



THE UNIVERSITY OF WINNIPEG

# Tenure, Promotion, and Continuing Appointment Process

Collective Agreement Procedures &  
Procedural Fairness

November 2019

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# Outline

1. Highlights of “New” Tenure and Promotion Process
2. Procedural Fairness – Generally
3. Conflict of Interest
4. Reasonable Apprehension of Bias
5. Process

# Article 13.04 - The Tenure, Promotion, and Continuing Appointment Committee (TPCAC)

- Replaces the DPC and the FTPC
- TPCAC Membership
  - Dean (non-voting) – Chair of the TPCAC
  - Applicant's Chair (non-voting)
  - Two nucleus members (voting) – appointed by the Dean, normally from the Dean's Faculty
  - Three members of the applicant's Department or a closely related discipline (voting) – appointed by the Dean, in consultation with the Chair, from a list of five nominees provided by the DPC

# Selecting TPCAC Nominees

- Associate Professor/Tenure application – TPCAC members must be tenured
- Promotion to Professor – TPCAC members must be tenured and at least one must hold the rank of Professor
- Application by Instructor – TPCAC shall be augmented by an Instructor with continuing appointment

# Selecting TPCAC Nominees

## - Small Departments

- Where the Department has sufficient tenured Faculty, they shall be nominated and shall serve
- Where the Department has insufficient tenured Faculty:
  - the DPC shall nominate 3 Departments members with rank of Assistant Professor;
  - At least 2 of the voting members of the TPCAC must be from the applicant's Department; and
  - At least 3 of the voting members must be tenured.

- UW & UWFA LOU, October 2015

# Articles 24.11 and 25.18

## Faculty-Based Criteria (FBC)

- Established by the Deans in 2015, following consultation with the Chairs, DPC Chairs, and the Vice-President (Academic)
- Must be consistent with the conditions and general criteria in the CA
- 2019/20 Applications – Applicants shall be evaluated pursuant to the CA and the FBC together

# Conditions and Criteria for Tenure, Promotion and Continuing Appointment

- Clause 24.09 – Continuing appt (Librarians)
- Clause 24.10 – Continuing appt (Instructors)
- Clause 25.11 and 25.13 – Promotion (Faculty)
- Clause 25.14 – Promotion (Librarians)
- Clause 25.15 – Promotion (Instructors)
- Clause 25.16 – Promotion (Counsellors)
- Clause 25.17 – Promotion (Coaches)

# Timelines

- June 30 - Applications due for tenure and promotion
- August 1 – Applications due for continuing appointment
- October 1 - DPC nominations to Dean
- October 31 - Dean appoints TPCAC
- Nov 1 – TPCAC meetings commence



# Timelines

- March 31 – President’s decision on continuing appointment to the applicant
- May 15 – Vice-President’s recommendation on tenure and promotion to the President
- May 31 – President’s decision on tenure and promotion to the applicant

# Principles of Procedural Fairness

- Procedural fairness/natural justice – legal rules governing decision-makers to ensure fair treatment of those about whom decisions are being made
- Generally, a right to a full and fair hearing by an impartial decision-maker
- Rights may vary depending on the type of tribunal, the rules under which the tribunal is acting, and the subject matter

# General Requirements of the CA

- Articles 24.04(4) & 25.07(4): The Dean/Administrator is responsible for ensuring that procedural fairness is maintained in the consideration of applications by the TPCAC and the Chair.
- Articles 24.04(5) & 25.07(5): If the Dean/Administrator determines that there was a breach of procedural fairness, he/she shall take appropriate steps to remedy the breach.

# Specific Requirements in the CA

## Referees and TPCAC

- Article 25.05(6) – External referees – The list of referees shall be consistent with the UW Conflict of Interest Policy and Article 37 Conflict of Interest and shall not include individuals who were the applicant’s thesis supervisor, or postdoctoral supervisor.
- Articles 24.04(1) & 25.07(1) – No Member shall serve on the TPCAC while his/her own candidacy is under consideration.

# Specific Requirements in the CA

## TPCAC

- Articles 24.04(6) & 25.07(6) When the TPCAC is unable to make a positive recommendation based on the information provided, the Member shall be invited to appear before the TPCAC and to present any further evidence and/or supporting information, oral and/or written, he/she deems appropriate. The Member shall have the right to be accompanied by another Member.

# UW Conflict of Interest Policy

- Definition: A conflict of interest occurs when the personal interests of an employee clash or have the potential to clash with his/her duties and responsibilities to the University. For the purposes of this policy personal interests include, but are not necessarily limited to, a business, commercial or financial interest, whether of the person involved or arising from family or marital relationships, from friends, or from former, existing or prospective business associations.

# UW Conflict of Interest Policy

- Policy Definition (continued): A finding of conflict of interest does not depend upon willful wrongdoing by a person, nor upon the issue of whether the judgment of the person has, in fact, been affected. A conflict of interest may exist whether or not a monetary advantage has been or may have been conferred upon the person.
- <http://www.uwinnipeg.ca/hr/policies/policy-conflict-of-interest.html>

# UWFA Collective Agreement, Article 37

- Article 37:01 - All Members are governed by the provisions of the UW Conflict of Interest Policy, which shall be updated from time to time in consultation with the Association through the Labour Management Committee (LMC) pursuant to Article 4.



# UWFA Collective Agreement, Article 37

- 37:02 Members, persons acting on behalf of the Employer and persons acting on behalf of the Association shall avoid participation in or voting on any decision-making process in which they have a conflict of interest.

# UWFA Collective Agreement, Article 37

- 37:03 A conflict of interest includes but is not limited to situations in which a Member, a person acting on behalf of the Employer or a person acting on behalf of the Association is involved in decision making and:
  - a) stands to benefit or be harmed financially by virtue of the decision;
  - b) has family or close friends who stand to benefit or be harmed financially by virtue of the decision;
  - c) has a close personal relationship, whether positive or negative, with anyone who is the target of the decision-making process.

# UWFA Collective Agreement, Article 37

- 37:05 Whenever a potential conflict of interest arises, the person who is first aware of the situation shall immediately inform in writing the relevant party or parties (e.g. Department Chair, committee chair, Dean) of the potential conflict, with the goal of resolving the matter in an open and collaborative manner.
- 37:06 The usual remedy for alleviating a conflict of interest is the recusal or removal of the person with the conflict of interest from the decision-making process.

# What is bias?

- Bias: An unauthorized predilection toward a particular result or to be subject to unauthorized factors which lead, or have the tendency to lead, to a particular result.
- Actual Bias need not be proven.
- Test: Reasonable Apprehension of Bias.

# Reasonable Apprehension of Bias

- Supreme Court of Canada:

*The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.*

# Reasonable Apprehension of Bias

- Supreme Court of Canada:

*The test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that (the decision-maker), whether consciously or unconsciously, would not decide fairly.”*

# Reasonable Apprehension of Bias

- Two-part objective test:
  1. Is the person considering the alleged bias reasonable?
    - A reasonable person is vested with knowledge and understanding of the decision-making process.
    - A reasonable person knows and considers the context surrounding the impugned behaviour.

# Reasonable Apprehension of Bias

- 2. Is the apprehension of bias itself reasonable?
  - The grounds for the apprehension must be substantial, not mere suspicion or speculation.
  - E.g. Is there a financial interest, specific conduct, evidence of pre-determination, or a close relationship?



# Letter of Understanding – UW & UWFA

- Signed September 30, 2015
- Absent other evidence, co-authorship and collaboration with the applicant for professional outputs and publication shall not normally amount to a conflict of interest or reasonable apprehension of bias with respect to Department Members who serve on the TPCAC. Each case shall be examined based on its particular circumstances.

# Letter of Understanding – UW & UWFA (continued)

- Two specific circumstances that the parties agree constitute a conflict of interest or reasonable apprehension of bias and prevent a Department Member from sitting on a TPCAC for an applicant.

# Letter of Understanding – UW & UWFA (continued)

- Where the Dean is satisfied that the Department Member:
  1. has engaged in prior co-authorship and collaboration on a substantial quantum of the material presented for the deliberations of the TPCAC; or
  2. is involved in current and on-going collaboration or co-authorship with the applicant for a grant competition or other contract expected to result in monetary compensation.

# Case 1 – York University

## Procedural Fairness & Reasonable Apprehension of Bias

- President made the final decision regarding tenure and promotion after receiving recommendations from the Adjudicating Committee and the Senate Review Committee
- Tenure & Promotion process in CA permitted President to seek advice as they deemed appropriate so the President commenced a practice of having the Provost review the application and provide a recommendation.

# Case 1 (continued)

- Administrative staff also took the step of preparing a draft denial letter on behalf of the President.
- President agreed that the draft had been prepared, but testified he would not have signed it if it did not reflect his decision.
- President's decision quashed.

# Case 1 (continued)

- Breach of CA as it did not provide for the Provost to make their own recommendation in the tenure and promotion process.
- Breach of PF because the Member had no opportunity to respond to Provost's recommendation.
- Reasonable apprehension of bias because a denial letter had been drafted before the President had made a decision.

# Case 2 - University of Western Ontario

## Improper Considerations

- Provost made final decision regarding promotion and tenure.
- Provost began a practice of having the Vice-Provost review the file and prepare a synopsis and recommendation, which was not contemplated by the CA.

## Case 2 (continued)

- Vice-Provost's recommendation said that if the Provost granted tenure and promotion, it could result in damage to the employer's reputation, setting a precedent for the future, and potential conflict with the Dean.
- Decision quashed – no basis for entertaining a recommendation from the Vice-Provost and the recommendation contained matters not properly considered under the CA.



# Case 3 – University of MB

## Reasonable Person Test

- University of Manitoba – Refusal of Research/Study Leave Grievance
- Head of Department was spouse of Dean.
- Acting Dean was put in place to insulate Dean from decisions made in the Department.

# Case 3 (continued)

- Head of Department and Acting Dean denied research/study leave.
- Recognition of spousal hiring and academic couples as part of University context
- Mere speculation insufficient to support reasonable apprehension of bias

# Case 4 – University of Windsor

## Reasonable Apprehension of Bias

- University of Windsor – Promotion Grievance
- University Committee on Academic Promotion & Tenure (UCAPT) – Ten person Board chaired by Vice-President
- VP was the defendant in a lawsuit brought by the Applicant and had been cross-examined in the civil suit shortly before the UCAPT hearing

# Process

- TPCAC members should be advised of duty to advise of potential conflict.
- Applicants should be notified of the constitution of their TPCAC and advised to raise any concerns regarding conflict or bias as soon as they become aware.

# Remedies

- Voluntary withdrawal/recusal from TPCAC
- Removal by Dean from TPCAC
- Document decision to applicant
- New recommendation by reconstituted TPCAC (depending on stage of deliberations)

# Arbitral Review of Tenure & Promotion Decisions

- Members' recourse is to the grievance process
- Standard of review at arbitration
  1. Compliance with Collective Agreement
    - Correctness standard; no deference
  2. Review of the assessment or decision
    - Substantial deference; should not be interfered with unless it is arbitrary, discriminatory, made in bad faith or manifestly unreasonable.

# TPCAC Resources

- <https://www.uwinnipeg.ca/hr/collective-agreements.html>
  - UWFA Collective Agreement
  - Faculty-based Criteria
  - Tenure & Promotion FAQ's
  - Summary of Tenure & Promotion Provisions
  - This Power Point