

**Executive Summary of
Comments and Recommendations by Law Faculty Senators
in Response to the Policy Proposal on Cumulative Performance Review As Prepared by the
“CPR Review Team” and Presented to the UT Faculty Senate**

In September 2015, a system-wide committee was formed to review and recommend changes to existing Cumulative Performance Review (CPR) policies at the University. At present, a tenured faculty member enters CPR after two “Unsatisfactory” reviews or a combination of three “Needs Improvement” and “Unsatisfactory” within a five-year period. This review, overseen by an appointed committee, may result in a recommendation that termination proceedings be commenced against the tenured faculty member for adequate cause based on unsatisfactory performance.¹

According to the Administration the justification for reviewing the CPR policy is based on the following:

The University of Tennessee Board of Trustees Policy on Academic Freedom, Responsibility and Tenure was adopted in 1998 and has not been comprehensively reviewed since then. The section of the policy relative to the cumulative performance review of tenured faculty has been identified as complicated and difficult to implement. To ensure the University policy reflects current best practices relative to cumulative performance review, a thorough review, with recommendations for improvements, is needed.

The Faculty Senate president announced via email on Saturday April 2, 2016, that the “CPR Review Team” had completed its work, and he attached to this message a copy of the policy proposal. He concluded by stating that the “current plan is to gather comments next week, with the intent of submitting a summary to Vice President High by April 15 (we have requested extension of this deadline)”. Although not on the formal agenda, the Faculty Senate held a brief presentation and discussion regarding the policy proposal at its meeting on April 7, 2016, where it remained unclear whether an extension of the comment deadline would be provided.

Given the time constraints imposed by the Administration, the Faculty of Law senators have reviewed the policy proposal with an eye to identifying the areas of greatest concern generated by the proposed revisions. Upon review, we have significant concerns regarding the proposal as currently formulated and conclude that it should be withdrawn. Our findings and recommendations are summarized below.

1. Inadequate Justification Provided for Revising Existing CPR policy

- The administration has not adequately substantiated the need to revise existing CPR policy. According to information supplied by the Administration, approximately 25 cases

¹ It merits recalling that existing UT policy already offers the administration several means of terminating tenure¹ (including “extraordinary circumstances”, “adequate cause”, and “misconduct”), See BOT, Part 8, “Termination Procedures for Category A Adequate Cause: Unsatisfactory Performance in Teaching, Research, or Service”, *Policies Governing Academic Freedom Responsibility and Tenure BT0006*, (Revised 19 June 2003, 16 March 2006).

of CPR have occurred over the past 18 years under existing policy.² Before a new policy is instituted, the administration should provide reasonable justification for the inadequacy of the existing system beyond vague assertions that it is “complicated and difficult to implement.”

2. Proposed Modifications Trigger CPR Faster and Permit Tenured Faculty to be Terminated Within One Year Without Being First Afforded the Opportunity to Improve

- The proposal significantly reduces the barrier to CPR. Under current policy, CPR is triggered for a tenured faculty member whose annual review is (1) “Unsatisfactory” in any two of five consecutive years or (2) any combination of “Unsatisfactory” or “Needs Improvement” in any three of five consecutive years.³ The proposed policy condenses this trigger to either (1) one “Unsatisfactory” or (2) two “Needs Improvement” evaluations within a four-year period.
- The proposal exposes any tenured faculty member who enters the CPR process based on a single annual review finding of “Unsatisfactory” to the possibility of termination without first being given the opportunity to develop and implement an improvement plan.

3. CPR Committee Member Criteria Raises Concerns Relating to Vagueness, Objectivity and Due Process

- Criteria for nomination to serve on a CPR committee are divided into “Required” and “Expected” without explanation or provision of clear standards. Furthermore, provisions here suffer from vagueness. For example, under “Required” criteria, CPR committee members must “be familiar with the relevant academic discipline and with performance expectations for faculty in that discipline”, however, no elaboration or meaningful standard/test for determining “familiarity” is provided.
- “Expected” criteria of committee members may be waived upon request by the dean and the faculty member is not provided with an opportunity to challenge such a waiver. Similarly, the faculty member is not provided with the opportunity to challenge committee nominations on the basis of a conflict of interest.
- Criteria for CPR committee members appear out of sync with best practices at UT’s Top 25 aspirational schools.

4. CPR Committee Selection Process Raises Concerns Relating to Objectivity, Due Process and Faculty Development

- Under the proposal, the dean selects all five members of the CPR committee.⁴ This process gives rise to the potential for bias inasmuch as the dean participates in the annual review process (including approving the negative annual review that triggers CPR), and therefore, potentially may be predisposed to use the CPR process to further validate the unfavorable review. This potential for bias becomes particularly acute in colleges without department heads, where the person who initiated the negative review is in turn given

² These numbers were furnished to the CPR Review Team by the Administration.

³ Board of Trustees’ Policy 3.8.3.

⁴ The dean selects the CPR committee chair and selects the four remaining committee members from pools of nominees presented by other parties to the process.

direct control over CPR committee member selection. The proposal as drafted offers no substitute procedure for such an eventuality.⁵

- If the CPR process intends to preserve one of its stated objectives, namely “assist[ing] the faculty member and administration in...identify[ing] strategies for improvement”, it must avoid bias—including the mere appearance of bias—in the committee selection process.

5. CPR Scope, Procedure and Time Frame Raise Concerns Relating to Reasonableness, Vagueness, Due Process, Arbitrariness, and Objectivity

- The proposal permits the CPR committee to request only a single extension of time to complete its review of the faculty member, and then only on the basis of “extenuating circumstances” approved by the Chief Academic Officer (CAO). The one-time allowance for an extension is unreasonable given the scope of the CPR committee’s charge and the potential that its findings may trigger termination proceedings. Furthermore, the term “extenuating circumstances” is vague and not defined.
- The provisions governing extension are further hampered by the fact that no reasons are required to accompany the denial of an extension request, no opportunity is provided for appealing such a denial, and the CAO rather than the CPR committee decides on the term of the extension.
- Related to the one-time cap on committee-requested extensions, the overall 75-day time frame envisioned for completion of the CPR committee’s work and submission of its report appears to be unreasonable for the same reasons noted above.
- The term “rebuttal” used to describe a faculty member’s response to a CPR committee report connotes an adversarial process, which is inimical to the CPR’s objective of “work[ing] together to identify strategies for improvement.”
- The proposal does not require the CPR committee to interview the tenured faculty member, nor does it provide a mechanism for disqualifying CPR committee members in the event a conflict of interest arises during the committee’s discovery process.
- The proposal purports to prohibit a CPR committee member from abstaining or recusal once the committee has been charged. No similar measure could be identified in the practices of other aspirational institutions.

6. Administration of CPR Improvement Plan Raises Faculty Development and Due Process Concerns

- The proposal claims that one objective of the CPR process is to “assist the faculty member and administration in working together to identify strategies for improvement.” However, as drafted the faculty member under review has no role in creating the CPR improvement plan.
- The proposal authorizes an improvement plan to be authorized on the basis of simple majority vote of the CPR committee. This method of approval is insufficient for validating a legitimate improvement plan that reflects buy in from all parties concerned.

⁵ In such cases, under the current proposal the individual charged with ultimate responsibility for appointing the CPR committee is the same person who originally elected to initiate the unfavorable annual review.

A separate body such as a faculty senate panel or a neutral third party is better positioned to objectively create and/or assess implementation of the improvement plan.

- The proposal tasks the CPR committee with both developing an improvement plan and judging its successful implementation. These functions should be separated to resolve due process concerns. For example, a CPR committee that originally mustered only three votes in favor of termination could impose an improvement plan instead, and then reconvene to reject the faculty member's improvement, which essentially has the same effect as a vote in favor of termination (only this time bypassing the required supermajority of four votes...). Any decision on a faculty member's failure to successfully implement an improvement plan should either be unanimous or at least comport with a super majority of four votes from the CPR committee.

7. **Additional Comments**

- The proposal does not allow for informal disposition of a dispute in the event the parties are able to achieve resolution during the course of a CPR process.
- The proposal does not address scenarios such as where a faculty member may be in the process of appealing a "Needs Improvement" annual review given in Year One and then is evaluated as "Needs Improvement" in Year Two, presumably triggering a CPR while an annual review appeal from Year One remains unresolved.
- The proposal does not expressly incorporate the relevant standard of review and burden of proof on termination from UT Board of Trustees policy, which states: "The award of tenure shifts the burden of proof concerning the faculty member's continuing appointment from the faculty member to The University." The policy further provides that "[t]he burden of proof [to terminate tenure for adequate cause] rests with The University and shall be satisfied only by clear and convincing evidence in the record considered as a whole."
- The proposal does not limit the initiation of a subsequent CPR process after a tenured faculty member completes a CPR review or improvement plan with a finding of "Satisfies Expectations". Based on practices at UT's Top 25 aspirational schools, in the absence of substantial new evidence, the CPR trigger should be reset and a cooling off period imposed to prevent initiation of back-to-back CPRs.
- Given the potential significance of any changes to the existing CPR process, the Board of Trustees should consider making any new policy subject to automatic expiry five to seven years after adoption if not renewed following a mandatory review process scrutinizing the policy's impact and effectiveness.