

THE UNIVERSITY OF ARIZONA
Committee on Academic Freedom and Tenure
Annual Report, 2013-2014
April 30, 2014

Prof. James Ratner, Chair

<u>CAFT Members</u>	<u>Department/College</u>	<u>Term</u>
James Ratner (Chair)	Law (LAW)	6/11-6/14
Sonia Colina (Vice Chair)	Spanish and Portuguese (COH)	6/10-5/16
Nafees Ahmad	Immunobiology (COM)	6/13-5/16
James A. Cook	Art (COFA)	6/12-5/15
Celestino Fernandez	Sociology (SBS)	6/12-5/15
Roberto Guzman	Chem/Envir Engineering (ENGR)	6/12-5/15
Jennifer Jenkins	English (COH)	6/11-5/14
Dante Lauretta	Lunar/Planetary Laboratory (COS)	6/13-5/16
Stephen Poe	Agric/Biosystems Engineering (CALC)	6/11-6/14
Alfred Quiroz	Art (COFA)	6/11-6/14
Linda Shaw	Disability/Pschoeducational Studies (COE)	6/09-5/15
S. Patricia Stock	Entomology (CALC)	6/13-5/16

The Committee on Academic Freedom and Tenure (CAFT) has the following items to report to the Faculty Senate:

Thanks for willingness to do work (a lot of it):

The Chair of the Committee on Academic Freedom and Tenure (CAFT) wishes to publically express his gratitude to all of the committee members and the personnel of the Faculty Center (in particular Jane Cherry) for all of their hard work, effort, good humor, and patience. CAFT involves a lot of work each year by the Faculty Center staff and by committee members who volunteer for the activity, and this year was no exception. The University owes them all a great deal of thanks.

CAFT completed two grievance hearings during the 2013-2014 academic year:

1. A grievance alleging improper performance review, improper behavior concerning appeal of that review, and retaliation for appeal of the review

A faculty member filed a grievance during the 2012-2013 year alleging that his department had improperly conducted his peer review/performance evaluation, that the Dean of his College had improperly reviewed his appeal of that performance evaluation, and that he had been retaliated against on his subsequent peer review/performance evaluation because he had pursued the appeal. Conciliation of the grievance had proved unsuccessful when, after about an hour, the grievant indicated he had no interest in conciliation. The hearing was conducted after last year's annual report.



The CAFT panel that conducted the hearing concluded that the allegations were largely unsupported by the facts revealed through the hearing, but recommended that the department head's failure to perceive the inappropriateness of conducting the subsequent performance evaluation while the previous one was still under appeal necessitated mild adjustment of the subsequent performance evaluation that removed the involvement of the department head concerning the disputed category. The President of the University chose not to respect the unanimous CAFT panel's recommendation, and instead concluded there should be no action. Lawyers were not involved in the hearing, although the grievant pursued Freedom of Information type requests from the respondents, the OGC may well have been involved in responding to that, and that matter became entangled with the grievant's requests for discovery and witnesses for the CAFT hearing.

2. A grievance alleging the University did not adhere to its rules while reviewing a tenure candidate

A faculty member denied tenure alleged that the University failed to substantially comply with its regular University procedures during its consideration of and ultimate denial of tenure. The allegations came to CAFT after (1) a final decision by the Provost of the faculty member's tenure candidacy (2) appeal of that decision to the President (3) denial of the appeal by the President (4) an appeal of that denial which requested a CAFT hearing pursuant to the ABOR requirement of a CAFT hearing if a tenure denial is alleged to be due to unconstitutional or illegal discriminatory action by the University or an interference with the Academic freedom of the faculty member, and (5) a rejection of that request by the President of the University as not alleging violations for which the ABOR required a CAFT hearing. Subsequent to these five events, the faculty member filed a grievance very similar to the appeal in (4) above, and that grievance nonetheless sufficiently alleged violations by the University in the tenure process to warrant a "non-ABOR required" CAFT hearing concerning the grievance.

The Provost's office, in response to the notice of the hearing on the grievance, took the position that the grievance should be dismissed because it would lead ultimately to the President making a decision on the CAFT panel's recommendation concerning the grievance while the President had already reviewed the matter. This required the panel chair (Prof. Ratner) to explain to the Provost that (1) the bylaws specifically entitle a faculty member denied tenure to pursue a grievance concerning that decision but only after the tenure process is complete including the President's review, so the Provost's position was in effect attempting to deny any faculty member the ability to ever raise a grievance on a tenure matter, and (2) the Provost's argument appeared close to suggesting the President in such situations may have a conflict, and if so, the solution is for the President to recuse herself from a decision on the grievance rather than dismiss the grievance.

The CAFT panel heard the grievance and ultimately unanimously concluded that the faculty member failed to demonstrate that the University behavior failed to conform with regular University procedures, and thus recommended no action be taken. The President of the University agreed with the CAFT panel recommendation. Lawyers were not involved in the hearing.

Other (at least somewhat noteworthy) matters that in some form came to CAFT's attention during this academic year

1. CAFT hearings for dismissals of service professionals

CAFT recommends that the UHAP be amended to establish a hearing body other than CAFT for non-academic "service" professionals recommended for suspension or dismissal by the University. The hearing body should be an ad hoc committee composed of service professionals and University faculty members with familiarity with employment law. Revisions to the UHAP concerning service professionals are apparently taking place, and if so an appropriate revision would remove the current requirement that CAFT hear employment law matters concerning "service" employees. The change should pertain only to "service" employees and not to academic professionals, as suspensions or dismissals of academic professionals are likely to raise matters within CAFT's expertise.

Explanation for the recommendation:

The University's fairly recent dismissal of a (non-academic) professional staff member necessitated the creation of a CAFT panel. The ABOR rules (6-302 I) indicate that staff members who are dismissed are entitled to a hearing, if they so desire, at which the University must prove "just cause" for the dismissal. The UHAP rules (4.20), making no distinction between academic and non-academic staff, establishes CAFT as the committee that conducts such a hearing. The President of the University thus referred the matter to CAFT. The employee eventually chose to resign from the University before the notice for the hearing was issued, and never requested a "just cause" hearing.

Upon the employee's resignation, the CAFT chair and the CAFT panel chair evaluated the situation. Their conclusion was that the applicable rules reveal a remarkable, disturbing lack of clarity concerning whether a resignation by a professional employee means that the employee has given up the entitlement to a "just cause" hearing, and whether such hearings should be conducted by CAFT, for the following reasons:

- (1) While the University Office of General Counsel took the position that a resignation waives the ability of the employee to force the University to prove just cause for the dismissal, the relevant ABOR rules granting the hearing (ABOR 3-302 I) make no mention of resignation and are susceptible to an interpretation that any recommendation of dismissal triggers a professional employee's entitlement to a "just cause" hearing regardless of a subsequent resignation by the employee.
- (2) While the ABOR rules differ concerning whether a dismissed employee is a "service" professional (regulated by ABOR 3-303) or an "academic" professional (regulated by ABOR 3-302), and indicate that a service professional recommended for dismissal is only entitled to a "just cause" hearing if "the employee requests the matter be referred for a dismissal hearing" (ABOR 3-303), the UHAP regulations do not distinguish between academic and service professionals and instead indicate ALL professional employees are entitled to a "just cause" hearing regardless of whether it was requested, referring to a no-longer existing section of the ABOR.
- (3) Suspension and dismissal matters pertaining to non-academic "service" employees raise standard employment law issues for which CAFT members have no particular expertise. CAFT

is elected by the faculty, and as its name suggests, has expertise concerning academic freedom and tenure as those concepts pertain to faculty members. The ABOR rules regulating service employees do not require the CAFT be the hearing body for "just cause" hearings pertaining to suspensions and dismissals of "service" employees. It only requires that the University establish a committee to hear the matters. It is the UHAP that blindly groups all professional employees together and funnels them all to CAFT for a "just cause" hearing. Thus the UHAP should be changed to provide for an ad hoc committee that includes service professionals (who have far more expertise concerning employment matters for service professionals than do members of the general faculty) and faculty and other university personnel who have employment law expertise.

2. A suspended "just cause" hearing

The university fairly recently notified a tenured faculty member that the University was pursuing his dismissal. The combination of ABOR, UHAP, and faculty by-laws rules require mandatory conciliation as the next step following the initial notice of intention of the University to dismiss. The rules also indicate that if conciliation is not successful within 60 days from the start of conciliation (30 days plus the possibility of a 30 day extension) the University "shall" issue a notice of dismissal, and a CAFT "just cause" hearing must be commenced shortly after the notice of dismissal. In this matter, conciliation was not successful within the 60 days, but the University did not issue a notice of dismissal, instead choosing to "suspend" the matter pending a judicially-ordered private employment review process relevant to the reasons why the University had initially pursued dismissal of the tenured faculty member. The University behavior seems entirely justified under the circumstances, but the rules do not anticipate such a situation and do not appear written in such a way as to accommodate the University's behavior. From CAFT's perspective, the matter is pending - if the ultimate result of the court-ordered process does not change the outcome of employment situation of the tenured faculty member, the University may proceed with dismissal and a "just cause" hearing will be conducted by a CAFT panel.

3. A possibly-pending hearing concerning sex discrimination in a departmental tenure decision

The GCC received an allegation of sex discrimination during faculty discussion and voting on a faculty member's tenure. The faculty member who filed the grievance tentatively sought a CAFT hearing concerning the matter, seeking remediation of the tenure procedures prior to a final decision by the University. The matter was initially referred by the GCC to OIE, but based on ABOR rules the grievance may ultimately lead to a CAFT hearing (pending, of course, the outcome of the OIE investigation). The rules concerning sex discrimination allegations and concerning denial of tenure contained in the ABOR rules, the UHAP, and the faculty by-laws indicate that eventually a faculty member making such an allegation is entitled to a CAFT hearing. The rules do not straightforwardly allow for a hearing during the tenure process so as to preclude a negative tenure result.

4. Panel size requirements for hearings required by the ABOR

CAFT internal guidelines describe that for ABOR-required hearings involving allegations of unconstitutional or illegally discriminatory behavior by the University and for "just cause"

suspension or dismissal hearings the CAFT panel shall be composed of 5 panel members. There is no requirement in the ABOR rules, the UHAP, or the faculty by-laws that a CAFT panel be composed of that many panel members. The language in the current ABOR rules is for allegations of unconstitutional or discriminatory action by the University there must be an impartial hearing committee of "not fewer than three committee members." (ABOR 6-201M 2 a.) The CAFT chair (Prof. Ratner) investigated the origin of the CAFT "five panel members" guideline but found nothing conclusive. The guidelines appear to have been drafted by a staff member, may have been based on previously-existing rules that distinguished between "formal" hearings (for which a minimum of five panel members were required) and "informal" hearings (for which a minimum of three panel members were required) or may have been based on a misunderstanding of previous rules. There is no record that panel numbers or other aspects of the internal guidelines were voted on by CAFT or reviewed by the faculty Senate. These guidelines are not on the CAFT web-site. The chair (Prof. Ratner) recommends that the guidelines be removed entirely from circulation, and that panel size be determined in accordance with the currently existing rules for hearings articulated in the ABOR rules, the UHAP, and the faculty by-laws.

5. Adjusting CAFT procedures to explicitly provide for alternatives for grievants short of a full-blown CAFT hearing.

The chair of CAFT (Prof. Ratner) met with, among others, the out-going and incoming Presidents of the Faculty concerning whether the by-laws should be adjusted to enable grievants to receive a hearing before CAFT that did not involve a full-blown hearing. Prof. Ratner explained (repeatedly) the current process and his view that the current process does not seem to be serving prospective grievants particularly well in certain respects. What follows is some of that explanation.

Despite CAFT's title, the vast bulk of the disputes of which CAFT becomes aware in some form or another do not pertain to either academic freedom or tenure. Prospective grievants get involved in disputes with fellow faculty members, especially with supervisors concerning matters such as teaching assignments, and believe they are treated badly. Many prospective grievants seek out the Chair of CAFT to set out their situations to the chair and discuss whether they will get what they want. A common theme among prospective grievants is that each believes CAFT should identify the prospective respondents as "bad" and give the prospective grievant what he or she deserves. Not all of the prospective grievants end up filing grievance petitions seeking a CAFT hearing, but when they do, under the current rules they are entitled to a full-blown CAFT hearing unless they fail to phrase their grievance in terms that fall within the vast CAFT jurisdictional grounds. While the GCC can recommend conciliation, under our current rules no one can be forced into conciliation for these grievances (and it is dubious as to how often mandatory conciliation or mediation would in any event result in a successful outcome).

My experience with CAFT has been that these disputes are seldom genuinely about a core concept of academic freedom or a serious violation of University rules. The University is full of faculty members who are unhappy in some way with how they have been treated, and the University is full of academics who are serving as managers and administrators without having training or life experience relevant to many of the important aspects of being managers and

administrators. It is hard for people to always get along in such situations. The rules and policies articulated by the University, located in three places (the ABOR rules, the UHAP, and the Faculty Constitution and Bylaws), are vague, and the meaning of academic freedom so broad, that anyone not getting along or treated poorly can if they so desire insist on a CAFT hearing if they bother to read the bylaws and frame the dispute with a minimum of care so that it falls within CAFT's jurisdiction. Thus with little effort grievants can frame their complaint, be it concerning teaching load assignments, failure to be invited to meetings, office and storage issues, or an undeserved performance evaluation, as an infringement of academic freedom, related to a University deviation from its established rules and policies impermissible arbitrary and capricious treatment. The bylaws instruct that CAFT "shall" give a hearing in a wide variety of situations, meaning CAFT has no discretion about it.

Full blown CAFT hearings, however, are a clumsy way to address the vast bulk of these matters, which often feature faculty members seeking from CAFT micromanagement of departmental deficiencies. CAFT hearings on these matters may aspire to be more analogous to faculty meetings than adjudications, but they frequently involve acrimony that can't feasibly be controlled except with an adjudicatory-like process. Thus in a typical CAFT hearing on these matters both sides present witnesses and cross examine the other side's witnesses, a structure that is cumbersome for many of these disputes. Neither grievants nor respondents are experienced concerning questioning and staying within topics relevant to the specific dispute. In contrast to CAFT hearings concerning e.g. dismissals of tenured faculty or allegations of illegal discrimination, it is almost always inappropriate for lawyers to be involved in these hearings and they seldom are present (although it is important to be sensitive to the needs of especially the respondents in these situations, because they have often been accused of professional incompetence). But a drawback to the absence of lawyers is that the parties often aren't particularly capable in a hearing environment, and there is a tendency for some parties to try to act like lawyers. (One grievant told a CAFT panel that he took a three day intensive law course in preparation for the grievance hearing.)

In addition, court reporters fit less comfortably into hearings for such matters, because grievants and respondents are often confused by the concepts of "on the record" and "off the record." A written transcript is often vastly preferable to simply recording the proceedings, however, because a written transcript is extremely valuable to the CAFT panel in their deliberations and when the Panel fulfills its obligation to make written findings of fact and written conclusions concerning the allegations.

Also of concern, parties consumed with their disputes often fail to perceive that the CAFT panel members are not (usually) professionally trained in dispute resolution and have teaching, research and other service obligations. As a consequence, parties, particularly but not exclusively grievants, are often unrealistic in their expectations and often behave in ways that consume the time of everyone involved (particularly themselves and the CAFT panel chairs). Much of the activity is fantastically unproductive. The time of everyone involved could be far better spent with students, on research and (even) on other faculty service.

Over the past few years faculty members who have pursued hearings have not generally obtained a positive outcome from the overall process. This should not be read to be a suggestion

that the entire endeavor should be eliminated. In the middle of all of this there will inevitably also be genuine issues for which a hearing is appropriate and crucially important. In the two matters that resulting in a hearing during this academic year, for example, the University Administration was overzealous in protecting its Administrators, in one instance seeking contrary to the rules to get a CAFT hearing dismissed, in the other rejecting the advice of the CAFT panel to adjust a performance review to reflect an unaddressed conflict. But the current system fails to serve many of the grievants and respondents particularly well. One way to streamline matters might be to specifically empower the GCC or CAFT to provide to grievants a relatively brief opportunity to be heard before a panel in a non-hearing format, and decide after that opportunity whether a full-blown hearing is necessary.

A different flaw in the current system is that for these disputes CAFT is obligated to conduct a hearing, produce written findings of fact and make a written recommendation to the President, but the President has no obligation to accept CAFT's recommendation. The President can choose to ignore CAFT recommendations as he or she sees fit without apparent consequence, thus rendering these hearings a time-consuming but frustrating and futile matter for CAFT panel members as well as ill-advised for grievants. In the end Presidents tend to support administrators rather than faculty. The grievant perhaps obtains some due process value of being heard regardless of the outcome, and that is not a trivial benefit, but not so for CAFT panel members.

The experience of a CAFT panel that concluded a grievance during this academic year demonstrates the problem. A panel with a large amount of experience both on CAFT and at the University painstakingly evaluated a grievance, sorted through a massive number of complaints that the faculty member had against his department head and the University in general, and concluded while most were warrantless a clear conflict had led to an inappropriate review of the faculty member by the department head in certain respects. The panel made written findings of fact and carefully explained in writing its unanimous recommendation that without assigning blame a small change in the performance evaluation was necessary to rectify what the panel found to be an obvious problem. The University President chose to ignore the recommendation without adequate explanation of why the problem the panel had identified was not a genuine problem. While the recommendation was slight, and it is hard to say that a serious wrong was left in place, the President's behavior was disrespectful to the hard, thoughtful work of the CAFT panel, who understandably could have been left feeling "why should we bother?" Perhaps if the system is adjusted to enable full-blown hearings only when they are appropriate to resolution of a genuine dispute involving genuine infringements on academic freedom or serious violations of University rules, it can also be adjusted to invest in the CAFT panel members who conduct such hearings authority to have at least the presumptive final say in the matter.

Respectfully Submitted



Prof. James R. Ratner