substantive changes to the rules concerning selection and service and FHC composition. There have not been any evident problems with this process in the past.

## B. Jurisdiction

The jurisdictional provisions of the FHC rules are the most important ones. They determine the validity and scope of any complaints filed with the FHC, give the FHC authority to deal with the most important matters for which the FHC exists, while also making clear that the FHC does not function as a general grievance body within the university.

The committee reduced the 10 jurisdictional provisions to 6 because of overlap, duplication, and confusion involving repetitive language and some terms. The committee does not believe that these clarifying changes reduce the scope of the FHC's jurisdiction.

The committee replaced the term "academic due process" with the term "procedural fairness." The due process formulation was confusing because it reads as if it is invoking a known, external legal standard. There is no legal concept of "academic due process," at least as applies to faculty. The committee believes that the term "procedural fairness" has a plain meaning, which of course may vary by departmental and situational context, but which encompasses cases of employment actions that, for example, were not based on genuine fact-finding or fair opportunity for all relevant persons to be heard, or were based on application of incorrect or inadequate standards in the particular context.

The committee added a separate jurisdictional provision (paragraph 2) to make clear what the committee concluded after examining Title IX law: if a complainant comes to the FHC after an adverse finding against the complainant in a university process falling within the scope of Title IX, the law permits review by a further authority (in this case the FHC) only with respect to sanctions imposed. Title IX prohibits the further authority from reopening or questioning any findings made in the Title IX context.

The committee decided to remove the "jurisdictional limitations" section from the existing rules. These provisions are unnecessary because the very nature of jurisdictional provisions is that any matter not falling within them is a matter outside jurisdiction. Not only is a limitations section unnecessary, it could cause confusion about matters that are not listed within it but nonetheless do not fall within any of the positive jurisdictional provisions.

## C. Complaints and Filing

With regard to the process for preparing and filing complaints, the committee did a substantial amount of editing to simplify the language and make it more jargon-free and user-friendly. We do not believe we have substantively changed the process or requirements for complainants with any of these edits.

## D. Hearings

Similarly, with regard to hearing procedures, the committee did a substantial amount of editing to simplify the language and make it more jargon-free and user-friendly.

The committee added subsection 4(a) to make clear that there can be cases in which a hearing panel can resolve the case without the need to hold a hearing because there is no need for additional fact-finding and no dispute about factual matters.

The committee removed the rule against being accompanied by a lawyer under subsection 4(f). The person accompanying the complainant, including a lawyer, may not participate in the hearing. The committee viewed it as arbitrary and unfair to say that a complainant may not bring a particular support person simply because of that person's status of bar membership.

Under subsection 4(i), the committee removed the term "cross examination" as part of our efforts to make the tone of the FHC and its rules collaborative and non-adversarial, at least in relation to traditional litigation and legal process.

Under subsections 4(l), 4(m), and 4(n), the committee clarified matters relating to access to material university records. This has been a recurring issue over the years and the existing rules lack language showing how such matters should be resolved.

#### E. Findings and Recommendations

Again, the committee mostly simplified and clarified language in this section. The existing rules both here and in the appeals section are confusing for reasons we were unable to determine. We speculated that there may have been past concerns about differences in process across different university components. In any event, paragraphs 5 and 6 clarify and simplify the process and standard governing Provost review of FHC recommendations.

#### F. Appeals

As stated, the appeals processes in the existing rules are complicated and appear bifurcated (or even trifurcated) according to the type of case and its location within the university. After substantial discussion, the committee determined that there is no good reason not to have a single appeal process for all cases, involving an appeal to either the President or the Executive Vice President for Health Affairs, and then, if applicable, the Executive Committee of the Board of Trustees.

#### G. Records

The existing rules lack any provisions on record keeping. This has been left informally to various FHC chairs. Best practice for a body such as the FHC would be to retain all records centrally. We have proposed rules to provide for that.