

The Faculty Senate Hearing Committee's Reconsideration

April 2, 2021

For purposes of addressing the Ohio University Board of Trustees objections and request for further explanations, the Faculty Senate Hearing Committee refers to the Faculty Handbook, the Tenure Revocation Hearing [written transcripts]: Faculty Senate Proceedings, vol. 1 (pp. 1-340) and vol. 2 (pp. 341-716), and Procedures for Tenure Revocation Hearing.

Standard Used:

The standard of proof ("clear and convincing") is stipulated in the tenure hearing procedures generated by the Office of Legal Affairs several years ago and shared with the Faculty Senate. Prior to the hearing involving Professor Yusuf Kalyango's tenure revocation appeal, the University's legal counsel did not request an alteration to the written procedures, did not provide a revised hearing procedures document, and did not raise the issue of revising the written procedures until after the hearing committee submitted its report on December 29, 2020. Moreover, before the hearing took place on December 10 and 11, the Attorney General Office in consultation with the hearing committee chair did not recommend a change in the standard of proof as stipulated in the written procedures. The hearing committee chair relayed these facts to the University's General Counsel in a meeting between the two on February 10, 2021.

The Board of Trustees's March 1 memorandum refers to "cases" but does not specify the type of case. There are investigatory cases, for example, which precede the case for the loss of tenure and the subsequent appeal case. In cases involving the loss of tenure coming before a Faculty Senate tenure revocation hearing committee the clear and convincing standard, as already noted above, has been consistently used since the Office of Legal Affairs first generated the procedures document used herein. The earliest use found in the Faculty Senate records is 1990. In addition, when the newly formed University Professional Ethics Committees (UPEC) involving sexual misconduct were being organized, there does not appear to be any Faculty Senate record of a discussion or action taken toward changing the tenure revocation hearing procedures.

The hearing committee followed the hearing procedures described above with an understanding that they were hearing an appeal – and all the evidence submitted by each party - at its final stage before being sent to the Board of Trustees. Furthermore, the procedures guiding the hearing committee's role clearly stipulated, "At the hearing the burden of proof rests with the university. The standard of proof for the charges brought by the university as warranting the dismissal of the faculty member shall be "clear and convincing evidence." (Hearing Procedures, p. 1) The hearing committee members are familiar with the different standards of proof that might arise in an academic hearing. Additionally, members of the hearing committee have participated in trainings dealing with sexual harassment, sexual

misconduct, and/or sexual discrimination as required by the University, during their service in previous UPEC's and/or in non-academic settings.

Cross-Examination:

The University's legal counsel did not request to cross-examine Professor Kalyango therefore the hearing committee could not object to a cross-examination. The hearing procedures clearly stipulate, "The faculty member shall have the right to testify on his/her behalf and to present witnesses and other information relevant to their case." (Hearing Procedures, II.K., p. 2). The itinerary for the two-day hearing was circulated to both parties in advance of the hearing, including Professor Kalyango's own scheduled testimony on the second day. The University's legal counsel never requested to change the hearing schedule to include a cross-examination of Professor Kalyango. However, the University made several other requests for changes in the itinerary and document submissions (i.e., University legal counsel's late submission of documents in the middle of testimony (Transcript vol. II, p 423); University legal counsel's persistent request for the rearranging of University witness's appearance in the middle of the testimony (Transcript, vol. I, pp. 129-130)). These requests from the University's legal counsel were allowed, so the hearing committee notes the Board's objection, but concludes that the University's legal counsel is responsible for not raising the issue of cross-examination in a timely manner.

Explicit Findings:

The hearing committee appreciates the Board's request for more explicit findings. There is an extensive record in this case, including but not limited to the hearing transcript. The hearing committee expected that the Board would receive the hearing committee's report and the transcript following the submission of the report to the President of the University per the Faculty Handbook (II.D.5.d.) The video file covers the two days of testimony via Zoom and the written transcript is over 700 pages. We have added parenthetical citations herein to our findings for easier reference. With regard to our explicit findings in the original report (Finding of Facts on the counts of Sexual Harassment and Sexual Harassment by the creation of a hostile work environment and Findings on the Process of Dismissal of the Faculty Member and Due Process), we offer the following examples. We could offer additional examples, but these will highlight some of the major questions and concerns:

1) In his testimony Professor Sweeney admitted that he spoke to The Athens News and expressed his support for the graduate students, while the investigation into the allegations of sexual harassment against Professor Kalyango was still ongoing (Transcript, vol. I, pp. 231-240). He also confirmed this fact and defended his involvement during the cross-examination by legal counsel for the respondent (Transcript, vol. I, pp. 248-255).

2) Mary Rogus testified that students working the SUSI program along with [REDACTED] abruptly changed their attitude and became hostile toward Professor Kalyango immediately after she resigned. Ms. Rogus strongly implied that that it was [REDACTED] who shared with them her allegations, even though she knew she was not supposed to discuss the ongoing investigation. The African scholars in that SUSI program, Ms. Rogus pointed out, also heard something about [REDACTED] allegations (pp. 293-295).

3) Professor Michelle Ferrier's testimony is filled with statements alleging hostile work environment for students and faculty of color in the Scripps College. She spoke of the reports from graduate students of "intimidation, verbal abuse, as well as sexual assault, and sexual harassment" (Transcript, vol. II, p. 551). She also complained that her own discrimination and whistleblower complaint to ECRC was held without action for 17 months (pp. 554-555). She accused the college (Dean Titsworth) of retaliating against her on behalf of a senior faculty member/school director in the college (p. 555) by removing her from her position. During cross-examination by the university legal counsel Ferrier claimed that her reports about faculty (other than Professor Kalyango) abusing students were ignored (p. 561). And, finally, she claimed that Professor Kalyango was singled out (and she knew of no reports against him for inappropriate behavior of any kind while she was at Ohio University), while other faculty eschewed responsibility for their abuses (p. 564), and that she herself experienced "deep hostile work environment towards people of color" in the college (p. 565).

Finally, the hearing committee heard testimony that raised serious questions about the Title IX investigations. The hearing committee was relying on the University's legal counsel, which had the burden of proof, to present the evidence and to make the case for tenure revocation. Hearing committee members raised questions throughout the two days of testimony of nearly every witness trying to understand all the complexities of the case. Among the testimonies offered were many that could have been included and investigated but were not in the earliest stages of this case. Numerous international alumni, colleagues, and co-workers of the students, staff and the faculty member involved in this case testified to the behavior, work product, and communications pertinent to the investigation and subsequent loss of tenure. (Transcript, vol. I, pp. 351 – 365; pp. 366- 385; pp. Pp. 469 – 486; pp. 487 – 505). Moreover, the hearing committee heard at least one material discrepancy in the testimony of an Ohio University faculty member who testified that he never knew of the identity of Professor Kalyango in his conversation with one of the respondents, although the subsequent investigatory findings indicated that there was a positive identification associated with Professor Kalyango. (Transcript, vol. I, pp. 134 – 143)

Conflation of Terms:

The hearing committee does not see that any terms were conflated; however, we understand where there might have been some confusion based on the committee's differentiated role in the process. Specifically, the hearing procedures stipulate, "Its [the hearing committee's] findings shall be based only on the evidence presented at the hearing."

(Hearing Procedures, p. 3) As a committee we must look at all the evidence presented to us. We must remain impartial, and as part of an academic appeal process, we share a role in pointing out where the evidence shows an absence of due process and/or is contradictory. As part of the tenure revocation appeal process, the hearing committee is charged to review the evidence presented at the hearing. Prior to the hearing the appeal moves through an appeal process that includes the home department, the College, the Provost's office, and the President's office. The hearing committee reviews the entire process and during the hearing itself might, as in this case, be presented with new or contradictory evidence not available at earlier stages of the appeal. Our role as a hearing committee per our hearing procedures as final stage of appeal is "to ensure substantial justice." (Hearing Procedures, p. 3)

"Moral turpitude" is an issue in this case, reflected in the discussions leading up to the loss of tenure. During the hearing, Dean Titsworth stated, "Those conclusions [2019 UPEC finding] drew into question the ability of the faculty member to carry out those responsibilities, and that weigh heavily in my determination that his tenure should be revoked, as well as the language that –that caused me to think that the provost should consider the moral turpitude point in the faculty handbook." (Transcript, vol. I pp. 153-154). The hearing committee heard evidence that led to Dean Titsworth's decision and factored into the appeal. To help the Board to understand the committee's thinking on the evidence related to moral turpitude and other issues, we offer additional explanation of the process.

Review of Process:

The hearing committee is charged with reviewing and deciding on an academic appeal for the loss of tenure. A loss of tenure case can develop from several sources including but not limited to sexual harassment cases; the standard of proof has already been discussed above.

We understand that this is a complicated case linking multiple academic processes. Relying on the Faculty Handbook and the Hearing Procedures as they are currently written, the hearing committee carefully weighed all the evidence presented. Our procedures specifically state that this is an academic hearing not a trial.

Per the Hearing Procedures (III. F.) "The committee shall recess for closed deliberations on the case. The committee shall make explicit findings with respect to each of the grounds for removal as presented in the hearings. Its findings shall be based only on the evidence submitted at the hearing. Based on the committee's findings of facts and determination of whether the facts sustain any or all of the reasons for removal, the committee shall submit to the President a written decision, containing a report of the findings of facts relative to each and every reason, and a recommendation or recommendations." (p. 3)

In answer to the Board's assertion regarding arbitration, the hearing committee did not state that the University had failed to conduct arbitration but asked why arbitration had not been conducted. Given the testimony and evidence on both sides that the case unfolded in a work environment that was contentious and potentially damaging to students, staff, and

faculty, the Hearing Committee was looking for evidence of due process in a very polarized and vocal academic unit.

In our report to the Board, the hearing committee noted that there were some questions remaining about Professor Kalyango's opportunities to respond to allegations during the investigation. The appeal process aside, the hearing committee heard how the investigation dragged on for over a year thereby undermining how and when Professor Kalyango could respond to the charges. Neither the University's legal counsel nor the Title IX investigator offered a satisfactory explanation for this egregious delay that was not serving the interests of either party. One explanation the hearing committee heard from the investigator was, "They [witnesses] were spread over numerous time zones; and, in fact, several of them were in Africa." (Transcript, vol. I, pp. 199-200). The hearing committee members, representing a cross-section of faculty who have lived and worked abroad, in addition to collaborating with universities on an international basis, were not convinced that multiple time zones could account for the delay.

Relatedly, the consideration of other disciplinary actions is stipulated in the UPEC process, for example, but that is not the same thing as an actual deliberation prior to initiating the loss of tenure. The hearing committee did not see or hear any evidence that any recourse other than the loss of tenure had been seriously considered. In fact, testimony from several faculty members indicated that the loss of tenure was the only disciplinary action considered even before the investigations had been completed.

The Faculty Handbook requires a consultation. A consultation is defined as a formal process; it is not merely a conversation. Former Director Stewart stated he chose not to have a full faculty meeting and instead meet individually with any Tenure Track and Instructional Faculty who wished to do so. He stated there was no formal vote taken and no requirement to participate. (Transcript vol. I, p. 179) The hearing committee heard that this call for volunteers to provide input was an effort to keep the peace. However, the committee did not hear evidence that this qualified as a consultation intended by the Faculty Handbook.

In conclusion, the hearing committee was charged with reviewing all the material presented by both sides. Per our established procedures for a tenure revocation hearing: "The fundamental objective of all procedures followed by the committee is that of due process and fairness, but it is not the intention of the committee that its procedures necessarily follow those of evidence used in a court of law." (Hearing Procedures, p. 3). It is understandable that questions arise during a tenure revocation hearing about the entire process initiated through any investigations leading to a loss of tenure decision and outlined by the Faculty Handbook. The hearing committee reviewed the documents submitted by both parties and listened to the testimony offered during two days of virtual meetings. During that time and through the writing of its final decision, the hearing committee asked numerous questions and evaluated a substantial set of documents. In doing so, the hearing committee did not seek to question the credibility of any party, but instead sought to decide an appeal on the loss of tenure "Based on

the committee's findings of facts and determination of whether the facts sustain any or all the reasons for removal..." (Hearing Procedures, p. 3) The hearing committee affirms its original decision calling for the reinstatement of Professor Yusuf Kalyango as a tenured faculty member of Ohio University.