

# APPENDIX N: OMBUDS AND FACULTY HEARING COMMITTEE

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## I. Purpose

The university, with the concurrence of the Academic Council, has established the position of ombuds and the Faculty Hearing Committee (FHC) to facilitate prompt and equitable resolution of allegations by faculty members and instructional staff that there has been a violation of either:

- A. the university's policy concerning academic freedom and academic tenure as set forth in Appendix C of this handbook; or
- B. the university's policy of equal treatment in employment, without regard to race, color, religion, national origin, disability, veteran status, sexual orientation, gender identity, sex, genetic information, or age.

The ombuds and the FHC shall function in accordance with the procedures below.

## II. Selection

- A. The Ombuds. The ombuds shall be appointed for a term of two years by the Academic Council from the number of active or recently retired members of the faculty. The appointment may be renewed. The ombuds shall report directly to the president of Duke University who shall appropriately compensate the ombuds and provide reasonable support services.
- B. The Faculty Hearing Committee
  1. The committee shall consist of twelve tenured faculty members, nominated by the Executive Committee of the Academic Council and elected by the council at large. In its nominations the Executive Committee shall seek to present a reasonable representation of the university's academic community. The Executive Committee shall appoint one member of the FHC to act as chair.
  2. Committee members shall serve for three-year terms, with four being elected to full terms each year and others elected to one-year or two-year terms to fill vacancies or to begin the practice of election to three-year terms, and may be reelected. No person shall serve more than six consecutive years. Retiring members shall nonetheless conclude the cases pending before them at the time of the expiration of their terms. Vacancies arising during an academic year may be filled by appointment by the Executive Committee of the Academic Council until the next regular election of FHC members.

## III. Jurisdiction

- A. The ombuds and the FHC shall have jurisdiction to consider complaints from faculty and instructional staff concerning one or more of the following matters:
  1. Dismissal for misconduct or neglect of duty;
  2. Termination of appointment prior to its expiration date;
  3. Disputed claims by a faculty member to the existence of tenure;
  4. Allegations of violation of academic freedom;
  5. Allegations of violation of academic due process with respect to an adverse employment or disciplinary action, including allegations of biased or prejudiced conduct by a decision-maker of a substantial nature that likely had a material impact on the outcome of the proceedings;
  6. Allegations of adverse employment action involving discrimination on the basis of race, color, religion, national origin, disability, veteran status, sexual orientation, gender identity, sex, genetic information, or age. Adverse employment actions include actions with respect to

the member's rank, salary, fringe benefits, sabbatical and other leaves with or without compensation, workload or work assignment, promotion, tenure, and extension or termination of employment.

7. Allegations of damaging instances of harassment directed against the complainant by other members of the university community after failure of a university officer or agency to resolve the matter.
8. Appeals from the findings by a harassment grievance hearing panel or the decision by a responsible official based on such findings.

Complaints of discrimination or harassment, including those based on race, color, religion, national origin, disability, veteran status, sexual orientation, gender identity, sex, genetic information, or age, may also be filed with the Office for Institutional Equity or, where the alleged misconduct is by a student, with the Office of Student Conduct.

B.

1. The jurisdiction of the ombuds and the FHC contained in Paragraph III.A.5. above refers to procedural rather than substantive issues.
2. While the ombuds may, at any stage, consider complaints, advise, and attempt conciliation, the FHC shall consider complaints only when university action is otherwise complete.
3. In any of the above causes for complaint, failure to act may be considered an action.

IV. Procedures

A. The Ombuds.

The purpose of the ombuds is to receive complaints from members of the faculty and instructional staff, to investigate those complaints, and to attempt to resolve the complaints through conciliation.

1. The ombuds shall be available to consult with potential complainants and to answer questions about how properly to file a complaint.
2. Complaints and all supporting evidence shall be in writing. The ombuds may reject any complaint that does not adequately identify the nature of the complaint, the evidence to support the allegations, and the evidence to show a good faith attempt to resolve the complaint. The ombuds shall reject any complaint that has been the subject of a previous proceeding, unless significant new facts are presented. The ombuds will consult the Vice President for Institutional Equity on all complaints concerning discrimination, including those cases where the complaint concerns issues of an academic nature (e.g., tenure, reappointment, teaching schedule, or the like), but where there is an allegation of underlying discrimination. The ombuds, upon request, shall have total access to such university records, accounts, files, and other sources of information as may be pertinent to the complaint or respondent's reply.
3. The complaint shall be filed with the ombuds as soon as possible after the occurrence of the action that is the subject of the complaint. The complaint shall:
  - a. Identify the complainant and the respondent;
  - b. State the action(s) complained of and whether all action is considered complete or still in process;
  - c. Specify the nature of the complaint;
  - d. Identify all efforts by the complainant to resolve the dispute;
  - e. Propose a desired remedy;
  - f. Include such attachments, exhibits, and statements in support of the complaint as can reasonably be included;
  - g. Name any persons thought contributory to decisive action who are also to be considered hostile toward or biased against the complainant.
4. In cases involving dismissal or termination, the respondent is the president or the president's designate. In other cases the respondent designated by the ombuds will usually be the chair of the department in which the complainant is a member, unless the action complained of was taken despite a departmental recommendation favorable to the complainant, in which case the committee chair or individual responsible for the adverse action is the respondent. Where there has been no department recommendation, the ombuds will designate the individual or

committee who is the respondent. Complaints shall be brought by individuals and not on behalf of a class.

5. The ombuds has sixty days from the filing of a complaint within which to investigate the complaint and, if appropriate, attempt conciliation. After receiving a written complaint and undertaking any necessary preliminary investigation, the ombuds is to consult with the chair of the FHC or designee to determine the most suitable means of dealing with the case, which may include but are not limited to deciding that neither further investigation nor conciliation is warranted; that further investigation would be warranted, with or without attempted conciliation; and that conciliation should be attempted. Whether conciliation is not attempted or is attempted and fails, the ombuds shall so notify the complainant and also inform the complainant of the right to seek redress from the FHC.
  6. When attempting conciliation, the ombuds shall confer and discuss the complaint with appropriate academic officers and submit to them, orally or in written form, any relevant facts and recommendations.
  7. If conciliation is not attempted or is attempted and fails and the complainant seeks redress from the FHC, the ombuds shall prepare and forward to the FHC a summary of relevant facts, identifying the respondent considered most appropriate, together with any additional subsidiary respondents named in IV.A.3.g. The ombuds shall append to this factual report a copy of the complaint and any other relevant documents.
  8. Except as called for in IV.A.7. above, or required by law, the ombuds shall not disclose information of a private or confidential nature obtained in the course of these proceedings.
- B. The Faculty Hearing Committee
1. Upon receipt of a report from the ombuds, the chair of the FHC may require written response to the grievance from any or all respondents named, and additional written submissions from either party, to focus the area of disagreement between the parties. Failure of timely response shall be grounds for finding against the non-responsive party. When the president is a respondent, and is represented by a non-responding representative, the president shall have reasonable opportunity to name another representative.
  2.
    - a. If the chair of the FHC considers that a complaint falls within the jurisdiction of the FHC, as specified in section III above, the chair of the FHC shall appoint a panel to conduct a hearing (if the panel decides that a hearing is necessary), to prepare a report, and to make recommendations. If the chair of the FHC considers that jurisdiction is in question, that question shall be decided in a meeting with at least two other members of the FHC. If there is a finding of jurisdiction, the chair shall appoint a panel to conduct a hearing (if the panel decides that a hearing is necessary), to prepare a report, and to make recommendations. If the finding is that the complaint is not within FHC jurisdiction the chair shall report that conclusion of the complaint to the complainant. To the extent possible, panels shall be drawn from the current members of the FHC, and it is advisable that at least one member of each panel be trained in law. The chair of the FHC shall notify both parties of the names of the panel members. Either party may challenge a panel member on grounds of personal interest or bias. If the chair agrees that a challenge is appropriate, the chair shall appoint a replacement panel member. The chair shall designate one of the panel members to act as presiding officer. The chair shall notify the complainant and the respondent of the membership of the panel and of the presiding officer.
    - b. Except in cases of denial of tenure or denial of reappointment, where panels should include five members, the chair of the FHC has discretion, after notifying both parties and considering any objections, to name panels of only three members in cases where time available, work loads, and FHC member availability make it necessary. Former FHC members may also be appointed in cases of such necessity.
  3.
    - a. If a panel deems a hearing necessary, it shall be held as expeditiously as possible at a time and place mutually agreeable to the hearing panel, the complainant, and the respondents. In case of dispute, the presiding officer shall set the time and place.

- b. The hearing shall be conducted in private unless the complainant and respondents both/all agree otherwise. The president, provost, or health affairs chancellor, if a party, shall have the option of attending the hearing, and may also designate an appropriate representative, who shall not be trained in law, and shall not be anyone designated a respondent under IV.A.3.g., to develop the case before the panel. Neither party may have an attorney present at the hearing to serve as an advisor. Advisors may be present but may not take an active part in the hearing nor be someone with a law degree. The presiding officer shall be responsible for maintaining decorum, assuring that the parties have a reasonable opportunity to present relevant oral and documentary evidence, determining the order of procedure, and making all procedural decisions. The hearing need not be conducted strictly in accordance with rules of evidence, but the presiding officer may exclude irrelevant evidence.
  - c. During the hearing, each party shall have the right, within reasonable limits set by the hearing panel, to:
    - (1) Call, examine, and cross-examine witnesses;
    - (2) Introduce exhibits;
    - (3) Rebut any evidence. If the complainant has difficulty securing the attendance of witnesses to testify on the complainant's behalf, the university administration shall assist by requesting such witnesses to appear.  
All evidence, written and oral, shall be recorded by a means furnished by the university.
  - d. A panel may hold sessions involving just the panel and the parties, in order to hear arguments and rulings germane to further hearing sessions.
  - e. The complainant shall have the right to confront at the hearing all witnesses or other persons the complainant considers adverse, including those named in IV.A.3.g above, as subsidiary respondents, except as provided herein. Where unusual and urgent reasons move the hearing panel to permit the introduction of particular testimony taken outside of the hearing, the identity of each such outside witness, as well as the statements taken outside, should be disclosed to the complainant. Subject to these safeguards, statements may, when necessary, be taken outside of, and reported at, the hearing.
  - f. In cases involving dismissal for misconduct or neglect of duty or in the case of termination of an appointment prior to its expiration date, the burden shall be upon the president or the president's representative to prove by a preponderance of the evidence the existence of misconduct or neglect of duty justifying dismissal or termination. In all other cases, the burden shall be on the complainant to prove by a preponderance of the evidence that the action complained of involved a violation of university policy.
  - g. The hearing panel, upon request, shall have total access to such university records, accounts, files, and other sources of information as may be pertinent to the complaint or respondent's reply. Where considerations of privacy or confidentiality are asserted, however, the FHC chair or panel, after consultation with university counsel, shall first review the requested materials to assure that substantial equivalent information is not available by other means that do not involve considerations of privacy or of confidentiality.
  - h. The hearing panel and the parties shall not disclose information of a private or confidential nature obtained in the course of these proceedings, except as directed in IV.B.4. below, or where required by law.
4. Findings and Recommendations
- a. Except in demonstrated extraordinary circumstances, the hearing panel shall have ninety days from the time the panel is constituted in which to prepare a report of its findings and recommendations. The report shall be by majority vote and shall be based on the ombuds's report and any evidence presented at the hearing. The report shall include the panel's findings of fact and its conclusions.
  - b. The presiding officer shall send notice of the findings and recommendations of the hearing panel to the parties, the ombuds, the chair of the FHC, the chair of the Academic Council, the Vice President for Institutional Equity, and the provost or the health affairs

- chancellor as appropriate. If the provost or the health affairs chancellor is also a respondent, the report shall be sent directly to the president.
- c. If due process is found to have been violated in a decision not to renew a term appointment, grant tenure, or promote in rank, the hearing panel may request that the decision be reconsidered, along with recommended procedures. The provost or health affairs chancellor, as appropriate, may request that the FHC modify or amend its request for reconsideration or recommendation of procedures in instances where effectuation of the FHC panel decision is seen as imprudent, impractical, or unnecessarily repetitious. The provost or health affairs chancellor, as appropriate, shall implement the FHC recommendation unless he or she determines that it is outside the jurisdiction of the FHC; that it is not supported by substantial evidence, is clearly erroneous, or violates fundamental university policy; or that other extraordinary and unusual circumstances require non-implementation. The provost or health affairs chancellor, as appropriate, must state in writing the reasons for not implementing the FHC recommendation and refer the matter to the president. The faculty member and the FHC shall be informed of the action of the provost or health affairs chancellor and given the opportunity, if they wish, to present reasons why the FHC recommendations should be accepted.
  - d. In all cases within its jurisdiction, except those cases enumerated in subparagraph c immediately above, the FHC may recommend any remedy not inconsistent with university policy.
5. Appeals
- a. Decisions of FHC panels in the further class of cases involving disputed claims by a faculty member to the existence of tenure, involving academic freedom, involving dismissal for misconduct or neglect of duty, or involving termination of an appointment prior to its expiration date are subject to review only by the Executive Committee of the Board of Trustees pursuant to the request of the complainant or respondent. Any such request for review must be made in writing and within ten business days after receipt of the FHC panel decision. If the Executive Committee wishes to consider taking action in the case, its review shall be based on the record of the hearing and the report of the ombuds, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or their representatives. The Executive Committee may also consult with the hearing panel. The Executive Committee may accept, reject, or modify the findings or recommendations of the FHC.
  - b. In cases involving allegations of academic due process:
    - (1) A complainant not satisfied with the findings and recommendations of the FHC may appeal in writing to the president within ten business days of receipt of the FHC report, giving reasons why he or she believes that the FHC erred and specifying what actions he or she believes the FHC should have recommended, except that in cases also covered by paragraph c. below the time for appeal in the aspect of the case coming under this paragraph b. shall be the same as for the aspect governed by paragraph c.
    - (2) If the provost or health affairs chancellor, as appropriate, does not wish to implement any or all of the FHC recommendations (for grounds of possible refusal, see paragraph IV.B.4.c), he or she must state in writing within ten business days of receipt of the FHC report the reasons why he or she believes that one or more of the grounds for refusal is applicable and refer the matter to the president.
    - (3) The appeal statement of a complainant, or the reference of a matter to the president by the provost or health affairs chancellor, with statement of reasons, shall be made available to the adverse party and to the FHC at the same time it is sent to the president. The adverse party and/or the FHC may within ten business days of receipt of the appeal or reference submit to the president reasons why the FHC's refusal to recommend relief should be upheld or the FHC's findings and recommendations accepted. The president shall respond within thirty days thereafter to the appeal or reference.
    - (4) A complainant not satisfied by the action of the president may by letter to the University Secretary request review by the Executive Committee of the Board of

Trustees within ten business days of notice of the president's decision. The Executive Committee may consider review under the terms and conditions defined in subparagraph a., immediately above.

- c. Decisions of the FHC in cases involving discrimination as defined in section III.A.6 above or harassment as defined in section III.A.7 or section III.A.8 above shall be submitted to the provost or health affairs chancellor, as appropriate, who shall decide within ten business days after receipt of the FHC decision whether to accept, reject, or modify the findings or recommendations of the hearing panel. The decision of the provost or health affairs chancellor may be appealed to the president by the respondent or complainant within ten business days after receipt of the decision. The president shall make a decision within thirty days of the request for review. The decision of the president may be reviewed by the Executive Committee of the Board of Trustees pursuant to the request of the complainant. Any such request for review must be made in writing and within ten business days after receipt of the decision by the president. The Executive Committee may consider review under the terms and conditions defined in subparagraph a., immediately above.
6. Records. A file in the office of the ombuds shall be maintained for retention of all records created pursuant to these procedures. The office of the Academic Council shall also seek and accept records arising from FHC chair and panel activities. Such records shall be kept in both custodies for at least three years.