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MEMO

To: All Members of the Faculty Association
Date: 20 May 2014
Subject: Arbitrator finds that the Board failed to comply with the Collective Agreement

In a decision received last week, the Arbitrator found that “the Board stepped outside the negotiated process for a tenure review and a teaching evaluation, and failed to comply with the rules of the Collective Agreement.” Further, he found that the Board “conflated what was a disciplinary or personnel process with an academic assessment process for tenure and, in so doing, fashioned a new context for an employment issue, previously addressed and resolved, constituting an unreasonable application of the Collective Agreement and an assessment which was unreliable on the evidence, or arbitrary.”

The Arbitrator ruled that the Member “be granted tenure effective July 1, 2013” ... and also direct[ed] that [the Member] “be given credit for any delay as may arise, or has arisen, for all purposes of promotion and sabbatical applications, or for any like matter under the Collective Agreement, so as to ensure [the Member] does not in any way suffer a penalty in salary or other benefits or be ‘one year behind’ in the pay scale or otherwise.”

This was an important decision for the Member involved, but also for all Members applying for tenure or promotion in the future, and potentially for our colleagues at other universities. This arbitration concerned who has the right to decide what goes into a tenure file, and the powers of the Board in relation to consideration of tenure.

As reported to you at FA meetings, the individual in this case received a positive recommendation for tenure from the DRC, the Dean, the URC Subcommittee, the URC, and the President. Further, as disclosed during the arbitration hearings, initially even the Human Resources Committee of the Board of Governors recommended the granting of tenure. A series of events then followed the HR Committee Meeting in late November 2012, leading to the final motion adopted by the Board at its October 2013 meeting to deny the tenure application. The Member was thus notified ten months after notification would normally be expected.

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What set in motion that series of events? A chance meeting in an airport between the Chair of the Board's HR Committee and a member of the Senior Administration, during which the latter disclosed information about the Member outside the tenure file.

This led to communications from the Chair of the Board to the Member and to the Dean requesting "additional information" -- information beyond the tenure application file. Further communications followed, including communications of which neither the Member nor the Association were aware until the arbitration hearings. At its May 2013 meeting, the Board then referred the tenure application back to the URC, with a request for the URC to re-evaluate and reconsider the tenure application file, "including all the additional information requested and received from the Dean ... , Interim Vice President Academic, and [the candidate]." The URC correctly "concluded that the process for consideration of files as outlined in the Collective Agreement had been followed and that considering additional information would fall outside the tenure decision-making process mandated by the collective agreement."

The Arbitrator clearly agreed. He wrote: "[The tenure review process] ... clearly demonstrates that the parties to collective bargaining ... have agreed upon what is not only a system and framework for tenure, but so too the criteria to be applied in determining a grant of tenure, or not, and the material(s) that will be considered, as well as the materials(s) that will not be considered." The Arbitrator ruled that the negotiated collective agreement does not provide for "specifics obtained by way of a conversation outside of the tenure review process, involving different levels of the administration of the university."

While accepting that the Board, as the Employer, has a right of oversight in the tenure review process, the Arbitrator wrote that "this right, however, is limited to ensuring that this process, 'the rules' of the parties' Agreement, are adhered to ... The University also cannot turn to general 'Conflict of Interest' or Purpose' provisions of the Collective Agreement, as urged upon me by it in argument, to avoid its negotiated obligation to follow the 'rules' for a tenure review, just as, I find, it cannot turn to alleged failures of ... a 'management representative' to uphold its denial of the tenure application ..."

The Association successfully argued that the Board violated the Member's rights under Article E2.2, which clearly stipulates the criteria to be used in tenure consideration and the relevant materials to be included in tenure files, and Article E2.6.1, which clearly specifies that it is the Member, not the Board of Governors, that has the right to decide what other pertinent information is included.

The collegial process as outlined in the Collective Agreement has been solidly confirmed.