

1. **Preamble – Objectives of a Cumulative Performance Review** – The objectives of a Cumulative Performance Review are to:
  - 1.1. provide an orderly process for conducting an enhanced review of post-tenure performance following negative rating(s) by the department head/chair<sup>1</sup>;
  - 1.2. assist the faculty member and administration in working together to identify strategies for improvement;
  - 1.3. identify situations in which tenure termination proceedings may be necessary because performance improvement efforts do not result in performance that satisfies expectations.

### **COMMENTS TO SECTION 1**

In the interest of transparency, it should be made clear that the objectives stated in Sections 1.2 and 1.3 may be mutually exclusive. Moreover, the objective to be pursued at the outset of the CPR process is neither known nor communicated to the faculty member under review. As described in Section 7, if the CPR committee finds the faculty member’s performance record “fails to satisfy expectations,” the committee may recommend the initiation of termination proceedings, presumably consistent with Section 1.3, or an improvement plan, presumably consistent with Section 1.2. The faculty member has no advance notice whether CPR will in fact assist in generating “strategies for improvement” or conclude with recommendation for termination of tenure.

#### **Recommendation:**

The objectives of the CPR process should be drafted in a manner that is non-contradictory and consistent with the principle that faculty should have an opportunity to correct inadequate or unsatisfactory performance. An outcome that recommends termination without providing such notice raises significant due process concerns and is contrary to AAUP best practices. For example, the University of Texas’ Comprehensive Periodic Review process provides that “Comprehensive periodic review of tenured faculty is intended to enhance and protect, not diminish, the important guarantees of tenure and academic freedom through a positive, thorough, fair, and transparent process.”<sup>1</sup>

2. **Events Triggering a Cumulative Performance Review** – A Cumulative Performance Review shall be triggered when a tenured faculty member receives:
  - 2.1. any one (1) overall “Unsatisfactory” annual performance rating (or campus equivalent for the lowest performance rating); OR
  - 2.2. any two (2) overall “Needs Improvement” annual performance ratings (or campus equivalent for the next-to-lowest performance rating) during any four consecutive years.

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<sup>1</sup> Art. 2(a), University of Texas, *2015-16 Guidelines for Comprehensive Periodic Review of Tenured Faculty*, <https://utexas.app.box.com/s/frddhrert3s01pqqdail9k9aeuwsgyj> (hereinafter *U Texas Guidelines*).

## COMMENTS TO SECTION 2

The current proposal triggers a CPR on the basis of a single “Unsatisfactory” annual rating, giving rise to the possibility that a tenured faculty member may be terminated within a single year **without being afforded the opportunity** to correct unsatisfactory performance. In effect, this formulation invalidates current procedure, which provides the faculty member and administration with: 1) meaningful opportunities to create and implement improvement plans based on identified performance issues; and 2) a more robust record of performance deficiencies prior to escalating to CPR, which in turn provides the faculty member with clearer notice that the CPR process may result in termination.

The current proposal provides no justification for shortening the triggers for CPR. Currently, CPR is triggered for a 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.<sup>2</sup> Under the proposed policy change, CPR shall be triggered with one “Unsatisfactory” or two “Needs Improvement” over four years. The risk with this approach—namely, engaging the CPR process earlier and as a substitute for faculty-driven improvement plans—is that it creates the appearance—if not effect—of coopting the university’s general system of evaluation and using it as a grounds for dismissal or other disciplinary sanctions, rather than as a tool for enhancing and improving faculty development.

As currently proposed, the policy changes to CPR would run contrary to best practices as indicated by the AAUP, as well as signal a dramatic departure from various procedural safeguards in place at UT’s aspirational Top 25 public universities. For example, within the UC system, termination represents an “extraordinary remedy designed to address gross performance deficiencies in extremely rare cases.”<sup>3</sup> This process requires that any request for termination by a supervisor be measured against a standard of “incompetent performance” and first be directed to the Chancellor. If the Chancellor elects to proceed, the faculty member must be given “not less than one year” to improve before the Chancellor can decide whether to formally initiate termination proceedings.<sup>4</sup>

It merits recalling that existing UT policy already offers the administration several means of terminating tenure (including “extraordinary circumstances”, “adequate cause”, and “misconduct”)<sup>5</sup>, and that the administration **has not substantiated any specific defects in the**

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<sup>2</sup> UT Board of Trustees, “Academic Freedom & Responsibility of The University Administration”, *Policies Governing Academic Freedom Responsibility and Tenure BT0006*, (Revised 19 June 2003, 16 March 2006), “Tenure: Evaluation of Tenured Faculty Members: Cumulative Periodic Review”, Art. 7.2 (hereinafter UT BOT Policy BT0006).

<sup>3</sup> University of California, General University Policy Regarding Academic Appointees: Termination For Incompetent Performance (APM-075), Part II(A). The standard for termination within the UC system is grounded in “incompetent performance” rather than the lower threshold “unsatisfactory” at UT. At UVA, a finding of “adequate cause” for termination requires “a clear level of professional incompetence.” UVA, *Disciplinary Suspension or Termination of Academic Faculty, Policy on*, Updated: 5/6/09, <http://provost.virginia.edu/disciplinary-suspension-or-termination-academic-faculty-policy>. Art. 10, *U Texas Guidelines*, *supra* note 1.

<sup>4</sup> It should be observed that these proceedings include many due process guarantees currently absent from the UT policy.

<sup>5</sup> UT BOT Policy BT0006, “Tenure: Termination of Tenure: Grounds for Termination”, Art. 8.1, *supra* note 2.

current CPR policy<sup>6</sup> or the need to expedite termination of faculty performing at an unsatisfactory level.<sup>7</sup>

**Recommendations:**

To ensure respect for academic freedom and due process, among other things, a tenured faculty member should have a meaningful opportunity to correct legitimate performance issues before administrative measures are taken that may give rise to the possibility of termination.

The existing CPR trigger (requiring two “Unsatisfactory” annual reviews or a combination of three negative reviews during a five-year period) should not be modified without providing a substantiated justification for compressing the designated time frame.

The language in sections 2.1 and 2.2 should be clarified to ensure that any CPR trigger relates to a tenured faculty member’s *overall* annual evaluation rating and not a given rating in any one category of performance evaluated. For example: “Review shall be triggered when a tenured faculty member receives: 2.1. A rating of “Unsatisfactory” overall for an annual performance review in a given year (or campus equivalent for the lowest performance rating)”.

3. **Role of the Chief Academic Officer in Administering a Cumulative Performance Review**– The CPR process shall be administered by the chief academic officer, who:

- 3.1. maintains data related to annual performance reviews for all tenured faculty;
- 3.2. provides written notice of the review to the faculty member (with copies to the department head/chair, dean, and faculty senate president);
- 3.3. solicits nominees to serve on the CPR committee (see Sections 4 and 5 below).
- 3.4. collects and provides to the CPR committee the performance records described in Section 6.1 below; and
- 3.5. charges the CPR committee within 30 calendar days after the annual performance review has been finalized (whenever the review has been completed under campus procedures or practices).

4. **Criteria for Service on a CPR Committee** – The CPR committee shall be composed of five (5) tenured faculty members (one of whom serves as voting chair) who meet the following criteria for service on the committee:

- 4.1. **Required Criteria:** Each committee member must:
  - 4.1.1. hold the same or higher rank as the faculty member undergoing review; and

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<sup>6</sup> However, campus administrators have stated: “[t]he section of the policy relative to the cumulative performance review of tenured faculty has been identified as complicated and difficult to implement.” Committee Charge Document, *Task Force to Develop an Advisory Framework for a Review of Board of Trustee’s Policy on Academic Freedom, Responsibility and Tenure*, undated.

<sup>7</sup> The only data provided to the faculty senate provides “about 25 cases (of CPR were) recorded in the past 18 years.” *CPR Team Presentation to UTK/UTIA Faculty Senate*, April 4, 2016.

- 4.1.2. be familiar with the relevant academic discipline and with performance expectations for faculty in that discipline.
- 4.2. **Expected Criteria:** To ensure diverse perspectives among its members, the CPR committee should include:
  - 4.2.1. three (3) faculty members who either hold tenure in the same department as the faculty member undergoing review OR, if the department does not include three (3) tenured faculty members eligible to serve, then three (3) faculty members who hold tenure in the same college as the faculty member undergoing review;
  - 4.2.2. one (1) faculty member whose tenure resides in a different department than the faculty member undergoing review; and
  - 4.2.3. one (1) faculty member who currently serves (or who served during the most recent review cycle) on a college promotion and tenure review committee, if such a committee exists.
- 4.3. **Circumstances Preventing Committee Formation:** In the unusual event that an appropriate CPR committee cannot be assembled using the expected criteria in Section 5 below, the dean shall explain in writing the reasons why the expected criteria cannot be observed. The Chief Academic Officer shall grant final approval of the makeup of the CPR committee.

#### COMMENTS TO SECTION 4

Sections 4 and 5 outlining the criteria for service on the CPR committee and nomination and selection of the actual CPR committee members is unnecessarily complicated and raises concerns relating to arbitrariness, objectivity and due process. The proposed arrangement is particularly worrisome given that it relates to the crux of the review process. Inevitably, a poorly organized committee formation process risks a poor result. We recommend significant changes to this section, and provide some more detailed comments below.

Section 4.1.2, which requires that each CPR committee member “be familiar with the relevant academic discipline and with performance expectations for faculty in that discipline”, is vague. For example, what does it mean to “be familiar with the relevant academic discipline?”

The designation of “Expected Criteria” in Section 4.2 is confusing and seemingly has little value, given Section 4.3, which allows the dean to simply explain in writing why said criteria has not been observed. Based on the nomination process described in Section 5 through which several different parties present lists of potential committee members to the chief academic officer for selection by the dean, a final CPR committee that actually satisfies Section 4 may be the product of mere coincidence. Further explanation and justification for the “Expected Criteria” would be useful here.

With an aspirational majority of the CPR committee consisting of tenured members of the department or college of the faculty member under review, the prospect of conflicts of interest or biases is a matter for serious consideration. CPR and other evaluative processes have exposed such conflicts and biases in the past. Notably, under the proposed policy, there is no requirement that

CPR committee members be free of actual or potential conflicts of interest. Furthermore, there is no opportunity for the faculty member under review to weigh in on the final composition of the committee (including for the purpose of exposing any potential conflicts of interest or biases that should be taken into consideration in populating the committee).

The provisions of Section 4.2 should be clarified with respect to colleges that do not have departments and make provision for such an eventuality. Additionally, even for those colleges with departments, it is unclear whether the faculty member described in Section 4.2.2 is one in the same college as the faculty member under review albeit a different department or from a different department outside the college.

Section 4.2.3 provides that a member of the CPR committee should be from “a college promotion and tenure review committee, if such a committee exists.” This language seems to say that a member of any college promotion and tenure committee could serve, whether from the same or a different college as the faculty member under review. But this should be made clear.

Also note that Section 5 envisions “a departmental or college promotion and tenure committee,” while Section 4.2.3 speaks only of “a college promotion and tenure review committee.”

Presumably, these two provisions should be consistent. Additionally, language should be added to provide the result if no such committee exists. Section 5.5 provides that “[i]f no promotion and tenure committee exists, the faculty member under review selects a department from which the dean selects a final committee member.”

**Recommendations:**

The provision as currently drafted gives rise to significant concerns relating to objectivity, vagueness and uncertainty that may impact the outcome of the CPR process. Accordingly, we suggest revisions to ensure respect for principles of fairness and due process, including opportunities for faculty member appeal of the CPR committee makeup as well as clear provisions for disqualifying potential committee members that may have or appear to have a conflict of interest or bias.

Similar objectivity and due process concerns arise in Section 5 below. Typical practice from UT’s Top 25 aspirational schools avoids some of the problems highlighted here by ensuring that committees tasked with reviewing performance where the potential for termination arises are either standing faculty senate committees formed on a more clearly objective standard or ad hoc committees appointed by the faculty senate rather than the dean who either initiated or approved the negative annual evaluation. Adopting this type of approach for committee member criteria and composition would eliminate many of the concerns generated here as well as under Section 5 below.

5. **Nomination and Appointment of CPR Committee Members** – Unless a campus has received approval of the Board of Trustees to implement a different procedure, the chief academic officer shall solicit nominations for membership on the CPR committee from the dean, department head, the faculty member under review, the faculty senate president, and the college promotion and tenure committee (if one exists). Consistent with the criteria for service on the CPR committee detailed in Section 4 above:

- 5.1. the dean nominates one (1) faculty member to serve as both chair of the CPR committee and as a voting member of the committee;
- 5.2. the department head/chair nominates three (3) faculty members eligible to serve, from whom the dean selects one (1) committee member;
- 5.3. the faculty member undergoing review nominates three (3) faculty members eligible to serve, from whom the dean selects one (1) committee member;
- 5.4. the faculty senate president nominates three (3) faculty members eligible to serve, from whom the dean selects one (1) committee member; and
- 5.5. if a departmental or college promotion and tenure committee exists, that committee nominates three (3) actively serving members, from whom the dean selects one (1) member for the CPR committee. If no promotion and tenure committee exists, the faculty member under review selects a department from which the dean selects a final committee member, so long as that member otherwise meets eligibility criteria in Section 4 above.

### **COMMENTS TO SECTION 5**

Selection of the CPR committee is concentrated in the hands of the dean, who participates in the annual review process and therefore, potentially may be predisposed (consciously or unconsciously) to use the CPR process to validate the faculty member's unfavorable annual review. This potential for bias is particularly acute in non-departmentalized colleges and schools. In those cases, the individual charged with ultimate responsibility for appointing the CPR committee is the same person who originally elected to initiate the unfavorable annual review. Moreover, the dean's ability to select all five members of the five-person committee is inequitable, particularly when, under the proposed policy, the CPR committee may recommend initiation of termination proceedings on the vote of just four members, or likewise vote on a simple majority that the faculty member has failed to implement a CPR-mandated improvement plan (which has the similar effect of recommending termination). See Sections 7.2.1 and 8.6.2. The practice at UT's Top 25 aspirational schools indicates a clear tendency to task the faculty senate with committee selection for procedures that may result in a termination process. This approach makes sense as a best practice inasmuch as this body plays no direct role in initiating or ratifying the annual review that may trigger the CPR, and accordingly maintains more clearly objective distance from the process.<sup>8</sup>

#### **Recommendations:**

Actual bias—and even the mere appearance of bias—in a committee selection process that may result in a tenured faculty member's termination must be avoided. This is especially so if the CPR process is intended to preserve its stated developmental objective as “assist[ing] the faculty member and administration in...identify[ing] strategies for improvement”, and not merely serve as a conduit for expedited initiation of termination proceedings. Accordingly, changes to the CPR policy should mirror best practices for nomination and appointment and ensure that

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<sup>8</sup> To be certain, the faculty senate appeals committee has a role to play in the event that an annual review is appealed. Nevertheless, the Faculty Senate could create a separate standing committee to either handle CPR or the CPR committee appointment process.

administrators responsible for either initiating or endorsing the negative annual review do not have the ability to determine or control composition of the CPR committee.

**6. Scope, Procedures, and Time Frames of the Cumulative Review**

- 6.1. **Review Documents** – with respect to the five-year scope of the cumulative review, the chief academic officer collects and provides to the CPR committee, who shall have sixty (60) calendar days to consider:
  - 6.1.1. all annual evaluations and materials submitted or developed as part of the evaluation process for the faculty member under review;
  - 6.1.2. materials submitted by the faculty member under review that fall within the five-year review period;
  - 6.1.3. performance expectations, which may have been established in past reviews, in department or college bylaws, in the faculty handbook, or in Board of Trustees, fiscal, human resources, safety, or information technology policies or procedures;
  - 6.1.4. any work assignments, goals, or other plans (however identified) that were described in previous performance evaluations during the five-year review period;
  - 6.1.5. any additional materials requested by the CPR committee regarding the five-year review period, consistent with University policy and law regarding disclosure of University records.
- 6.2. **Conduct Interviews** – the CPR committee *may* conduct interviews. If the committee chooses to conduct interviews, both the faculty member undergoing review and the administrator who assigned the negative rating(s) should be given the opportunity to be interviewed. The unavailability of the faculty member or administrator for an interview during the review period does not constitute grounds for an extension.
- 6.3. **Single Extension of Time** – For extenuating circumstances, on a case-by-case basis, the chief academic officer may approve a written request from the CPR committee for an extension of time to complete its initial review. Only one extension will be granted per committee, and the chief academic officer shall determine the length of the extension.
- 6.4. **Voting and Presentation of Recommendations** – The CPR committee shall make and report findings and recommendations using the following standards:
  - 6.4.1. Any committee finding or recommendation shall be adopted by a simple majority vote, except that a recommendation that termination proceedings be initiated requires the agreement of at least four (4) members of the committee.

- 6.4.2. All voting shall be made by collecting anonymous ballots from all members. No member of the committee may abstain or recuse him/herself from voting once the committee has been charged.
- 6.4.3. The committee's written report must explain the committee's findings and conclusions, the rationale for each, and the corresponding vote count if findings are not unanimous. The committee's report shall be issued to the chief academic officer, the dean, the head/chair, and the faculty member under review.
- 6.4.4. The dean, chief academic officer, and faculty member under review have the opportunity to respond to the report. The final report to the Chancellor should include any rebuttal by the faculty member as well as any additional recommendations by the dean and chief academic officer.
- 6.5. **Written Report** – within seventy-five (75) calendar days of its charge, the CPR committee shall provide a written report as described in Section 6.4.3.
- 6.6. **Written Response to the Initial Report** – the faculty member shall have fourteen (14) calendar days to provide a written rebuttal. The committee's report shall also be made available to the chief academic officer, the dean, and the head/chair, who may provide additional recommendations during the same fourteen (14) day period.
- 6.7. **Final Report** – The final report, including any rebuttal by the faculty member under review and any additional recommendations by the dean and chief academic officer, shall be collected by the chief academic officer and presented to the Chancellor for review and action.
- 6.8. **Review and Action by the Chancellor** – Once the Chancellor receives the final written report, along with a rebuttal or additional recommendations, s/he shall provide a written explanation of the rationale for his/her conclusions and actions, his/her final decision, and outline the next steps of action. This explanation shall be maintained in faculty records by the chief academic officer, with copies provided to the faculty member, dean, department head/chair, and CPR committee.

### **COMMENTS TO SECTION 6**

Setting aside concerns regarding compression of the CPR trigger addressed above in Section 2, the 5-year review period in Section 6.1 should be changed to a 4-year period to be consistent with the proposed CPR trigger.<sup>9</sup> Additionally, the years included within the CPR review should be clarified. Presumably, the review period should include the year that triggered CPR plus the three years prior to the triggering annual review.

The phrase “extenuating circumstances” in Section 6.3 is vague. We are concerned about the CPR committee's ability to conduct a thorough review within the specified time, particularly in cases where additional documents are required during the course of the process but disclosure is delayed, for example, by delays in the collecting and transmission of requested documents to the university's general counsel, or by the general counsel's review of requested material prior to

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<sup>9</sup> This reference appears to be a carryover from the 5-year review period associated with the existing CPR system.



release to the committee. Related to this, the provision under 6.2 deeming unavailability of a faculty member or administrator for an interview as failing to constitute “extenuating circumstances” for the purpose of an extension appears arbitrary. Where the CPR committee concludes that legitimate grounds for such an absence exist, an extension should be granted to enable the committee sufficient time to conduct such interviews.

Restriction to only one extension is onerous and limits the ability of the CPR committee to effectively undertake its task. We also question whether the chief academic officer is the best person to grant an extension and note that the draft policy provides no requirement for the chief academic officer to provide reasons for declining a requested extension nor a means by which the CPR committee may appeal such a decision.

In Section 6.5, we question whether 75 days is sufficient: (1) to gather the faculty member’s performance record, including the CPR committee’s request for additional materials pursuant to Section 6.1.5; (2) to conduct interviews pursuant to Section 6.2; (3) to review the performance record, deliberate, and vote; and (4) to prepare a written report.<sup>10</sup>

Throughout Section 6, the faculty member’s “rebuttal” to the committee’s report should be recharacterized as a “response”. The term “rebuttal” may in some cases be too narrow. For example, suppose the faculty member wants to endorse, not rebut, the committee’s recommendations. Additionally, the term “rebuttal” connotes an adversarial process, which is inimical to the CPR’s objective of “work[ing] together to identify strategies for improvement.” See Section 1.2.

### **Recommendations:**

The review period open to the CPR committee’s scrutiny should mirror the period governing the CPR trigger mechanism. Furthermore, if the CPR process is indeed intended to generate strategies for improvement, language suggesting an adversarial process should be modified.

The proposed 75-day deadline for producing a CPR report and the limit of a one-time extension (granted on the basis of discretion) should be modified to reflect the scope of the CPR committee’s task and the fact that its outcome may result in a recommendation in favor of termination. Furthermore, any denial of an extension request should include reasons and be appealable, and the decision-making power should be placed with a neutral third-party.

Given the possibility for termination, we recommend that the CPR committee be required to interview the faculty member under review as well as the administrator who assigned the negative rating(s). We also recommend adding a provision providing a mechanism for the disqualification and replacement of CPR committee members in the event information provided to the committee indicates a conflict of interest or a material bias.

We recommend deleting the language in Section 6.4.2 that 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, and we are not aware of other types of organizations that use a prohibition of this kind. Finally, because the proposed CPR revisions enable the possibility for a tenured faculty member to be terminated on the basis of a

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<sup>10</sup> We assume that faculty members serving on CPR committees are carrying a full courseload and are conducting the expected scholarship/creative activity as well as undertaking other service. The workload in these circumstances is by design very heavy, especially for the chair.

single “Unsatisfactory” review, we recommend requiring a unanimous committee vote in Section 6.4.1 if the committee opts in favor of pursuing termination.

In Section 6.6, we recommend the administration’s review of the final report to be limited to a reciprocal right to respond rather than providing additional recommendations.

Section 6.8 seems to suggest that in reaching his/her conclusions, the Chancellor is limited to the committee report and responses from the faculty member and administration, but this issue should be made clear. Any explanation by the Chancellor should also include reasons.

## 7. **Findings and Recommendations within the Authority of the CPR Committee**

- 7.1. **CPR Committee finding of “satisfies expectations”** A recommendation by the CPR Committee that the faculty member satisfies expectations requires a simple majority vote. If the CPR committee finds that the performance record satisfies expectations, the committee shall conclude its work by explaining that finding in a written report, as outlined in Sections 6.4.3, 6.5, 6.6, and 6.7. The Chancellor may accept the CPR committee’s findings and recommendations or make different findings, and shall explain in writing the rationale for his/her conclusions and actions, as outlined in Section 6.8.
  - 7.1.1. If the Chancellor finds that the performance under review satisfies expectations, the CPR process will be concluded. The Chancellor’s written explanation should identify any need to modify past performance ratings and any corresponding across-the-board raises.
  - 7.1.2. If the Chancellor finds that – contrary to the CPR committee’s conclusion – the performance under review *fails to satisfy expectations*, the Chancellor may take further action as s/he deems appropriate, including initiating tenure termination proceedings, pursuant to this policy.
- 7.2. **CPR Committee finding of “fails to satisfy expectations”** If the CPR committee finds that the performance record fails to satisfy expectations, the committee may recommend *either* that termination proceedings be initiated or that a CPR improvement plan be implemented.
  - 7.2.1. **CPR committee recommends that termination proceedings be initiated:** A recommendation by the CPR committee that termination proceedings should be initiated requires the support of at least four (4) members of the committee. The CPR committee shall provide a written report as outlined in Sections 6.4.3, 6.5, 6.6, and 6.7. The Chancellor may accept the CPR committee’s findings and recommendations or make different findings, providing a written explanation as outlined in Section 6.8.
  - 7.2.2. **CPR committee recommends a CPR improvement plan:** A recommendation by the CPR Committee to implement an improvement plan requires a simple majority vote. The CPR committee shall provide a written report as outlined in Sections 6.4.3, 6.5, 6.6, and 6.7. The Chancellor may accept the CPR committee’s findings and

recommendations or make different findings, providing a written explanation as outlined in Section 6.8.

- 7.2.2.1. If the Chancellor agrees that a CPR improvement plan should be implemented, s/he shall refer the matter to the chief academic officer for continued administration under this policy.

### COMMENTS TO SECTION 7

Section 7 appears to contain several inconsistencies. Under Section 6.8, after the Chancellor receives the CPR committee's final written report, along with any responses, s/he is required to provide a written explanation of the rationale for his/her conclusions, including for any findings that are contrary to the committee. Under Section 7, this requirement is implemented inconsistently, and is missing altogether from Section 7.1.2.

#### **Recommendations:**

Clarify provisions to comport with the requirement under Section 6.8 that the Chancellor provide reasons justifying any conclusion that is contrary to the CPR committee's report.

The Chancellor's evaluation of the CPR committee's conclusions and reasoning should be subject to a prescribed standard of review. The proposal should specify that overturning of CPR committee findings be grounded on a standard that finds the committee's work to be "clearly erroneous".

We recommend deleting references to a "simply majority" when the term "majority" seems to suffice.

In cases where the CPR committee recommends the initiation of termination proceedings, we recommend a unanimous vote.

#### **8. Administration of a CPR Improvement Plan**

- 8.1. **Use of CPR:** Only one CPR improvement plan may be offered to a faculty member during a given CPR process; however, the CPR process *may be* implemented more than once during a faculty member's career.
- 8.2. **Duration of CPR:** The CPR improvement plan may extend no more than eighteen (18) months from the time it is implemented by the dean or chief academic officer.
- 8.3. **Notification of CPR:** The Chancellor shall promptly notify the faculty member under review, the department head/chair, the dean, and members of the CPR committee that a CPR improvement plan is to be developed using the procedures in this section.
- 8.4. **Development of the CPR Improvement Plan:** The department head/chair, in conjunction with the CPR committee, dean, and chief academic officer, has forty-five (45) days to draft the improvement plan.

- 8.4.1. If, after forty-five (45) days, the department head/chair and CPR committee cannot agree on an improvement plan, (as voted by simple majority) the committee's recommendation will default to a finding that the faculty member's performance *satisfies expectations*.
- 8.5. **Approval of the CPR Improvement Plan:**
- 8.5.1. Once a CPR improvement plan has been adopted, the faculty member under review shall be given one opportunity fourteen (14) calendar days to comment on the plan and propose modifications.
- 8.5.2. In response to any modifications proposed by the faculty member, the CPR committee must consider and adopt/reject the proposed modifications within fourteen (14) calendar days of receiving them from the faculty member.
- 8.5.3. The committee finalizes the CPR improvement plan and forwards the final plan to the dean for implementation, with copies to chief academic officer, department head and faculty member undergoing CPR implementation.
- 8.6. **Completion of the Improvement Plan:** At the end of the time allotted for the CPR improvement plan, the CPR committee shall reconvene to review performance under the plan, and to decide whether the performance under the plan (in the context of the full five-year review period) satisfies expectations or fails to satisfy expectations.
- 8.6.1. *CPR Committee finding of "satisfies expectations"*: If the CPR committee finds that the performance record satisfies expectations, the committee shall conclude its work by explaining that finding in a written report, following the procedures outlined in Sections 6.4.3, 6.5, 6.6, and 6.7. The Chancellor may accept the CPR committee's findings and recommendations or make different findings, providing a written explanation as outlined in Section 6.8.
- 8.6.2. *CPR Committee finding of "fails to satisfy expectations"*: If the CPR committee finds that the performance record after the CPR improvement plan fails to satisfy expectations (by at least a simple majority), the committee shall conclude its work by explaining that finding in a written report, following the procedures outlined in Sections 6.4.3, 6.5, 6.6, and 6.7. The Chancellor may accept the CPR committee's findings and recommendations or make different findings, providing a written explanation as outlined in Section 6.8.

### **COMMENTS TO SECTION 8**

Because one objective of the CPR process is to "assist the faculty member and administration in working together to identify strategies for improvement," it stands to reason that the faculty member under review should participate actively in crafting the improvement plan. Indeed, a realistic and meaningful improvement plan requires neutrality and buy-in of all the parties involved, including the faculty member. Accordingly, a simple majority vote of the CPR committee in Section 8.4.1 is not the appropriate way to validate an improvement plan. The

drafting under Sections 8.4 and 8.4.1 is also unclear: are the dean and chief academic officer— together with the CPR committee and department head— also required to agree on the improvement plan within 45 days?

The proposal authorizes the CPR committee to both develop an improvement plan, if applicable, (see Section 8.4) and review success of implementation of the plan (see Section 8.6). These functions should be separated due to concerns regarding the committee’s objectivity. It is foreseeable that hardened supporters or opponents of a given faculty member might attempt to influence the substance of the improvement plan at the outset, and then again during the evaluation phase either endorse minimal improvement or ignore genuine improvement, no matter how significant.

To the extent the CPR committee reconvenes to evaluate implementation of plan, Section 8.6 should be revised to address, among other contingencies, the unavailability of a committee member at the time the committee is reconvened and committee deadlock.

Under Section 8.6.2, a simple majority CPR committee vote that the faculty member under review failed to satisfy the improvement plan essentially opens the door to termination. Therefore any decision on the failure to successfully implement an improvement should either be unanimous or at least comport with a supermajority of four rather than a simple majority of three.

Finally, in the event a CPR committee concludes by simple majority that the faculty member failed to satisfy the improvement plan, under existing Board of Trustees policy, the Chancellor can proceed with termination proceedings without an advisory vote from the faculty on the question of whether such proceedings should be initiated.<sup>11</sup> The effect of the proposed policy therefore purports to substitute the majority opinion of the faculty with that of three individuals appointed to the CPR committee.

### **Recommendations:**

Section 8.4 should be revised to require the faculty member’s involvement in the development of the improvement plan from the outset. Obtaining the faculty member’s buy-in will enhance the overall process and maximize the opportunity for faculty development.

To further ensure an improvement plan’s legitimacy, relevant parties noted in Section 8.4.1 should strive to develop a plan by consensus. Where consensus is not forthcoming, a four-person majority vote may be used.

A separate body such as a faculty senate panel or a neutral third party may be better positioned to objectively assess implementation of the plan. Consideration should be given to hiring a professionally credentialed third party to help craft and/or help with assessing improvement plans.

Even if the CPR committee finds the tenured faculty member under review failed to satisfy the improvement plan, the tenured departmental faculty should review the faculty member’s

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<sup>11</sup> UT BOT Policy BT0006, “Appendix B: Termination Procedures for Category A Adequate Cause: Unsatisfactory Performance in Teaching, Research, or Service”, Art. 1.

performance in teaching, research, and service and vote on the question of whether termination proceedings should be initiated.

Section 8.6.1 should specify that a finding of “satisfies expectations” requires only a simple majority vote by the CPR committee.

The time frames associated with this section (45 days to ratify an improvement plan and 14 days to furnish comments on its substance) may place undue pressure on the process and its outcome. The drafters should consider extending them or justifying their necessity based on best practices.

### **ADDITIONAL COMMENTS**

- Consider including procedures to provide for informal disposition of a dispute in the event the parties are able to achieve resolution during the course of a CPR process.
- Provisions to address how this proposal and the annual review process fit together would be helpful. Consider a faculty member who appeals a “Needs Improvement” rating on an annual review, and receives a second “Needs Improvement” while an appeal from the prior year’s review is still pending. Under Section 2.2, the CPR process would be triggered upon receiving a second “Needs Improvement” rating in two consecutive years.
- This proposal should expressly incorporate the relevant standard of review and burden of proof from the UT Board of Trustees’ policy entitled Policies Governing Academic Freedom, Responsibility, and Tenure, 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.”<sup>12</sup> 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.”<sup>13</sup> The CPR committee should adopt this standard as its threshold for any finding it reaches inasmuch as such findings may be used to validate a recommendation for termination.<sup>14</sup>
- As drafted, 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”. For example, suppose the CPR process is triggered for a faculty member under Section 2.1 upon receiving an “Unsatisfactory” annual review rating. An improvement plan is implemented, the CPR committee finds performance under the plan “Satisfies Expectations”, and pursuant to Section 8.6.1., the Chancellor concurs. At this stage, if the faculty member receives another “Unsatisfactory” in the following annual review, presumably the current proposal would subject the tenured faculty member to another CPR review. Based on the practices at UT’s Top 25 aspirational schools, we recommend that in the absence of substantial new evidence, the CPR trigger be “reset” with a one-year cooling off period, and then require two “Unsatisfactory” or “Needs Improvement” annual ratings or a combination of both before being allowed to trigger a new CPR process.

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<sup>12</sup> UT BOT Policy BT0006, “Tenure”, Art. 1, *supra* note 2.

<sup>13</sup> UT BOT Policy BT0006, “Appendix B: Termination Procedures for Category A Adequate Cause: Unsatisfactory Performance in Teaching, Research, or Service”, Art. 6(9).

<sup>14</sup> The University of Texas’ comprehensive review policy states: “Nothing in these guidelines shall be interpreted or applied to infringe on the tenure system, academic freedom, due process, or other protected rights, nor to establish new term-tenure systems or to require faculty to reestablish their credentials for tenure.” Art. 1(b), *U Texas Guidelines*, *supra* note 1.

In the absence of substantial new evidence, neither shall the Chancellor initiate a termination within the next three years.

- Consideration should be given to creating alternatives short of termination. For example, some of UT's Top 25 aspirational institutions enable underperforming scholars to be given higher teaching loads, or alter their status from tenured faculty to lecturer or instructor.
- Whether the Board of Trustees adopts the policy proposal as written or incorporates some or all of our recommendations, consideration should be given to making the policy expire automatically five to seven years after adoption if not renewed after a mandatory post-adoption review.

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<sup>i i</sup> Many terms throughout this document are used generically. "The University" refers to The University of Tennessee System. "Campus" refers to the Knoxville campus, the Health Science Center, the UT Institute of Agriculture, the UT Space Institute, UT at Chattanooga, and UT at Martin. "Chancellor" refers to the Chancellor or Vice President of the unit. "Department" refers to the smallest academic unit (in some cases a "college," "school," or "division"); similarly, "department head" refers to "chair," "director," or "Dean" as appropriate. "Faculty Senate" refers to the campus governance body of elected faculty members and "Faculty Senate Executive Committee" refers to that committee or its comparable group of elected Senate officers. "Chief Academic Officer" refers to the campus provost, academic vice chancellor, or, Dean, etc. "Bylaws" includes written policies, procedures, standards, rules, guidelines, etc.