

FAYETTEVILLE STATE UNIVERSITY
PROCEDURES FOR THE CONDUCT OF HEARINGS
IN NON-REAPPOINTMENT CASES

I. HEARINGS PROCEDURES

A. Purposes of Reviewing Non-Reappointment Decisions

A decision not to reappoint a faculty member may be made for any reason that is not an impermissible reason. The purpose of reviewing decisions not to reappoint is not to second-guess professional judgments based on permissible considerations, but to determine whether the decision was based on considerations that the university considers to be impermissible. Decisions based upon (1) the faculty member's exercise of rights guaranteed by either the First Amendment to the United States Constitution or Article I of the North Carolina Constitution; (2) discrimination based upon the faculty member's race, gender, religion, age, national origin; disability as defined by law, or honorable service in the armed services of the United States or (3) personal malice¹ are considered to impermissible.

Hearings in non-reappointment cases serve several important purposes. The primary purpose of the hearing is to give the faculty member (hereafter, "Petitioner") the opportunity to prove his or her contention that the decision not to reappoint was impermissibly based. Conversely, the hearing provides an opportunity for the decision maker, (hereafter, "Respondent") to answer the Petitioner's allegations. Another important purpose of the hearing is to create a record of testimony and documentary evidence for review by the parties, and the Board of Governors, should the Petitioner seek further review of the non-reappointment decision.

B. Role of the Hearing and Reconsideration Committee

The role of the Hearing and Reconsideration Committee (hereinafter, "HRC") is to create a clear, permanent record of the evidence presented at the hearing and to advise the chancellor whether or not the faculty member has demonstrated, by a preponderance of the evidence, that the decision not to reappoint the faculty member was based in significant part on an impermissible reason. The Chancellor has final administrative responsibility for deciding the issue, with the assistance of the faculty committee.

The HRC's role is not to "second-guess" the professional judgment of administrators and colleagues responsible for making the non-reappointment decision. In other words, the HRC does not reexamine the merits of the faculty member's candidacy. Its sole function is to determine if the decision was based on one of the three impermissible grounds.²

¹ The Board of Governors has defined the term "personal malice" to mean dislike, animosity, ill-will or hatred based on personal characteristics, traits or circumstances of an individual that are not relevant to valid University decisionmaking.

² See Board of Governors' policy entitled *Appeals of Non-reappointment Decisions Under Section 604 of The Code*.

C. The Scope of Review

The scope of review by the HRC is specified in Section V of the *Tenure and Promotion Policies, Regulations and Procedures of Fayetteville State University* (hereinafter, the *Policies*). Section VA. provides that the decision not to reappoint may not be based upon the following:

1. the faculty member's exercise of rights guaranteed by either the First Amendment to the United States Constitution or Article I of the North Carolina Constitution;
2. discrimination based upon the faculty member's race, gender, religion, age, national origin, disability as defined by law, or honorable service in the armed services of the United States, or
3. personal malice.

Section IIIG.4. of the *Policies* details the process to be followed when a decision not to reappoint upon the expiration of a probationary term is made.

D. The Burden and Standard of Proof

Unlike dismissal or the imposition of other serious sanctions, the faculty member has no constitutionally protected expectation of reappointment or tenure. Thus, the burden of proof in non-reappointment cases rests with the Petitioner and not with the Respondent. The hearing begins with the presumption that the non-reappointment decision was properly made. That presumption continues unless and until the HRC is satisfied that the Petitioner has proven otherwise.

The standard of proof, i.e., the degree of proof required, is proof by a preponderance of the evidence. This means that the Petitioner must prove that his or her allegations of impropriety are more likely true than not true. The HRC determines whether this burden of proof has been met by weighing all of the evidence and the demeanor and credibility of the witnesses, in the light of experience and common sense judgments.

E. Pre-Hearing Procedures

1. Interviews with Administrators/Committee Coordinator

A formal request for a hearing may only be filed after the faculty member, in accordance with Section V.B and C of the *Policies*, has had interviews with administrators/committee coordinators who made the initial and final decision not to reappoint.

2. Written Request for a Hearing

A formal request for a hearing shall be written and addressed to the chairman of the HRC. The request shall specify the following:

- a. the grounds upon which the Petitioner contends that the decision was impermissibly based and a brief statement of facts that the Petitioner believes supports the contention;
- b. the identity of all parties against whom the charge is filed; and,

- c. a statement that members of the HRC may examine documents submitted by the parties from the Petitioner's personnel files.

3. Initial Evaluation of Written Request from Petitioner

Upon receiving a written request for a hearing from the Petitioner and verifying that the required interviews have been held, the HRC shall consider the request and grant a hearing only if it determines that the written request specifies the grounds upon which the Petitioner contends that the decision was impermissibly based. A copy of the written request must be sent to all parties against whom the grievance is filed by the Petitioner, by certified mail or by another means that provides proof of delivery.

4. Decision by HRC Whether to Grant Request for Hearing

- a. The request for a hearing will be granted if the HRC determines that the request contains a contention that the decision was impermissibly based and the facts suggested, if established, will support the contention. This is determined by a majority vote. If the request is granted, a hearing shall be scheduled to be held within twenty (20) days³ after the request was received by the HRC chair. The Petitioner and the Respondent shall be given at least ten (10) days' notice of the hearing and each will be sent a copy of these procedures. The HRC chair may seek agreement from the Petitioner and Respondent to extend these time limits if the limits are viewed as impractical.
- b. A denial of the request for a hearing confirms the decision not to reappoint. The HRC chair shall write a simple statement to the Petitioner indicating that the Petitioner's request for a hearing has been denied. A copy of that letter shall be sent to the Respondent.

5. Arrangements for Court Reporter and Transcript

If a decision is made to grant the Petitioner a hearing, the HRC chair shall contact the Office of Legal Affairs to arrange for the hiring and payment of a court reporter. The court reporter shall make a verbatim record of the hearing. Either of the parties desiring a transcript may obtain one by making a request to the Office of Legal Affairs.

6. Notification of Attendance by a Representative or Attorney

Although active participation by legal counsel during the hearing is not allowed, the Petitioner and the Respondent may each be accompanied by a third-party observer. A third-party observer may be an attorney; however, the attorney may not participate actively in the hearing process. No later than fifteen (15) days prior to the hearing, Petitioner shall notify the HRC chair, Respondent and the university's Legal Counsel of the Petitioner's intent to be accompanied by legal counsel. If Petitioner intends to be accompanied by legal counsel, the University may elect to obtain counsel to represent Respondent and may request a reasonable continuance of the hearing date for that purpose.

³ As used with these procedures, days shall mean calendar days.

Upon request by the chair of the HRC, the Office of Legal Affairs shall obtain counsel to provide procedural advice to the HRC. Any attorney who assists the HRC may not discuss the merits of the case with any party, observer, or other attorney and shall not act as an advocate for or against any party when advising the committee on procedures.

7. Witnesses and Exhibits

- a. In the spirit of avoiding unfair surprise, and to facilitate the hearing process, the parties shall provide a list of witnesses and copies of exhibits they intend to introduce at the hearing, to each other, and to the HRC chair, at least five (5) days prior to the date set for the hearing. No evidence shall be provided to the HRC (except the chair) prior to the hearing.
- b. If a party wishes to introduce exhibits at the hearing that were not included in the pre-hearing exchange, the HRC chair shall decide whether there is a good reason for accepting such evidence.
- c. Exhibits must be numbered sequentially and identified by party; e.g., Petitioner's Exhibit No. 1, Respondent's Exhibit No. 3, or Committee's Exhibit No. 5. The exhibit numbers shall be written on the exhibits and page numbered at the time they are first presented to the HRC. References to documents during the hearing shall be by exhibit number with page references as applicable.
- d. The HRC has no authority to compel the attendance of witnesses. However, the chair of the HRC may request that the Chancellor ensure that all witnesses who are employees of the university are given permission to attend the hearing.

F. The Hearing

1. Call to order-Quorum

The chair of the HRC shall call the hearing to order, determine whether a quorum exists, and explain the hearing process. A quorum consists of a simple majority of the total HRC membership.

2. Challenge to HRC Membership

Committee members who hold an appointment in the Petitioner's department, who will testify as witnesses, or who have any other conflict of interest, are disqualified from participating in the hearing. Following the call to order, each party will be given an opportunity to challenge an HRC member's qualifications to serve. The HRC (excluding the HRC member under challenge) will decide whether to grant or deny that challenge based on a majority vote.

3. Opening Remarks

Starting with the Petitioner, each party will be given the opportunity to make opening remarks limited to five (5) minutes each. The purpose of opening

remarks is to orient the HRC to the nature of the case and to the facts the parties intend to establish. Opening remarks shall not be considered evidence.

4. Petitioner's Case in Chief

At the conclusion of opening remarks, the Petitioner shall present evidence (witnesses, documents, his or her own testimony, etc.) in support of his or her allegation(s). All witnesses may be questioned by members of the HRC, the Petitioner and the Respondent. Except under extraordinary circumstances, Petitioner will be limited to a total of three (3) hours to present his or her case. Petitioner may reserve a portion of those three (3) hours for rebuttal at the conclusion of Respondent's evidence. If the Petitioner wishes to reserve rebuttal time, Petitioner must notify the HRC chair of that fact at the beginning of the hearing.

5. Determination of Whether a Prima Facie Case has been Presented

After the Petitioner concludes his or her presentation, the HRC will recess the hearing and withdraw into closed session to determine whether Petitioner has established a prima facie case. A prima facie case is established if the Petitioner's evidence, standing without rebuttal and with the most reasonably favorable inferences to be drawn, proves his or her contention. The HRC's decision shall be by majority vote. If the HRC determines that the Petitioner has not established a prima facie case, the HRC chair shall orally notify the parties of that decision and thereby end the hearing. The decision that a prima facie case has not been established confirms the decision not to reappoint. The HRC chair shall notify both parties of the decision. If the HRC determines that Petitioner has established a prima facie case, it will resume the hearing.

6. Respondent's Case

The Respondent may present evidence (witnesses, documents, his or her own testimony, etc.) in support of the decision not to reappoint. All of Respondent's witnesses may be questioned by members of the Committee, the Respondent and the Petitioner. Except under extraordinary circumstances, Respondent will be limited to a total of three (3) hours to present his or her response.

7. Petitioner's Case in Rebuttal

At the close of Respondent's case, the Petitioner may submit evidence which rebuts the Respondent's evidence. The Petitioner shall not be allowed to present evidence outside of the evidence presented by Respondent at the hearing.

8. Closing Remarks

At the conclusion of all the evidence, Petitioner may make closing remarks to the HRC, followed by the closing remarks of Respondent. Closing remarks shall not exceed fifteen (15) minutes each.

9. Committee Deliberations and Decision

After closing remarks are concluded, the chair shall conclude the hearing and the HRC shall withdraw into closed session. If the HRC prefers to review the written transcript, the chair will adjourn the hearing and reconvene the HRC after the transcript becomes available, otherwise, the HRC may begin its deliberations immediately. The HRC's decision shall be by majority vote. The Petitioner bears the burden of proving, by a preponderance of the evidence, his or her contention that the non-reappointment decision was impermissibly based.

II. POST-HEARING PROCEDURES

If the HRC determines that the Petitioner's contention(s) have not been established, it shall, by a simple unelaborated statement, so notify the Petitioner and Respondent. Such a determination confirms the decision not to reappoint. Such notice shall be sent no later than ten (10) days following the hearing or ten (10) days following the receipt of the written transcript.

If the HRC determines that the faculty member's contention has been satisfactorily established, it shall submit a report to the chancellor containing the committee's findings and recommendation and what it considers to be appropriate action by the chancellor to resolve the matter. The report shall be submitted to the chancellor no later than ten (10) days following the hearing or ten (10) days following the receipt of the written transcript.