

MEMO TO: Terry Nolan, General Counsel and Secretary NYU

MEMO FROM: Executive Committee, T-FSC

RE: Examination and response to the proposal from the Grossman School of Medicine to adjust their Tenure and Promotions guidelines

DATE: 11.20.20

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The T-FSC Council is writing to share our review of the Grossman School of Medicine proposal to create its own policy for the revocation of tenure for “adequate” cause and has examined its three-part policy document with great care. The attached document was generated by the Personnel Policies & Tenure Modifications Committee (PPTM), vetted by the Council (T-FSC), and overwhelmingly supported by the Senators.

T-FSC Council has significant concerns regarding the three key points below.

1. Protocols. Our Senators believe that *The Faculty Handbook* contains fair and clear guidelines for the termination of tenure. The Council believes the existing guidelines should continue to apply for all schools; GSOM has not offered compelling explanations and evidence as to why they were superseded. This foremost concern was discussed by the T-FSC as a whole, is not articulated in the attached committee review.

Should the GSOM have issues with these guidelines, a preferable course would be to seek amendments to them and supplement the *Handbook*, rather than seek to replace in practice the Handbook's carefully delineated, legally sound procedures.

2. Process. The majority of faculty who comprise the Faculty Council at the School of Medicine are not tenured/tenure-track. Thus, the majority vote of the Council *does not reflect the support of the community to whom the policies apply* (tenured faculty). Moreover, separate from the Faculty Council vote, it does not appear that the community of tenured faculty at GSOM were given the opportunity to vote separately and confidentially about the proposed terms. These conditions do not conform to university practice pertaining to shared governance and set a troubling precedent that threatens the sanctity of tenure.

3. Policy. The policy that introduces grounds for disciplinary action (not rising to the revocation of tenure) appears capricious and invites unnecessary and arbitrary allegations.

In short, the T-FSC is unable to support the proposed policies submitted for our review and find the process that produced them most irregular.

We trust the University senior leadership and GSOM will consider the judicious commentary of the committee report seriously. We look forward to your feedback regarding this correspondence and the deliberative report from the PPTM committee of T-FSC.

Observations, Concerns, and Recommendations regarding the Grossman School of Medicine's Proposed New Policies for 1) Termination of Tenure for Cause, 2) Termination of Tenure-Track Appointments for Cause, and 3) Other Disciplinary Proceedings for Tenured and Tenure-Track Faculty.

The observations and concerns shared below for consideration by the Provost's Office, The President's Office, and GSOM are primarily in the form of questions. Each arises out of preliminary observations that seek clarification about: the text/formulation of the policy including ambiguities that need resolution; how a section relates to (or departs from) *The Faculty Handbook* or best practices across the university; and in some cases, about the need for complementary information (by way of explanation or justification) that appears to have been overlooked.

All comments are intended to be constructive. It is our hope that any subsequent revisions to the GSOM policies ultimately submitted to the President and the Board of Trustees will benefit from this input, and achieve the policies' reasonable objectives, with fewer risks, fuller deliberation, and greater procedural clarity.

**Development process concerns.** It is important, before sharing observations about the new policy frameworks themselves, to raise some questions about the process behind their development. This is particularly important with regard to the customary expectations of appropriate T-faculty involvement and representation in the drafting, consultation, and voting on any policy document concerning matters of tenure.

In the experience of the T-FSC over the past several years at least, the practice of all other NYU schools that have submitted new policies concerning appointment, advancement to tenure, promotion or separation of T-Faculty or of appointment, promotion, or separation of C-Faculty has been to provide confirmation of support by the majority of all eligible concerned faculty. This is usually done by citing the results of an official voting process conducted by secret ballot. (Indeed, over the last two years, the Provost has returned proposals to some schools, when it has been noted that that expectation was not met--or at least not reported. A majority vote of support from the pertinent faculty community has been expected, separate from the vote of the representative body of the Faculty Council, before the new policies would be eligible for consideration.)

This practice is consistent with the spirit of *The Faculty Handbook*, which is explicit about voting on matters of tenure and promotion: "*Only tenured faculty may vote on the awarding of tenure; only full Professors with tenure may vote on promotion to full Professor within the Tenured/Tenure Track Faculty and on the awarding of tenure to a faculty member hired as a full Professor.*" Schools have applied this principle in assuring that the eligible faculty cohort is given voice before policies are approved within a school, prior to submissions to the Provost (or in this case, to the President).

The reason for the reminder here is that the GSOM transmittal document refers to the Faculty Council's support for the policies. But it makes no reference to further consultation, such as a vote by protected secret ballot of all the eligible tenured and tenure-track faculty of the GSOM.

Why is securing the support of all eligible tenured and tenure-track faculty important? While it is clear that the new policies were supported by the GSOM Faculty Council by a large margin, the vast majority of the GSOM Faculty Council members are drawn from the clinical faculty, who constitute the vast majority of GSOM faculty as a whole. That means that however the T-faculty on the Council may have voted, their voice as T-faculty would have been in the minority.

Our T-FSC Senators from the GSOM have informed us that about two or so years ago the GSOM Faculty Council by-laws were revised—following the school's guidelines. They now affirm that Clinical and T-Faculty can vote equally on all matters, *including policies that govern Tenured and Tenure-Track faculty alone.*

Given the natural majority of clinicians and their importance, it is of course entirely desirable that their views are considered in all shared issues that involve the faculty and their school as a whole. And it can certainly be argued that their opinions should always be solicited, and their experience valued.

*But is there not a policy dilemma here?*

Although the Provost on October 22 at the T-FSC meeting affirmed correctly that the vote was conducted in accordance with the *school's* by-laws, might there be an unintended, but potentially highly problematic precedent for the university as a whole—in authorizing C-Faculty to vote on matters governing the tenure rights of T-Faculty, let alone the process for removing tenure? That authority seems to be in clear opposition to the language (and the spirit) of the *Handbook*, cited above.

In this instance, do the School's Faculty Council by-laws supersede the kind of comity of principles that animate the *Handbook*—and if so, can they be maintained? (A question of constitutionality, of sorts.) Would such a change in itself require a policy review—and vote of approval—by the President and the University Board of Trustees, for superseding university-wide principles?

The preoccupation with precedent here is also a matter of prudence for GSOM with respect to the application of its proposed new policies. If the rights of the T-Faculty to have a protected voice on matters that affect them exclusively were not respected, does that not make GSOM vulnerable in a potential grievance/lawsuit emanating from a "guilty" party—who might credibly raise a *procedural* challenge whether the policy that led to his/her dismissal was legitimately implemented, and if not, whether it has standing?

The aforementioned concern is thus far hypothetical. It could be easily attenuated if we were informed that separately the proposal was also submitted to *all* GSOM T-Faculty for a vote by secret ballot (the practice at other schools), and received the support of a majority of those eligible.

While these questions and references to best practice comparisons are not about the **substance** of the particular tenure policy modifications under consideration, the absence of clarity about this sensitive matter of apparent inconsistency with University policy and practice impacts our reading of the policy document, making us more attentive to ambiguities in its language that appear concerning.

What follows are a series of numbered (1-16) "*PPTM comments*" about substantive issues, presented as interlinear notes in the body of the submitted documents themselves.

Concerns about errors in presentation, textual cross-references, gnarled passages, etc. are identified as "*PPTM technical comments*" --and to differentiate them for the more substantive issues addressed by the "PPTM comments," are in a distinctive font and color and are marked alphabetically (A-F).

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## **Sequential Commentary on GSOM's Proposed Policies**

**PPTM #1 comments** re: The Resolution (below). *Question about process.* The Medical School has its own Advisory Board, made up of select members of the NYU Board of Trustees. The President and the NYU Board of Trustees must vote on any policy that will supersede the guidelines spelled out in *The Faculty Handbook*.

This resolution comes from the Advisory Board of the GSOM to the NYU Trustees as a whole.

Is this the normal route for approval? Would it not be established academic protocol for the President (in consultation with the Provost) to weigh in first—as the ultimate academic authorities of the University—*before* involving members of the Board of Trustees? Is there not a risk of politicizing what should be a carefully wrought academic recommendation?

**RESOLUTION OF THE BOARD OF TRUSTEES OF  
NYU GROSSMAN SCHOOL OF MEDICINE ADVISORY BOARD**

Recommend Amendment to NYU Faculty Handbook September 22 2020

WHEREAS, faculty members of NYU Grossman School of Medicine ("GSOM") are governed by policies set forth in the New York University Faculty Handbook; and

WHEREAS, in recognition of the types and import of misconduct issues specific to the GSOM, GSOM leadership recommends that provisions of the Faculty Handbook with respect to disciplinary and termination procedures for tenured and tenure-track faculty be amended as applicable to faculty of GSOM, as set forth in the proposed amendment attached hereto, and

WHEREAS, the GSOM Faculty Council has approved the proposed amendment.

NOW, THEREFORE, be it hereby:

RESOLVED, that the Advisory Board hereby recommends that the Board of Trustees of New York University approve the proposed amendment to the NYU Faculty Handbook, solely applicable to the NYU Grossman School of Medicine.

**NYU GROSSMAN SCHOOL OF MEDICINE  
PROPOSED AMENDMENT TO THE  
NEW YORK UNIVERSITY FACULTY  
HANDBOOK**

DISCIPLINARY RULES AND PROCEEDINGS FOR TENURED AND  
TENURE TRACK FACULTY FOR THE GROSSMAN SCHOOL OF  
MEDICINE

**PPTM #2.** *Comment regarding the bracketed introductory paragraph:* We note the expressed intention to have these policies replace the procedures laid out in the Faculty Handbook.

**[The procedures outlined below are intended to supersede the procedures set forth in Titles I (VI), III and IV of the New York University Faculty Handbook establishing the disciplinary rules and proceedings applicable to tenured and tenure-track faculty members at the Grossman School of Medicine]**

**A. Tenured Faculty**

*I. Termination of a Tenured Appointment*

A tenured faculty member's employment and faculty appointment in the Grossman School of Medicine may be terminated for "Adequate Cause" as defined in Title I.VI.2 of the New York University Faculty Handbook.

*II. Proceedings for Termination of a Tenured Appointment*

**I. General Provisions**

- a) [Rules; notice; record] Proceedings for termination of service for cause shall be conducted in accordance with the rules herein as may from time to time be amended by the Board of Trustees, and shall be initiated by service upon the person involved of a written notice setting forth clearly and directly all charges preferred against him or her and informing him or her of his or her rights under this section. The person charged shall be entitled to a hearing before a hearing panel of the Grossman School of Medicine Tenure and Tenure-Track Faculty Disciplinary Committee. A full stenographic record of the hearing shall be given to the parties concerned.

**PPTM #3** (*comment & question*). This language (in 1b) is consistent with the Handbook as it applies to all schools—it is the President (and not the Provost) who is the ultimate decider. Would there be merit in suggesting (not just for GSOM) that as termination for cause is the most sensitive personnel action within the academic culture, that there be some expectation that the Provost review the dossier before passing it (expeditiously) to the President for the final determination?

- b) [Appeal to the University President] Upon the request of either the faculty member charged or the charging party, the record, findings, conclusions, and proposed sanctions of the hearing panel of the Tenure and Tenure-Track Faculty Disciplinary Committee shall be forwarded to the University President for review and final determination. In the absence of such request, the findings, conclusions, and proposed sanctions of the hearing panel shall be final.
- c) [Rules bind all parties] The rules regulating proceedings to terminate service for cause shall be binding upon all parties.

Several concerns about section A. II. 1. d:

**PPTM #4.**

- The authorization to give the dean authority “*whenever in his or her judgment*” sees a threat to the well-being of the individual or to the school could be interpreted as giving license to arbitrary dissatisfaction with the faculty member. To avoid an open-ended use of authority, we recommend an affirmation/expectation about the availability of substantial preliminary evidence that has informed the dean’s judgment: For ex: “*...whenever upon an examination of a substantial body of compelling evidence, in his or her judgment, continuance...*”

**PPTM #5**

- The word “reputation” is an addition to the language of the *Handbook*. Worries about damage to institutional reputation might be a valid consideration in some cases, especially if the egregious misconduct that has triggered the process of seeking to withhold tenure and dismiss, has become public knowledge or, for example, it risks compromising relations with a major funding agency supporting other GSOM researchers. On the other hand, is there a risk that citing potential damage to reputation as a substantive cause for dismissal in itself might also be highly subjective—and thus potentially arbitrary? Again, perhaps language that is more explicit about what is intended by way of “damage to reputation” could be strengthened with a hypothetical example of what “damage to reputation” might entail.

**PPTM #6.**

The discussion of the bases of salary reduction is a substantial addition to the current policy. The language of the Handbook: *"Unless legal considerations forbid, any such suspension shall be with full base pay. At any time during the pendency of termination proceedings, the President and Chancellor may lift or modify any suspension in the interest of substantial justice."* This GSOM alternative may be a reaction to frustrating previous experiences with salary costs during prolonged deliberative processes, but the details herein are notably far more specific about the bases for withholding compensation than the existing policy—and yet might also be too limited.

In this case, would it be advisable to have a more general statement, which puts the respect for 'substantial justice' in play both for lifting or modifying a sanction—as well as increasing a sanction by *imposing* allowable reductions of compensation consistent with the law? Something like *"At any time during the pendency of termination proceedings, the President and Chancellor of the University may lift or modify any suspension in the interest of substantial justice, or conversely when sanctioned by law impose some element of reduction in compensation beyond base salary."*

Moreover, does not the punitive focus on reducing compensation in the policy (notwithstanding how much the circumstances might justify reducing compensation until the process is completed) need also to be balanced against some anticipation that the accusations against the faculty member might not be conclusive? On the supposition that the accused will be considered innocent until the charges of adequate cause are evaluated and upheld, it might be prudent to consider putting whatever part of compensation is being withheld into a kind of escrow account during the duration of the deliberative process. Should the accusations be corroborated and loss of tenure and subsequent dismissal are supported, those funds then return to the School. Should the charges not be sustained, the withheld compensation would be paid to the faculty member.

Of course the proceedings for disciplinary action would not be undertaken without compelling evidence at the outset. But some more consideration for the due process "rights" of the accused throughout the proceedings would strengthen the University's ability to sustain a decision to dismiss.

[Summary suspension] Summary suspension pending termination proceedings is an extraordinary remedy, but nothing in this statement shall be interpreted as precluding such action by the Dean of the School, with the assent of the President whenever, in his or her

judgment, continuance of the person in service threatens substantial harm to himself or herself, to others, or to the welfare or reputation of the University or the Grossman School of Medicine. During the period of such suspension, the faculty member's pay shall be adjusted to, and the faculty member shall be paid, the base salary commensurate with the faculty member's position, except in a case where the faculty member is incarcerated or under prosecution for a criminal act or is employed by another employer with equivalent compensation during the period of any such suspension, in which case the suspension shall be without salary or compensation. At any time during the pendency of termination proceedings, the President may lift or modify any suspension in the interest of substantial justice.

**PPTM #7:** Language. In a civil or criminal trial, the outcome of conviction or acquittal is not pre-determined—but the process is initiated because of reasonable supposition of the likelihood of guilt. A trial is about an alleged crime, not the punishment that would follow conviction.

If the analogy holds, shouldn't the proceedings begin with the effort to *establish adequate cause* for dismissal, not with a statement of a predicted outcome? "Dismissal Proceedings" implies that the conclusion has been pre-determined. Punishment comes after the allegations have been corroborated and no other course of remediation is available---and the loss of tenure and of employment are justified. At the least, the conclusion might seem less foregone if the policy retained language of the *Faculty Handbook*: "Initiation of Disciplinary Proceedings."

**PPTM technical comment #A.** Numeration. The numbering of sections in the documents is irregular, not following the usual order of I.A.1.a.i, etc., but A./I.a. As for the section below, the last number in the sequence being used heretofore was an un-italicized Roman Numeral "I." As there is no preceding Arabic "1" previous to this, should what follows then be Roman numeral "II."? (Whatever revisions may occur in the policies, the sequence numbering should be normalized and internally consistent throughout.)

## 2. Initiation of Dismissal Proceedings

**PPTM #8.** Same concern as #4 above about the language— “Whenever the Dean or the Vice Dean...” being too open-ended.

- a) Whenever the Dean or the Vice Dean for Education, Faculty, and Academic Affairs of the Grossman School of Medicine (the "charging party"), with the assent of the President, deems that such action is warranted, the charging party shall initiate proceedings to terminate for cause the service of a tenured faculty member. The charging party shall formulate, or cause to be formulated, the charges in writing. A copy of such charges, together with notice of proceedings for termination of his or her service for cause, shall be e-mailed or mailed by registered mail to the faculty member involved (the "respondent").

**PPTM technical comment #B.** Re § 2.b. Given that turnaround time for various steps of the process must be respected by different parties, here and elsewhere when a certain number of days are specified, it might be prudent to affirm whether calendar days or working days are intended. Imagine that charges are served on Friday, December 21, 2020: Would the respondent be in compliance only if answers are forwarded by January 10, 2021—or would weekends and the December 25 and January 1 holidays not be counted, allowing the respondent to be in compliance by submitting answers by January 20? Not a trivial ambiguity. Recommend clarification of intent at some point in the document.

- b) The respondent shall serve a written answer upon the charging party within twenty (20) days after service of the charges and notice upon him or her admitting or denying each of the allegations contained in the charges and setting forth any defenses to the charges. The time for service of the answer may be extended by the charging party in the interests of substantial justice.

**PPTM #9:** The proposed policies in § c) below seek to replace the *Faculty Handbook's* guidance about the Tenure Appeals Committee that would normally be charged to evaluate and make recommendations about the determination that separation for cause is justified.

So particular attention here is essential.

- Representation. It is common practice to assure that committees constituted to deliberate on matters of promotion (for Clinical and T-faculty) or consideration for tenure (for T-faculty), the relevant faculty body would be expected to select/vote for one or more representatives, who are NOT appointed by the Dean. In the event of likely contestation by an ‘accused’ faculty member—whatever rights to appeal or

grieve are guaranteed—constituting membership from GSOM to include ONLY faculty members who hold administrative positions under the Dean is problematic. Could this oversight be remedied to suggest that at least two more T-faculty members on the Disciplinary Committee should be elected by their peers and be independent of holding academic administrative responsibilities? That would be consistent with principles of shared governance and mitigate the appearance of bias, in balancing representation of faculty members with administrative titles appointed by the dean with those chosen by their peers.

- Inclusion of participation of faculty from other Schools. It is salutary that GSOM seeks input from other schools—in partial emulation of the university-wide net cast by the selection of the Tenure Appeals Committee. But, while there's a transparent logic in including representation from the other Health Science schools where faculty are involved in research and clinical practice, and balancing an aspiration for greater efficiency (because fewer schools would be involved), is there a middle-ground?

T-research faculty in the sciences in FAS, Tandon, or select departments from other schools who are heavily dependent on grant-funding from government agencies and major foundations, might also be well-positioned to understand the gravity of evidence that concern data manipulation, fraudulent reporting, disregard for human subject research protocols, etc. Possible Hearing Panel representation from the School of Law might be particularly helpful as well.

Although there may be compelling arguments to simplify the process used in constituting the Tenure Appeals Committee by avoiding the requirement to call upon ALL schools, it remains self-evident that welcoming a somewhat larger but qualified pool to draw upon could make it easier to constitute a viable committee—and help guard against perceived or actual bias.

- Lastly: Obviously dealing with such cases involves a prudent impulse for damage control, and assuring an equitable process—one that is as *confidential* as is humanly possible. This said, are there practices at other universities known to GSOM that in dealing with such matters, include an “external” faculty member from another institution in the disciplinary/hearing panel?

- c) Upon receipt of the answer of the respondent, unless the respondent resigns their tenured faculty appointment, the charging party shall convene the Tenured and Tenure-Track Faculty Disciplinary Committee. The Committee shall be composed of five members, each a tenured faculty member, consisting of President of the Faculty Council, the Chair of the Grossman School of Medicine Appointments, Promotion and Tenure Committee, the Chair of the Professional Conduct Committee of NYU Langone Hospitals, the

School of Nursing's longest- serving Senator on the Tenured/Tenure Track Faculty Senators Council, and the School of Dentistry's longest-serving Senator on the Tenured/Tenure Track Faculty Senators Council. In the event any of the faculty members holding these designated positions are non-tenured, the Executive Committee of the Faculty Council shall select a tenured member of the body represented by such non-tenured faculty member (except that, in the case of the Faculty Council, it shall be the most recent past President of the Faculty Council who was tenured).

**PPTM technical comment #C.** Our committee is unable to comprehend the procedure being stipulated in the highlighted passage above. Recommend a rewrite.

After appointment, in the event of a Committee member's conflict of interest or inability to serve, the other Committee members will designate a tenured senior faculty member of the body represented by such Committee member to serve on the Committee in such member's place. No member of the Tenured and Tenure-Track Faculty Disciplinary Committee from the same department as the respondent may serve as a member of the Committee during tenure revocation proceedings.

- d) The charging party shall forward to the Tenured and Tenure-Track Faculty Disciplinary Committee copies of the written charges and of the answer to such charges. If the respondent fails to serve a written answer within twenty (20) days, or any extension of such time, the charging party shall nevertheless forward the charges to the Tenured and Tenure-Track Faculty Disciplinary Committee with a statement showing that no answer has been served by the respondent.
- e) Within twenty (20) days after submission of the charges and answer, or of the charges alone, as the case may be, to the Tenured and Tenure-Track Faculty Disciplinary Committee, the committee shall set a time for the commencement of a hearing, which shall not be more than thirty (30) days thereafter unless further time is granted by the Committee upon request of either party. The Tenured and Tenure-Track Faculty Disciplinary

Committee shall serve as the hearing panel.

3. Conduct of Hearings before the Hearing Panel

- a) A hearing officer who is an attorney shall preside over the hearing on the charges. The charging party and the respondent shall select a hearing officer from a list of 10 qualified attorneys compiled by the American Arbitration Association to conduct the proceedings. The charging party and respondent may each strike up to five names from the list and each shall rank, in order of preference, the names of those whom they have not stricken. The Association shall then designate as the hearing officer the available person with the highest degree of joint preference of the parties. Should more than one available person have an equally high joint preference, the Association shall select the hearing officer by lot from those with the highest joint preference.
  
- b) A calendar of hearing dates in a proceeding for dismissal shall be fixed by the hearing panel after consultation with the parties to the proceeding and the hearing officer; the calendar shall be read into the record on the opening day of the hearing; it shall be adhered to unless the hearing panel orders exceptions for due cause. Whenever the interests of substantial justice appear to so require, the hearing panel may direct either or both parties to submit a summary of the evidence, a first list of witnesses to be called, or both. If the statement of the charges, or the answer thereto, appears to the hearing panel to be indefinite or obscure, the hearing panel may require a more definite statement. Where the respondent has failed to serve an answer to the charges and where it further appears that the respondent is unable to understand the charges and to participate meaningfully in the proceeding, the panel shall obtain the services of a qualified person to represent the respondent, at the respondent's expense. In the absence of such circumstances or other good cause, upon the failure of the respondent

to serve an answer prior to the commencement of a hearing or to appear at the hearing, the panel may, in its discretion, preclude the subsequent assertion of any defense or the introduction of evidence on behalf of the respondent.

- c) The hearing officer shall preside over the hearing and rule on all procedural matters, including the admissibility of evidence, subject to the right of each party to appeal to the hearing panel. Upon such appeal, the decision of a majority of the panel members shall control. The panel shall have the power to enlarge the time appointed in these procedures for doing any act or taking any proceedings, where the interests of substantial justice appear to so require.
- d) The hearings shall not be restricted by the rules of procedure or of the admissibility of evidence which prevail in the courts of law. Subject to the provisions of section (c) above, each member of the hearing panel may inquire into whatever is believed relevant to the inquiry. Whenever the proceedings originate from a finding of scientific or research misconduct in accordance with the separate rules governing such proceedings, the hearing panel shall deem the report of the earlier committee to constitute the facts as to the existence of such misconduct.
- e) The respondent and the charging party may be assisted by counsel of his or her choice throughout the proceedings. Counsel for both sides shall cooperate at all times with the panel and the hearing officer.
- f) A request by either party to present witnesses shall be made to the hearing panel, which may limit the hearing of witnesses at its discretion. If witnesses are called, each party shall have the right of cross-examination. Each party may introduce exhibits, which shall constitute part of the record of the case.
- g) A stenographic record shall be made of all proceedings at the

hearing. On order of the hearing officer, procedural matters may be discussed in executive session, the minutes of which need not be included in the transcript of the record of the hearing. The transcript shall be available to all parties to the hearing.

- h) Each party shall have equal opportunity at the final session of the hearing for the summation of the case, either in person or by counsel, but no new evidence or testimony may be introduced during such summation.

**PPTM #10.** Re § 3.i (below): Clarification needed regarding the size of the committee. Is this an oversight or is something else intended? There are five (5) members of the proposed hearing panel, not three (3) as the opening sentence states. On the other hand, there are three members from GSOM. (Not taking into account the question raised in PPTM #9 above about the benefits of enlarging the panel.)

Therefore, is the "three" below just a typo, when "five" was intended? Or does the proposed rule here intend that the *three GSOM reps* must be present?

And there's a related concern about the nature of the vote. If the hearing panel is limited to five members, three of whom are from GSOM, that would assure the medical school of the possibility of achieving a majority in every vote. This mathematical certainty is thus an additional argument for enlarging the panel further so that a majority vote could only be achieved with support from representatives from other schools—or for requiring *a unanimous vote* from a smaller number of members.

- i) All three members of the hearing panel shall be present at the hearing. If, after the commencement of the hearing, a member of the panel becomes unable to continue to serve, he or she shall be excused from further service, and the member's designee (a tenured senior faculty member of the body they represent) shall serve in his or her place. Prior to serving on the panel, the member's designee must have read the hearing transcript and all charges and other pleadings filed in connection with the hearing and certify to having done so. Should a member of the panel repeatedly fail to carry out his or her obligations as a member of the panel, upon a unanimous vote of the remaining members of the panel, he or she may be discharged from further service and replaced by a tenured senior faculty member of the body represented by the replaced member, such replacement member to be elected by the remaining panel members.
- j) Upon completion of the hearing, the panel shall deliberate and

issue its decision in a written report. The deliberations shall be conducted in executive session and shall be attended only by the members of the hearing panel. The decision of the panel must be based upon the evidence presented, and no recommendation of dismissal shall be made based solely upon the failure of the person involved to answer the charges or appear at the hearing. The decision of the panel must be supported by a majority of its members.

**PPTM #11.** Re §3. k.(below): *Clarity.* To a non-lawyer, the language of this section is not clear. It is likely that a substantial body of information against the accused faculty member will be provided in confidence. However, what is being protected? Confidentiality—or its breach? Does this paragraph intend to protect participants who “leak” information about the hearings that gets published? Or about their ability to access confidential information? Moreover, does the ‘charged’ faculty member have immunity as well—since he or she is a member of the faculty and a witness in his/her self-defense? Respectfully suggest that section 3.k, should be re-written to avoid ambiguity of intent and vulnerability of application.

- k) [Hearing Immunity]. The members of the Board of Trustees, the President and Provost of the University and other officers of administration, the members of the Tenured and Tenure-Track Faculty Disciplinary Committee, the Vice Dean, the Dean and members of the faculty, and all witnesses and other participants in any hearing shall be absolutely privileged as to statements or publications made in connection with the hearings, and shall have complete immunity for any decision, statement of fact, or comment relating thereto.

#### 4. Decision and Report of the Hearing Panel

- a) The hearing panel's decision shall resolve the matter, unless the matter is appealed, as set forth in section (d) below. The report containing the hearing panel's decision shall be in writing and shall consist of: (1) a transcript of the record of the hearing and the exhibits offered or introduced into evidence by the parties; (2) such findings, conclusions and any proposed sanctions as the panel shall make, including a statement of the facts deemed essential to the findings; (3) a memorandum setting forth the reasons for any recommendations; and (4) any memorandum submitted by any dissenting member of the panel, at his or her own discretion, with reference to his or her opinion as to the matters in controversy.

- b) Each finding, conclusion, and recommendation shall be reported with the numerical vote of the members of the panel, but not with the names of the members who voted for or against the same.
- c) Complete copies of items (2), (3), and (4) in section (a) above shall be transmitted to the parties to the hearing and to the University President.

5. Appeal to the President

- a) Either party may appeal the hearing panel's decision in writing to the University President, who may seek consultation at his or her own discretion. The bases for appeal are limited to the following: (1) findings in support of one or more of the charges are not supported by substantial evidence in the record as a whole, or (2) hearing was not conducted fairly or was not conducted in substantial compliance with the governing rules, or (3) the sanction is disproportionate to the infraction. The appeal request should set forth the basis for the party's appeal, and any arguments in support of a reversal of the hearing panel's decision.
- b) Upon appeal, after reviewing the report and decision of the hearing panel, and any documentation submitted in support of the appeal, the President shall issue a written decision, which shall be considered final.
- c) [Appeal of Decision to Dismiss for Cause]. On appeal of the hearing panel's decision to dismiss the faculty member for cause, the President shall uphold the hearing panel's decision unless the President determines either: (i) that the findings against the faculty member on one or more of the charges are not supported by substantial evidence in the record as a whole; (ii) that the hearing was not conducted fairly and in substantial compliance with the rules set forth above for the conduct of such hearings; or (iii) that the sanction of dismissal is not appropriate. If the President determines either (i), (ii), or (iii), the President shall have the option to either: a) dismiss the charges; b) remand the case for a new hearing before the same or a new hearing panel; or c) reduce the sanction.

**PPTM #11.** Re § 5.c.iii.b above and 5.d (below). *Problematic ambiguity in the language.* Given that two of three of the hypothetical reasons for the President to empanel a new hearing panel are related to perceived irregularities in the process, in the event the President agrees that the hearing may not have been conducted fairly or was not in compliance with the governing rules, would it not appear irresponsible to call for a new hearing before the *same* panel?

- d) [Appeal of Decision Not to Dismiss for Cause]. On appeal of the hearing panel's decision not to dismiss the faculty member for cause, the President shall make the final determination with respect to the appropriate sanction to be imposed, including any decision to dismiss the faculty member or increase any sanction recommended by the hearing panel. If the President determines either that the hearing panel's findings are not supported by substantial evidence in the record as a whole, that the hearing was not conducted fairly, or was not conducted in substantial compliance with the governing rules to the detriment of the charging party, the President shall have the option, but shall not be required, to remand the case for a new hearing before the same or a new hearing panel.
- e) If the President's decision is to terminate the service of the tenured faculty member, it shall be subject to approval by the Board of Trustees. The final disposition of the case shall be made public only after the faculty member has been officially informed of the decision of the President. Until that time no information concerning the hearings shall be disclosed to the public.

## **B. Tenure-Track Faculty**

Notwithstanding provisions set forth in Title II, Section XI of the Faculty Handbook by which a non-tenured tenure track faculty member may be removed upon sufficient notice where it is unlikely that tenure will be achieved, a tenure-track faculty member may be removed for "Adequate Cause" (as defined in Title I.VI.2 of the University Handbook), in which case the proceedings set forth below shall apply.

*I Proceedings to Terminate for Cause a Non-Tenured Tenure-Track Appointment*

**PPTM #12.** Re § B.I.a. (below). [Recalls PPTM #4 (above)]. As written, the highlighted language is too open-ended and could be an invitation to arbitrary action. Some reference to due-diligence and finding compelling grounds should precede "whenever".

- a. Whenever the faculty member's Department Chair (the "charging party") deems that such action is warranted, the charging party shall initiate proceedings to terminate for cause the service of a non-tenured tenure track faculty member.
- b. The charging party shall draft a memorandum setting forth the basis for removing the faculty member and forwards to the Vice Dean for Education, Faculty, and Academic Affairs of the Grossman School of Medicine (the "responsible administrator"). Upon authorization by the responsible administrator, a copy of such memorandum, together with notice of proceedings for termination of his or her service for cause, shall be e-mailed or mailed by registered mail to the faculty member involved (the "respondent").
- c. The respondent shall serve a written response to the charging party and to the responsible administrator within twenty (20) days after receipt of the charging party's memorandum. The time for service of the answer may be extended by the responsible administrator in the interests of substantial justice.

**PPTM technical comment #D**, re § B.I.d below. We cannot find the referenced section in this document. Need to remedy.

- d. The responsible administrator shall forward to the Tenured and Tenure-Track Faculty Disciplinary Committee (as described in Section III.2(d) above) a copy of the memoranda from each party. If the respondent fails to serve a written response within twenty (20) days, or any extension of such time, the responsible administrator shall nevertheless forward the charging party's memorandum to the Committee with a statement showing that no response has been served by the respondent.
- e. Both the charging party and the respondent will have the opportunity to appear before the Committee to present an oral

summary of the arguments in support of their position. The respondent and the charging party may be assisted by counsel of his or her choice. Counsel for each party shall cooperate at all times with the panel.

- f. A request by either party to present witnesses shall be made to the hearing panel, which may limit the hearing of witnesses at its discretion. If witnesses are called, each party shall have the right of cross-examination. Each party may introduce exhibits, which shall constitute part of the record of the case.
- g. Each member of the Committee may inquire into whatever is believed relevant to the inquiry. Following the oral summaries, the Committee shall deliberate and deliver its decision, in writing, to both parties and to the responsible administrator. The Committee's decision shall consist of: (1) such findings, conclusions and any proposed sanctions as the panel shall make, including a statement of the facts deemed essential to the findings; (2) a memorandum submitted by any dissenting member of the panel, at his or her own discretion, with reference to his or her opinion as to the findings, conclusions, and any proposed sanctions.
- h. Either party can appeal the Committee's decision to the Dean. The bases for appeal are limited to the following: (1) findings are not supported by substantial evidence in the record as a whole, or (2) the sanction is disproportionate to the infraction.

**PPTM #14.** Re § B. II. i. (below). *Concerns about due process.* Seems that the accused faculty member has no basis of defending him/herself except through counsel, has no means of appeal, or access to a grievance process, and that there is no "hearing panel" as such. Is this a misreading? A vulnerability?

Since the *Faculty Handbook* is silent on dismissal for cause for a tenure-track faculty member, it offers no guidance as such.

- i. After reviewing the report of the Committee, the Dean shall issue a written decision to the parties, which shall be considered final. If "cause" is found, the faculty member shall no longer be eligible for tenure at the School and may be terminated without further notice.

**PPTM #15.** Re: §C (below). The opening statement to section C may be the most worrisome language in the policy document as written. Its formulation could be construed as an invitation for peremptory dismissal for minor missteps that might be easily remediable.

Of course, disciplinary action is warranted in light of truly egregious misconduct or recurrent patterns of problematic behavior/performance.

But is it not dangerous or even potentially abusive to be able to invoke failure to “abide by *any* [italicization and boldface added] rule or regulation” of the GSOM as the basis for initiating disciplinary action?

Consider these conjectural concerns: Couldn't such a broad authorization be used to seek to sanction a faculty member for the exercise of academic freedom and/or of sound professional judgment, in the event she or he might challenge a policy, a practice, or an internal regulation on entirely professional and reasonable grounds? Or if she or he were unable to comply with—for example, the expectation of attending a certain number of meetings--because of documented health or family circumstances?

Similarly, it is easy to imagine how perceived non-compliance with “professional standards” could be subject to ambiguity of interpretation—and arbitrary charges. Is there an existing policy document known to all faculty where these GSOM-specific standards are spelled out in an institutional code of conduct, for example? (If so, this particular concern would be unwarranted—and the lack of specificity in the document here could be resolved simply by referencing where the statement of those standards can be accessed.)

It is expected of course that any proposed disciplinary policy would be applied judiciously--and in the expectation that the need for deploying it would be rare.

That's why it is especially important that the first part of the framework paragraph below--which establishes the justification for a broad range of disciplinary sanctions--be re-written. The last lines of the paragraph (from “engaged in an activity...”) are straightforward and unexceptionable. But we respectfully submit that what precedes them needs to be re-worked to avoid being so open-ended as to seem to give license for abuse and inadvertently seed a climate of mistrust

### **C. Other Disciplinary Proceedings for Tenured or Tenure-Track Faculty**

The following procedure applies when a tenured or tenure track faculty is alleged to have violated or failed to abide by any rule or regulation of the Grossman School of Medicine, engaged in behavior or conduct that does not meet the professional standards of the School, engaged in an activity that is a threat to the welfare or safety of anyone in the medical center community, or violated any local,

state, or federal law, for which the discipline sought is not termination.

- a. After an internal investigation confirms evidence of a basis for such action, the Chair of the faculty member's department shall make a recommendation to the Vice Dean for Education, Faculty, and Academic Affairs of the Grossman School of Medicine for disciplinary action. Disciplinary action under this section shall include, but is not limited to, the following:
  - 1) Reprimand
  - 2) Censure
  - 3) Removal of Privileges
  - 4) Suspension
  - 5) Monetary fine
- b. If the Vice Dean approves disciplinary action, the Vice Dean will notify the Chair, who will notify the faculty member in writing.

**PPTM technical comment #E** re § C.c. below. Unclear reference. Since the Vice Dean is also a dean, on the assumption that the faculty member's right to appeal cannot be to the person who approved the disciplinary action, the text should be explicit that the "*Dean of the School*" is intended.

**PPTM technical comment #F** refers to the highlighted clause below. Where can these policies or procedures be found? It is customary to refer to specific school by-laws, grievance policies, etc., so that the expectations are transparent and the governing frameworks are identified. (And usually included or cited via an accessible hyperlink when a new proposal is being advanced for consideration.)

- c. The faculty member has the right to appeal the decision in writing to the Dean on the following grounds: (1) the decision was not supported by substantial evidence on the record, or (2) the investigation was not conducted fairly or **in accordance with the applicable policy and/or procedures**; or (3) the sanction is disproportionate to the infraction.

**PPTM #16.** Re § C.d. (below). A question not about what is written, but an anticipation for the need for something not apparently considered. What if it's the Dean him/herself who initiates the charges? The policy must therefore also anticipate who adjudicates in such cases, because the same individual cannot be the accuser/prosecutor and the judge. (Other schools have named the Provost as the arbiter in anticipating this eventuality.)

- d. Upon review of the record and the appeal request, the Dean shall issue a decision, which shall be considered final.