

## **Overview of the process in a Regents' Bylaws 5.09 hearing conducted under Section 5**

**(Approved by SACUA, September 21, 2009)**

The primary role of SACUA in Regents' Bylaws (RB) 5.09 hearings is to ensure:

- (i) That the hearings are fair to all parties;
- (ii) That the procedures set forth in 5.09 are followed;
- (ii) That the hearing committee has an appropriate charge and understands the issues before it, the options it has and the level of proof required for a recommendation of dismissal or demotion.

SACUA does not make a determination on the factual issues underlying a 5.09 case; decisions as to the factual culpability of the faculty member are left to the Tenure Committee. SACUA comments on the proceedings and decisions of the Tenure Committee before transmitting them to the President. SACUA may remand the case back to the Tenure Committee on the basis of procedural error before transmitting the decision to the President. SACUA may also conduct a hearing for the purpose of determining whether the Tenure Committee provided a fair hearing and followed the procedures set forth in RB 5.09.

In this regard it is noted that there may be more inherent due process under Section 5 of RB 5.09 than under Section 4, because Executive Committees of Colleges don't have a separate oversight committee.<sup>1</sup> All 5.09 hearings, proceedings and documents should be treated in confidence by SACUA and the Tenure Committee.

### **Initial Process**

Under Section 3, the President consults with SACUA about whether a particular case should be handled under Section 4 or Section 5. When the President initiates this consultation, the entire body of SACUA should be given copies of all initiating documents provided to SACUA by the President before making a recommendation to the President.

If the 5.09 hearing is referred to the Tenure Committee, SACUA should approve a charge to the committee that clearly states:

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<sup>1</sup> Note that under both Section 4 and Section 5, a faculty member may appeal to SACUA with any procedural concerns about the hearing conducted by the Executive Committee (under Section 4) or the Tenure Committee (under Section 5). However, decisions are rendered to the executive authority before appeals are made, and there is no automatic oversight of the process by SACUA.

- i) The grounds for which a recommendation of dismissal or demotion would be consistent with the faculty perspective of academic freedom. 5.09 specifies that “[i]f dismissal, demotion, or terminal appointment is recommended, the report shall contain a specific statement of the conduct on which the recommendation is based.”
- ii) The standard of proof required for a finding of culpability. In particular, this should reflect the AAUP standard of "clear and convincing" proof for all facts bearing on the Tenure Committee’s recommendation.
- iii) A list of possible recommendations that the Tenure Committee may make. These may include recommendations to take no further action, to dismiss, to demote, or to impose other sanctions.
- iv) Specific questions that must be answered by the Tenure Committee in their report back to SACUA.

In those cases where the faculty member has retained an attorney to represent him or her in the 5.09 proceedings, the Office of the General Counsel will represent the administration during the proceedings. In these cases, the University should hire an external attorney who will advise SACUA and the Tenure Committee on matters of process and procedure (*i.e.*, not on the substance of any alleged conduct by the faculty member). The University should provide the resources to provide a hearing transcript.

### **Tenure Committee**

The Tenure Committee’s role is that of an academic committee comprised of peers charged with 1) the factual investigation of serious accusations affecting the status of tenure at the University<sup>2</sup> and 2) the issuance of a report with the conclusions, recommendations, and reasons therefore arising from its investigation. Therefore, all of the normal outcomes of such an academic report might, or might not, result. These could include, but are not limited to, the recording of a vote tally, the issuance of a minority report, and the like.

The Tenure Committee can develop its own rules of procedure. These may vary depending on the particular case, but both parties, or their attorneys, should be allowed to develop questions to clarify the rules of procedure before the proceedings. The procedures must afford due process, and a transcript of the hearings must be made. The Tenure Committee may encourage both sides, or their attorneys, to submit stipulations of fact before the hearing. The Tenure

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<sup>2</sup> Note that in certain circumstances, a faculty member without tenure could fall within the ambit of RB 5.09.

Committee will decide questions of fact, and should recognize that earlier investigations may not have been conducted with the benefit of legal advice. The affected faculty member and his or her representative have the right to be in the room at all times during the formal hearings, but not during deliberations or discussions at which only members of the Tenure Committee are present. The Dean may also be present or be represented at all times during the formal hearings, and may make recommendations to the Tenure Committee. These become part of the Tenure Committee's record in the case.

The following recommendations were developed from guidelines established by the Tenure Committee in 2008.

1. *The attorneys for both parties have the right to make opening and closing statements to the Committee at the hearing.*
2. *The administration will present its witnesses first, followed by witnesses called by the affected faculty member. Both sides have the right to cross-examine witnesses called by the other side, and both sides have the right to recall witnesses or call new witnesses for the purpose of rebuttal. The Committee may also question witnesses.*
3. *The attorneys for both sides should discuss the identity of witnesses expected to testify and the scope of their testimony with the Committee before the formal hearing.*
4. *All witnesses should be asked to affirm the truthfulness of their statements. This means that the court reporter present to make a transcript of the hearing will ask each witness to swear or affirm that the testimony given will be the truth at the hearing.*
5. *The hearing should be confidential and attended only by those whose presence is required or explicitly permitted by Bylaw 5.09.*
6. *The Committee may allow the presentation and consideration of hearsay evidence. but will carefully determine what weight to accord it.*
7. *Other than for their own testimony, no witnesses will be allowed in the hearing room during the proceedings. No advisor or support person of any witness is allowed in the room when a witness gives testimony. (This does not apply to the Dean or affected faculty member.)*

*Regents' Bylaw 5.09(5)(b) specifies that "[t]he affected faculty member may...call [and] examine...witnesses...and...examine...all documentary evidence received by the hearing committee." In addition, if any witness declines to testify about any issue, the Tenure Committee may draw conclusions about the probable content of that testimony based on the refusal to testify.*

## **Final Process**

After the Tenure Committee has written its report, it shall forward the report plus the complete written record in the case (including the hearing transcript) to SACUA. If any sanctions are recommended, the report must contain a specific statement of the conduct on which the recommendation is based.

A copy of the transcript will be provided to the University official handling the case and to the affected faculty member.

If the Tenure Committee's report is not adverse to the affected faculty member, SACUA will discuss the case prior to forwarding it on.

If the Tenure Committee's report is adverse to the affected faculty member, SACUA will advise him/her that s/he can request a review of the proceedings within ten days by filing a written request with the Chair of SACUA.

After ten days, SACUA will discuss the fairness of the proceedings. This will be done even in the absence of a formal request from the affected faculty member. Issues of clarification may be requested from the Tenure Committee. SACUA's discussion may involve a review hearing (as provided for in 5.09) for the purposes of determining whether the Tenure Committee granted a fair hearing and whether the procedures set forth in 5.09 were followed. A transcript will be taken of this review hearing.

If SACUA determines that the hearing was not fair, or did not follow established procedures, it will set aside the Tenure Committee's findings and conclusions, and remand the case back to the Tenure Committee for a new hearing. A written report of the action taken by SACUA, together with a written record of the review proceedings will be filed with the affected faculty member, the President, Provost and appropriate Dean.

In the following circumstances, SACUA will forward the report of the Tenure Committee and the complete written record in the case, including hearing transcript(s), to the affected faculty member, the President, the Provost and the appropriate Dean:

1. The Tenure Committee's report is not adverse to the affected faculty member;
2. The Tenure Committee's report is adverse to the affected faculty member and SACUA determines that the hearing was fair and followed established procedures either based on its own review, or in response to a request for review by the affected faculty member.

3. SACUA remands a case to the Tenure Committee to correct a procedural error, and a second Tenure Committee report meets one of the two immediately preceding criteria.

SACUA may include comments on the case when forwarding the report to the President.