
INTEROFFICE MEMORANDUM

TO: MEMBERS OF FACULTY SENATE
FROM: MEMBERS OF FACULTY SENATE SUBCOMMITTEE – TENURE TERMINATION
SUBJECT: TBR VS ETSU TENURE TERMINATION POLICIES
DATE: NOVEMBER 5, 2014

Dear Members of Faculty Senate:

The purpose of this memo is to update members of the ETSU Faculty Senate the results of Faculty Senate's Subcommittee on Tenure Termination ("Subcommittee") review of the existing tenure termination policies and procedures of TBR versus ETSU. It is the recommendation of the Subcommittee the following items be implemented by ETSU going forward for all tenure termination proceedings to insure compliance with TBR mandated guidelines as well as mitigate potential unnecessary litigation against ETSU.

Subcommittee source documents are attached to this memo. The source documents include the following:

1. Published TBR policy and guidelines for the termination of tenured faculty.
2. Published ETSU policy and guidelines for the termination of tenured faculty.

Subcommittee Recommendations based on variance of TBR & ETSU policies and procedures:

1. Attorney Representation at Hearing Committee – ETSU must comply with TBR policy

TBR policies and procedures for "Termination for Adequate Cause" via subsection 1(b)(2) regarding suspension of a tenured faculty member as well as subsection 8(a) regarding the Tenure Termination Hearing Committee clearly states the faculty member "will be permitted to have an academic advisor and may be **represented** by legal counsel of his/her choice". ETSU policies and procedures state "During the proceedings the faculty member will be permitted to have an advisor and/or counsel of his or her choice. This advisor or counselor may be present during the hearing but may not participate." The ETSU policy is in direct contradiction to the clear language spelled out by TBR that a faculty member "may be **represented** by legal counsel of his/her choice". ETSU policies and procedures restrict a right conveyed to tenured faculty members by TBR. Present ETSU policies and procedures may create more harm to ETSU rather than help, as the ETSU restriction is more than likely a violation of a party's fundamental constitutional right.

2. Pre-Hearing Discovery – ETSU must comply with TBR policy

TBR policies and procedures for "Termination for Adequate Cause" via subsection 7 permits a Pre-Hearing prior to the formal Hearing Committee to discuss the upcoming Hearing Committee procedures as well as discovery of evidence. Subsection 7 states "The chairperson of the hearing committee may in his/her discretion require a joint prehearing conference with the parties which may be held in person or by a conference telephone call."

ETSU policies and procedures state "The hearing committee may, with the consent of the parties concerned, hold joint pre-hearing meetings with the parties to define and clarify the issues, effect stipulations of facts, provide for the exchange of documentary or other information, and achieve such other appropriate pre-hearing objectives as will make the hearing fair, effective, and expeditious."

In light of the contradiction between TBR and ETSU policy it is the recommendation of the Subcommittee ETSU recommends ETSU policy be modified to state "The Hearing Committee *will at the request of the faculty member concerned...*"

3. Appeal of President's decision to terminate faculty member when Hearing Committee recommended any result other than termination

TBR policies and procedures for "Termination for Adequate Cause" via subsection 9 states "After consideration of the committee's report and the record, the president may in his/her discretion consult with the faculty member prior to reaching a final decision regarding termination. Following his/her review, the president shall notify the faculty member of his/her decision, which, if contrary to the committee's recommendation shall be accompanied by a statement of the reasons. If the faculty member is terminated or suspended as a result of the

president's decision, the faculty member may appeal the president's action to the Chancellor pursuant to TBR Policy 1:02:11:00. Review of the appeal shall be based upon the record of hearing. If upon review of the record, the Chancellor notes objections regarding the termination and/or its proceedings, the matter will be returned to the president for reconsideration, taking into account the stated objections, and, at the discretion of the president, the case may be returned to the hearing committee for further proceedings”.

Current published ETSU policies and procedures state “If the hearing committee concludes that adequate cause for dismissal has not been established by the evidence in the record, it will so report to the president, who may reject the report with a written statement of reasons. Any decision by the president may be appealed to the Board within twenty calendar days of the decision pursuant to the following subsection: (a) If dismissal or other severe sanction is recommended, the president will, on request of the faculty member, transmit to the chancellor the record of the case. The review of the record by the Board or its designee will be based on the record of the committee hearing, and will provide for written argument by the principals or by their representatives. The decision of the president will either be sustained, or the proceeding returned to the president with specific objections. The president will then reconsider, taking into account the stated objections, and return the case to the hearing committee if necessary. The Board or its designee will make a final decision only after study of the president's reconsideration.”

ETSU policies and procedures must comply with TBR policy. Standing ETSU policy restricts an appeal right TBR conveyed to tenured faculty members by limiting the appeal of the President's termination decision over Hearing Committee findings to the ETSU Board. Based on the composition of the ETSU Board versus the Chancellor, ETSU policy and procedure may create potential litigation claim against ETSU for failing to follow proper due process procedures.

4. TBR policies and procedures subsection 8(h) & 8(i)

TBR policies and procedures for “Termination for Adequate Cause” via subsection 8(h) states “The findings of fact and the report will be based solely on the hearing record.” In addition, subsection 8(i) states “The president and the faculty member will be provided a copy of the written committee report. The committee's written report shall specify findings of fact and shall state whether the committee has determined that adequate cause for termination exists and, if so, the specific grounds for termination found. In addition, the committee may recommend action less than dismissal. The report shall also specify any applicable policy the committee considered.”

ETSU policies and procedures must comply with TBR policy. ETSU policies and procedures does not contain TBR subsection 8(h) nor 8(i) in its prevailing format.

5. TBR mandated timing notice of Affidavits

TBR policies and procedures for “Termination for Adequate Cause” via subsection 8(e) states “The faculty member and the administration will have the right to confront and cross examine all witnesses. Where the witnesses cannot or will not appear, but the committee determines that the interests of justice require admission of their statements, the committee will identify the witnesses, disclose their statements, and, if possible, provide for interrogatories. *An affidavit may be submitted in lieu of the personal appearance of a witness if the party offering the affidavit has provided a copy to the opposing party at least ten (10) days prior to the hearing and the opposing party has not objected to the admission of the affidavit in writing within seven (7) days after delivery of the affidavit or if the committee chairperson determines that the admission of the affidavit is necessary to ensure a just and fair decision.*”

ETSU policies and procedures regarding submission of an affidavit when a party is not available to be present states “The faculty member and the administration will have the right to confront and cross-examine all witnesses. Where the witnesses cannot or will not appear, but the committee determines that the interests of justice require admission of their statements, the committee will identify the witnesses, disclose their statements, and if possible provide for interrogatories.”

ETSU policies and procedures must comply with TBR policy. ETSU policy and procedures lacks TBR mandated opposing party notice regarding the use of affidavits (10 and 7 day rule).

6. TBR Pre-Hearing discovery of Witness List, Hearing Procedures and copy of Written Record Shared.

TBR policies and procedures for “Termination for Adequate Cause” via subsection 7 permits a Pre-Hearing prior to the formal Hearing Committee to discuss the upcoming Hearing Committee procedures as well as discovery of evidence. Subsection 7 states “The purpose of the pre-hearing conference should include but is not limited to one or more of the following: (a) As notification as to procedure for conduct of the hearing. (b) To exchange of witness lists, documentary evidence, and affidavits. (c) To define and clarify issues. (d) To effect stipulations of fact. A written memorandum of the pre-hearing conference should be prepared and provided to

each party.”

ETSU policies and procedures state “The hearing committee may, with the consent of the parties concerned, hold joint pre-hearing meetings with the parties to define and clarify the issues, effect stipulations of facts, provide for the exchange of documentary or other information, and achieve such other appropriate pre-hearing objectives as will make the hearing fair, effective, and expeditious.”

ETSU policies and procedures must comply with TBR policy. Standing policy language excludes the exchange of witness list, notification of hearing procedures as well as written record of the Pre-Hearing meeting being shared with all parties. It is the recommendation of the Subcommittee ETSU comply with existing TBR policy.

Subcommittee Recommendations based on transparent proceedings to avoid future litigation by parties involved.

1. Historical Record of Prehearings, Hearings, Hearing Committee procedural instructions as well as recommendations be recorded going forward and made available for future tenured faculty members facing termination.
2. Consistent and static procedural rules from notice of pending termination, prehearing meetings and hearing meetings. By publishing a transparent process and policy regarding tenure termination process, potential terminated faculty members can make an informed decision regarding resignation or pursuit of a hearing. In addition, potential Hearing Committee members would be afforded the opportunity to prepare prior to accepting the Committee appointment as well as prepare for their Committee duties.
3. While TBR and ETSU policy require notice of at least 20 days prior to the Hearing Committee to the tenured faculty member facing termination the TBR and ETSU policy is ambiguous and may be construed to require 20 days prior notice to the Pre-Hearing meeting. Under current guidelines, potential litigation may arise from this time discrepancy. Since the Pre-Hearing meeting is elective by the tenured faculty member facing termination, it may be advantageous to ETSU to indicate the 20 days prior notice stipulation starts when the tenured faculty member facing termination waives his/her right to the Pre-Hearing meeting or at the conclusion of the Pre-Hearing meeting.