

**AD HOC COMMITTEE TO STUDY THE
RELATIONSHIP BETWEEN THE UNT FACULTY AND
THE UNT SYSTEM OFFICE OF GENERAL COUNSEL**

Part Two

**Tensions and Problems
During 2004 UTC Hearings**

May 4, 2008

Ad Hoc Committee
Corey Ditslear
Richard Fossey, Chair
Jacque Lambiase
Michael Nieswiadomy
G. L. Seligmann

The Relationship Between UNT Faculty and the UNT Office of General Counsel: Tensions and Problems During 2004 UTC Hearings

A second issue that the UNT Faculty Senate asked the Ad Hoc Committee to address pertains to tensions between UNT faculty and the UNT Office of General Counsel. These tensions arose after Provost Howard Johnson rejected twelve out of 32 tenure candidates in 2004, in spite of the fact that all twelve rejected candidates had the support of their respective Colleges and Deans. Many of the rejected candidates appealed Provost Johnson's decision to the University Tenure Committee (UTC), which held hearings on six of the Provost's tenure rejection decisions. Prior to these tenure appeal hearings, Provost Johnson received advice from the UNT Office of General Counsel; although OGC attorneys were not present at the hearings themselves. The rejected tenure candidates were advised by faculty advocates during the UTC appeal process. This appeal process lasted several months for many of the appellants.

At the outset, the Ad Hoc Committee reiterates that it is charged with examining the relationship between the attorneys in the OGC and UNT faculty—not to review Provost Johnson's actions in denying twelve tenure applications in the spring of 2004. The events surrounding Provost Johnson's decisions are relevant to the Committee's inquiry, however, because Johnson's decisions triggered six appeal hearings before the UTC during which Johnson received advice from the OGC. These hearings in turn precipitated communications between UTC members and the OGC and between faculty advocates for the appealing faculty members and the OGC.

I. The Provost's Decision to Reject Twelve Faculty Tenure Applications: Chronological Overview

In the fall of 2003, 32 tenure-track faculty members applied for tenure at UNT. All went forward with positive recommendations from their respective Deans and College faculty committees. In April of 2004, however, Provost Johnson rejected twelve of these candidates for tenure.¹

¹ Piper Fogg, "No, No, A Dozen Times No," *Chronicle of Higher Education*, 1 October 2004.

Provost Johnson's decision came as a surprise to the UNT academic community. In the six years prior to Provost Johnson's 2004 decision, previous UNT provosts had denied only seven tenure requests. According to newspaper reports, the percentage of tenure denials at UNT in the spring of 2004 was far higher than at other Texas institutions. Texas A & M University typically rejected about 5 percent of tenure applicants at the level of the provost's office.² The University of Texas typically granted tenure to about 75 percent of tenure applicants.³ In contrast, Provost Johnson rejected about 37 percent of the candidates who came before him with tenure applications. Under the terms of their contracts, most of the rejected candidates would lose their jobs at UNT in the spring of 2005.

Two of the twelve rejected candidates left UNT for other jobs. Ten of the candidates appealed Provost Johnson's decision to the University Tenure Committee (UTC). Unfortunately, due the delay in Provost's Johnson's decision (April 2004), the large number of appeals, and the length of the various appeal proceedings, the UTC appeal process did not conclude for several of the candidates until late 2004 or early 2005, only a few months before the tenure candidates were slated to lose their jobs.

Not surprisingly, a lot of tension surrounded the appellate process to the UTC. The rejected candidates believed that they had met the University's criteria for tenure under standards in place before Provost Johnson arrived at UNT in the fall of 2003 and that the tenure-review criteria had been changed unilaterally and without notice by the new provost. Dr. Don Smith, president of the UNT

² "UNT Rejects 38% of Tenure Candidates," *Dallas Morning News*, 4 July 2004.

³ "UNT Rejects 38% of Tenure Candidates." The tenure rejection rate at the University of Texas (UT), as reported by the *Dallas Morning News*, may not be comparable to the tenure rejection rate at UNT in the spring of 2004. It is not clear from the *Dallas Morning News* article whether the 25 percent reject rate at UT includes tenure applicants whose applications were negatively recommended by applicants' departments and colleges.

chapter of the American Association of University Professors, stated that the large number of tenure rejections amounted to “grotesque malpractice on the part of the provost.”⁴

Provost Johnson took a different view. In a newspaper interview, Johnson said, “My responsibility as provost and chief academic officer is to make sure I do a good job investing in the university’s resources.”⁵ Johnson maintained that he had evaluated the candidates objectively and that he applied the same tenure standards that had been in place prior to his arrival at UNT.

As the UTC review process went forward in the fall of 2004, appellant faculty members, working with faculty advocates, began asking for specific explanations as to why their tenure applications had been denied in spite of the support of their respective deans and college or department tenure committees. One of the appellants, Jacqueline Lambiase, requested in writing on May 5, 2004, and again on September 1, 2004, the reasons for her termination. The Journalism Department Chair Susan Zavoina had also requested reasons, as had CAS Dean Warren Burggren. On September 10, 2004, Dean Burggren said at a CAS faculty meeting on promotion and tenure that he had no specific reasons to share with the three denied candidates who remained on the college’s faculty (Lambiase, Ed Lopez of Economics, and Ken Loomis of Radio, Television & Film).⁶ Mark Mortensen, one of the appellants and a faculty member in the Department of Technology and Cognition, put it this way: “Here’s our guy just whacking people left and right. I would just like to know why.”⁷

UNT policy regarding the Provost’s responsibility to explain a decision to deny tenure to a faculty member is not a model of clarity. (The Ad Hoc Committee discusses the relevant UNT policy

⁴ “6 Tenure Appeals to Go Before UNT Panel,” *Denton Record-Chronicle*, 1 October 2004.

⁵ Fogg, “No, No, A Dozen Times No.”

⁶ The second, third, and fourth sentences of this paragraph were contributed by Dr. Lambiase, based on events that she experienced.

⁷ Fogg, “No, No, A Dozen Times No.”

provisions on this issue later in the report.) Rejected tenure candidates interpreted UNT policy to mean that the Provost is required to give a rejected tenure candidate written reasons for the rejection decision, and all the appealing faculty members asked for a written explanation.

Provost Johnson declined to honor those requests, and none of the twelve rejected candidates ever received a written explanation from the Provost as to why he rejected them for tenure. Provost Johnson maintained that his only obligation was to verbally notify the various college deans of his denial decisions and that no written explanation to the candidate was required.⁸

Provost Johnson's position was supported by UNT's Chief Counsel, Nancy Footer. The tenure policy does not include a provision for a written explanation, Footer explained, and "the specific policy always supersedes a general policy."⁹

During the fall of 2004, the 11-member UTC ruled on four appeals, and ruled against Provost Johnson in all four cases. (Not all the decisions were unanimous.) In each of those rulings, the UTC questioned Provost Johnson's judgment and accused him of violating UNT policy. According to an article in the *Denton Record-Chronicle*, G. L. Seligmann, chair of the UTC and a faculty member in the History Department, stated that the UTC did not understand how Johnson could review the same

⁸ "Appeals Favor Faculty Denied Tenure: Committee Ruled against UNT Provost's Decision in All Cases Brought before It," *Denton Record-Chronicle*, 19 December 2004. One illustration of Provost Johnson's position is contained in a memorandum that Dr. Lambiase received from the Provost's Office on October 14, 2004 entitled, "Response to the Particulars for Dr. Lambiase." This memorandum responded to Dr. Lambiase's assertion that the Provost had "[failed] to follow established procedures of the University of North Texas as regards to the written notification of reasons for denial of promotion and tenure." The memorandum said merely this:

The Provost followed the advice of the university council (sic) in responding to requests regarding the tenure decisions and process.

Or

The Provost followed procedures in this regard.

⁹ "Appeals Favor Faculty Denied Tenure."

materials that had been reviewed by the appropriate committees in the applicants' departments and colleges and reach a different decision from those committees.¹⁰

In the spring of 2005, President Pohl, responded to the first of the UTC's recommendations by rejecting Provost Johnson's decision to deny tenure to Assistant Professor Jacqueline Lambiase of the Journalism Department. But President Pohl also indicated that he would likely reject the UTC's favorable recommendations on behalf of two other faculty members who had been turned down for tenure and that he would uphold Provost Johnson's decisions regarding those two faculty members.

In his letter explaining his decisions, President Pohl wrote that he disagreed with the UTC regarding the scope of its authority. According to Pohl, the UTC "explicitly rejected its obligations under university policy" by ruling on the merits of three tenure applications instead of simply reviewing the Provost's decision to determine whether policies and procedures were followed correctly.¹¹ "The purpose of the appeals process is not for one group to substitute its own professional academic judgment for that of the department, college and provost, but rather to determine whether an action was taken as a result of a faculty member's exercise of academic freedom or constitutional rights or that the action did not follow established procedures," Pohl wrote.¹²

G. L. Seligmann, UTC chair, rejected President Pohl's interpretation of the UTC's authority and function. "I think the University Tenure Committee has a right to consider substance and merit when matters of substance and merit cannot be neatly divorced from procedure," Seligmann said.¹³

By mid-April 2005, the status of the twelve rejected tenure candidates was as follows. Eleven appealed the Provost's decision to the UTC. Of these eleven, two reached a mediated settlement, and

¹⁰ "Appeals Favor Faculty Denied Tenure."

¹¹ "UNT's Pohl Decides on 3 Tenure Cases: One Teacher Recommended for Tenure, Two Likely to be Denied," *Denton Record-Chronicle*, 11 February 2005.

¹² "UNT's Pohl decides on 3 Tenure Cases."

¹³ "UNT's Pohl decides on 3 Tenure Cases."

three withdrew their appeals. Of the remaining six, all had completed their UTC hearings. One faculty member—Jacqueline Lambiase, received tenure after the Board of Regents accepted President Pohl’s decision that she should be tenured. The cases of the other five were still pending.

In May, 2005, the UNT Board of Regents voted to send the appeals of Drs. Daniel Peak and Edward Lopez back to the UTC, which had already ruled that they should be granted tenure. In August, the Board voted 5 to 1 to deny tenure to both Dr. Peak and Dr. Lopez.¹⁴ The Board also voted to deny tenure to Dr. Ken Loomis.

In the fall of 2005, Dr. Peak filed a lawsuit against UNT in federal court. In November 2005, the Faculty Senate approved a faculty vote of “confidence or “no confidence” in Provost Johnson.¹⁵ In December 2005, the results of that election were announced. With two thirds of the UNT faculty voting, 72 percent registered that they did not have confidence in Provost Johnson.¹⁶

II. The Provost’s Decision Not to Give Tenure Applicants a Written Explanation for Rejecting Their Tenure Requests

In the Ad Hoc Committee’s view, the most troubling aspect of the whole series of events surrounding Provost Johnson’s decision to deny tenure to twelve UNT faculty members was the Provost’s position that he was not obligated to give the tenure applicants a written explanation for his decision.

Apparently, Provost Johnson relied on the advice of the OGC in taking that position. Provost Johnson said as much at Dr. Lambiase’s UTC hearing in October 2004.

It was my understanding by talking to legal that, historically, tenure has not been coupled from promotion and I was advised that I was not to do that [provide reasons for tenure denial] by legal here at the university. And I am abiding by the

¹⁴ “Regents Back Tenure Decisions: Board Upholds Denials in Three Cases, Votes to Bow Out of Appeals Process, *Denton Record-Chronicle*, 20 August 2005.

¹⁵ “Faculty Senate Calls for ‘No Confidence’ vote; Ballots Due Dec. 2, *Denton Record-Chronicle*, 10 November 2005.

¹⁶ “UNT Provost Gets No-Confidence Vote: Johnson Pledges to Give Faculty a Greater Voice in Future of the University, *Denton Record-Chronicle*, 7 December 2005.

rules. And as pointed out in the policy that tenure is a university prerogative and I'm bound by those policies that I'm not supposed to write out my reasons why.¹⁷

Provost Johnson's view was in harmony with that of President Norval Pohl. In a letter to UTC Chair G. L. Seligmann dated August 20, 2004, President Pohl responded to a UTC resolution asking the Provost to provide reasons for his tenure-denial decisions. President Pohl wrote that he had consulted with Provost Johnson and General Counsel Nancy Footer with regard to the UTC's request and had concluded that the Provost was not required to provide his reasons for rejecting a tenure application until he responded to a grievance petition. (A copy of President Pohl's letter is attached as Exhibit A.) Specifically, President Pohl wrote:

With respect to the request for the Provost to provide reasons for a denial of tenure decision, neither our policy nor case law requires this at the time the decision is made. Certainly in any response to a grievance petition or during the grievance hearing the reasons will have to be presented.¹⁸

(A *NT Daily* news story reported that UNT officials argued that the University was not required to provide an explanation for tenure denial decisions.)¹⁹

In fact, none of the rejected tenure candidates received a written explanation from Provost Johnson as to why he overrode the positive recommendations for tenure that had come from the various UNT departments and colleges.²⁰ For example, according to the transcript of Dr. Edward Lopez's UTC hearing, Dr. Lopez received no explanation of any kind from the Provost's Office regarding the Provost's tenure rejection decision until the night of Dr. Lopez's UTC hearing.

¹⁷ Quoted from the transcript of Dr. Jacqueline Lambiasi's UTC hearing, October 15, 2004, p. 302.

¹⁸ Letter from UNT President Norval Pohl to Dr. G. L. Seligmann, August 20, 2004.

¹⁹ Christine Stanley, "Administration rewrites policy in tenure cases, *NT Daily*, 16 September 2004.

²⁰ *The NT Daily* reported, "All of the appellant professors interviewed by the *Daily* by this week have received no written documentation from the provost explaining their tenure denials." Christine Stanley, "Faculty still looking for answers after tenure denials," *NT Daily*, 16 September 2004.

Dr. Steve Cobb: Okay. Provost Johnson, until this last twenty minutes, did you communicate the reasons for your decisions to Dr. Lopez?

Provost Howard Johnson: No, I did not.

Dr. Steve Cobb: Did you communicate the reasons for your decision to me, as department chair?

Provost Howard Johnson: No, I did not.²¹

During the fall of 2004, as tenure candidates were preparing for their appeals to the UTC, some candidates became frustrated by the Provost's position that he was not required to give a written explanation of his tenure-rejection decisions. In September 2004, appellate Jacqueline Lambiase filed the first Freedom of Information Act (FOIA) request to Provost Johnson, asking for any written documentation of the tenure application process that was under appeal. Later, other appellants also filed FOIA requests.

When the UTC hearings took place, it became evident that some of the analysis engaged in by the Provost's Office to justify tenure-rejection decisions took place after the Provost issued his tenure rejection decisions in the spring of 2004. For example, at Jacqueline Lambiase's UTC hearing in October, 2004, the following exchange took place between Provost Johnson and Faculty Advocate Richard Wells.

Dr. Richard Wells: Can I ask just one quick question if I may since we're still on this. When did you do this stuff, Dr. Johnson?

Provost Howard Johnson: I'm doing it continuously.

Dr. Richard Wells: No, no-no, on Dr. Lambiase, at what point in 2004 did you do this?

Provost Howard Johnson: It started in when I received the packet which was late February, early March.

Dr. Richard Wells: When did you finish it?

²¹ Edward Lopez UTC hearing transcript, page 204.

Provost Howard Johnson: I haven't finished yet.²²

III. The UTC's Position Regarding the Right of Rejected Tenure Candidates to a Written Explanation from the Provost's Office

The Provost's position with regard to his obligation to provide written reasons for his tenure-rejection decisions was directly contrary to that of the UTC during the hearings it held on the rejected tenure applications of six faculty members. The UTC concluded that the appealing faculty members were entitled under University policy to receive a written explanation from the Provost that explained why he had rejected tenure applications from faculty members who had been favorably recommended by their departments and colleges. UTC Chair G. L. Seligmann communicated the UTC's views on this point to President Norval Pohl in a letter dated Oct. 28, 2004 pertaining to Dr. Lambiase's UTC hearing:

It was not until about 11 p.m. that Friday night, some eight hours into the deliberations, that Provost Johnson finally notified the appellant and the UTC of his reasons for recommending termination of Appellant 05-01 The members of the UTC were troubled by the fact that Provost Johnson did not provide Appellant 05-01 the reasons in writing for termination, in May, 2004, when the appellant should have received such notice. The appellant received neither verbal nor written response from the Provost after several written requests. This appears to be in violation of the University Policy Manual and the UNT Faculty Handbook. Other than policy, it would be collegial to provide an individual the grounds and reasons for being terminated.²³

The UTC's view was also expressed from time to time during the UTC hearings themselves.

As UTC member Robert Pirtle observed during Dr. Edward Lopez's appeal hearing:

It is very disturbing to me to have discordancy between the Dean and the Provost and there is not a damn thing in writing not at all from the Dean or the Provost stipulating why Dr. Lopez should be terminated. Why the hell isn't there? Really, why is there not? Now I've heard that we have advice from legal counsel, again legal counsel is that, its counsel it's advice. Dr. Burggren and Provost Johnson are

²² Jacqueline Lambiase UTC hearing transcript, October 15, 2004, pp. 333-34.

²³ UTC Chair G. L. Seligmann to UNT President Norval Pohl, October 28, 2004.

administrative. They run the place and they take advice from the legal office. And why don't they say thank for your advice and have a nice day? I'll write the memo. Why can't the man have his memo for being terminated? We still at 10:20 don't know why in the hell he was terminated. When are we going to find out?²⁴

Linda Marshall, another UTC member, expressed the same view during the Lopez hearing. She pointed out that the academic units are required to document adverse personnel decisions in writing and in detail when the employee was a nonacademic staff person. In remarks that were apparently directed to Provost Johnson and Dean Burggren, Marshall questioned why an academic faculty member was not entitled to the same amount of written documentation when faced with an adverse tenure decision that a staff member was entitled to receive when faced with an adverse personnel action.

Both of you gentlemen are in positions where you have staff members that you supervise and so you will be responsible for doing UPO 35s and UPO 31s for those staff members.

Now in the process of doing those evaluations for a staff member there are specific processes that you have to go through and those are cut and dry. [T]here are no ifs, ands, or buts. And if you send them in incorrectly, they come back to you and you have to do them again. You have to do remediation [for poorly performing staff members] and you have to write letters and memos and it's back and forth and back and forth. It's almost impossible to get rid of a staff person or to terminate them. In the end you can finally do it after everyone is totally worn out. But during that process, those staff members know exactly what they have done in order to be terminated but it's never nebulous at any point. [Y]ou have to let them know because if not HR is going to send it back and you'll be told to do it differently. If you haven't been through that process I am just telling you that that's going to happen.

Faculty, however, when they're terminated, they don't get any of this. They don't get any of it. I mean you guys have sent emails back and forth to each other. You guys have had lots of conversations. The faculty member is stuck there not having any kind of reason, as you saying. I am trying to say it a different way, but don't have the concrete reason other than speculation for why they were denied tenure, why he was denied tenure. How can that be changed? I mean how can that be done differently so that it is much more humanitarian?²⁵

²⁴ Edward Lopez UTC hearing transcript, page 146.

²⁵ UTC member Linda Marshall, speaking at Edward Lopez's UTC hearing, p. 149.

III. UNT Policy Manual Provisions Regarding Rights of Rejected Tenure Candidates for Written Explanation

A review of the UNT Policy Manual shows that the tenure and promotion process at UNT is premised on openness and objectivity and that promotion decisions should not be made based on ex post facto considerations. For example, UNT's Policy Manual Section 15.1.2.1, pertaining to promotion, states that "[r]esults of all personnel decisions should be clearly communicated to faculty in writing from the academic department heads." The same UNT Policy provision also states that the colleges have the freedom to weigh a faculty member's responsibilities for teaching, scholarship and service in different ways, but those decisions should be made at the beginning of a faculty member's evaluation period, "not ex post facto."

Likewise, Policy Manual Section 15.1.1, pertaining to tenure, requires departments to put their tenure recommendations to the deans in writing and to notify the affected faculty member "in writing" as to the departmental recommendation. Furthermore, "Adverse recommendations from the department for tenure or renewal must show written evidence that the faculty member has received copies of the recommendations of the chair and the Tenure Committee and has been informed of departmental and university appeals procedures." Adverse tenure recommendations at the level of the deans' offices must also "show written evidence that the faculty member has received a copy of the recommendation of the dean . . ."

Section 13.3 of the UNT Policy Manual, which pertains to the Department Chairs' role in teacher-related professional affairs, states: "It is also believed that the individual faculty member has a right to know the basis on which and the manner in which decisions affecting his or her professional life are made."

The Policy Manual also makes clear that the academic units—not the Provost's office—have the greatest responsibility in the tenure and promotion process. Section 15.1.2.2 states this explicitly:

The primary academic unit (division, department or professional school) of a candidate for promotion and/or tenure has the greatest responsibility in the process for recommending the candidate, including a thorough scrutiny of the accomplishments of the candidate and assessment of the external letters of recommendation.

The same Policy Manual provision states that the role of the Provost's Office with regard to tenure and promotion is limited: "The Provost and Vice President for Academic Affairs' responsibility is to ensure that the candidate meets university standards and that the recommendation conforms to institutional policies and procedures."

Finally, the Policy Manual makes clear that the Provost is required to provide faculty members with a written explanation as to why they were rejected for promotion to faculty members who request them. Specifically, Section 15.1.3.IV.D (4) states that the Provost shall:

[n]otify those faculty members recommended by the department whose promotions were not approved; the faculty members may request the reasons for disapproval; with the consent of the faculty member, the reasons for disapproval of promotion by a dean or by the provost and vice president for academic affairs shall be transmitted in writing to the departmental chair and the chair of the department promotion committee.

Admittedly, Section 15.1.3 of the Policy Manual concerns promotion, not tenure; but a reasonable reading of Section 15.1.3 suggests that the same considerations that apply to the University's promotion process should apply to tenure decisions as well. In fact, the language of Section 15.1.3 indicates that this is how the section should be interpreted:

Thus, while this document addresses itself primarily to the question of policies for promotion, it should be emphasized that similar considerations must of necessity apply to appointments, *the granting of tenure* and the fixing of salary increments. . . .²⁶

Apparently, Provost Johnson and the OGC took the position that Section 15.1.3 of the Faculty Handbook applied to promotion decisions only, and not tenure decisions; and thus Provost Johnson was not required to provide rejected tenure applicants with a written reason for their rejection.

²⁶ UNT Policy Manual, Section 15.1.3.I (Introduction section) (emphasis added).

Interestingly, President Pohl did acknowledge that the appellants were entitled to hear the Provost's reasons for denying their tenure applications at the time of their UTC appeal hearings. President Pohl admitted as much in his letter to Dr. Seligmann, which is attached as an appendix to this report. Having admitted that the appellants were entitled to hear the Provost's explanation for denying their tenure applications at their UTC hearings, we do not understand why he concluded that the Provost could withhold those reasons until those hearings took place. If, as President Pohl admitted, the tenure applicants were entitled to hear the Provost's reasons for rejecting their tenure applicants at any point in time, they were certainly entitled to hear those reasons in a timely manner. Provost Johnson notified the applicants that he was rejecting their tenure applications in May 2004. He should have put his reasons in writing at that time.

IV. Ad Hoc Committee's Conclusion Regarding the Provost's Obligation to Provide a Written Explanation for Rejecting Twelve Candidates for Tenure in 2004

In the Ad Hoc Committee's opinion, the underlying philosophy in the UNT Policy Manual's tenure and promotion policies, taken as a whole, is undermined if the careful and deliberate recommendations at the Departmental and College level regarding tenure applications can be rejected by the Provost without any written explanation. In addition, our reading of those policies leads us to conclude that rejected tenure candidates are entitled *by the language of UNT policy itself* to a written explanation from the Provost as to why he rejected a faculty member's application for tenure. Thus, the Committee believes that the Provost erred in his position that he was not required to provide rejected tenure candidates with a written explanation of his decision.

As discussed earlier in the report, the Provost was supported in his view by the OGC, which was contrary to the view of the appealing tenure candidates and of the UTC. In the Ad Hoc Committee's opinion, when it became apparent that the Provost and the UTC held different views on such a fundamental issue, then a conflict of interest existed between the Provost and the UTC. At the

point when this conflict became apparent, the UTC should have been provided with independent legal counsel.²⁷

The Ad Hoc Committee's conclusion on this matter is supported by UNT System Policy 10.12.7 (in existence at the time of the 2004 UTC hearings), which states:

The Vice Chancellor and General Counsel reports to the Chancellor and serves as the principal attorney for the University of North Texas System, the University of North Texas, and the University of North Texas health Science Center at Fort Worth, *and is responsible either directly or through members of his staff for providing general and specific legal advice and services to Board of Regents members, officers, and employees of the System and the institutions on matters related to their official duties and functions and in support of the institution's academic missions.* [Emphasis added]

Section 9 of Systems Policy 10.12.7 states more specifically that the General Counsel's Office "[o]ffers opinions to Board of Regents members, administrators, faculty, and staff on legal matters regarding conflict of interest, contracts, fringe benefits, personnel issues, collections, intellectual property, student and administrative issues, and so forth."

The Ad Hoc Committee interprets Systems Policy 10.12.7 (as it existed at the time of the 2004 UTC hearings) to obligate the OGC to provide legal advice not only to the Provost and the UNT Denton President but also to the UTC while it was conducting the appeal hearings of six rejected tenure candidates. Since the same counsel could not represent both the Provost and the UTC after a fundamental conflict arose as to the Provost's obligation to explain his tenure-rejection decisions, the UTC should have been given access to an independent lawyer.

²⁷ The most profound disagreement between the Provost and the UTC concerned the question of the Provost's obligation to provide written justifications for his tenure-rejection decisions. In addition, the Provost's Office disagreed with the UTC about the appropriate termination date for UTC appellants. As reported in the *NT Daily*, "Footer disagrees with Seligmann's interpretation, insisting that May 31 is the official termination date for the six appellants, regardless of when the regents make their final decision." James Draper, "Tenure appeals head into final phase," *NT Daily*, 28 April 2005. President Pohl expressed his disagreement with the UTC about the appropriate termination date for UTC appellants in a letter to Dr. Seligmann dated August 20, 2004.

V. Sources of Tension Between UNT Faculty and the OGC

Provost Johnson's decision not to explain his tenure-rejection decisions in writing, approved by the OGC, led to significant tensions between the OGC and the appealing professors and their faculty advocates. As stated earlier in this report, several appellants filed Freedom of Information Act requests for documents pertaining to the Provost's tenure denial decisions. These requests injected a legalistic note into the UTC appeal process and led to disagreements about whether the Provost's Office had complied with all FOIA requests.

In fact, it appears that the UTC appellate process changed from being a collegial review process by UNT scholars into quasi-litigation, which involved several acrimonious encounters between attorneys of the OGC and individual faculty appellants or their faculty advocates. We do not think it is necessary to describe these encounters in detail. In our view, however, the UTC appellate process was never intended to take on the tone of bare-knuckle corporate litigation.

CONCLUSIONS AND RECOMMENDATIONS

- 1.) As stated earlier in this report, the Ad Hoc Committee concludes that Provost Johnson erred when he took the position that he was not obligated to provide a written explanation for his decision to deny tenure to twelve faculty members who had been favorably recommended by their departments and colleges. We believe the Provost's position is contrary to the language of the Policy Manual and to the spirit of the tenure and promotion process at UNT.
- 2) The tenor of the UTC appellate process changed from a collegial review process that typically prevails in an academic environment into tense and often hostile quasi-litigation at least partly because the Provost utilized the services of the OGC to defend tenure decisions he made in the spring of 2004 when preparing to testify at the UTC appeal hearings.

- 3) When it became evident that Provost Johnson, represented by the OGC, was in fundamental conflict with the UTC over the interpretation of the Provost's role in the tenure review process, the UTC should have been provided with independent counsel.
- 4) If the University continues to take the position that UNT Policy does not require the Provost to give a timely and written explanation for rejecting a faculty member's tenure application that was approved at the departmental and college level, then UNT policy needs to be changed to reflect the position that was articulated by the UTC during the 2004 UTC appeal hearings.
- 5) Finally, we conclude with an expression of regret that the OGC supported Provost Johnson in his position that he was not required to explain his tenure-rejection decisions in writing. We do not think the University of North Texas was well served by expending the resources of the Office of General Counsel to defend an administrative officer's personnel decisions that were not in harmony with formal University policy and clearly not in the best interest of the University.

At the request of the UNT Faculty Senate, we are attaching e-mail commentary on our April 2008 report from the following individuals: Nancy Footer, UNT General Counsel; G. L. Seligmann, Ad Hoc Committee member; Mike Nieswiadomy, Ad Hoc Committee member; and former tenure appellant and UNT faculty member Dan Peak.

Also at the request of the Faculty Senate, we are including the following suggestions for addressing the problems that were identified in this report. These suggestions are compiled from the recommendations that were made by individual Ad Hoc Committee members or that were proposed by individual Faculty Senate members during the April Faculty Senate meeting when we submitted our report. The Ad Hoc Committee did not meet and endorse these suggestions as a group.

1. UNT policy should make clear that the Provost is required to explain tenure rejection decisions in writing. [Recommended by the Ad Hoc Committee in its April 2008 report to the Faculty Senate]

2. When a faculty member indicates that he or she is planning to file a tenure appeal with the UTC, the OGC should appoint a member of the legal staff to work with the appellant in order to insure that the appellant is fully advised of her or her rights and that all necessary and useful documentation is made available in a timely and non-adversarial manner to the appellant. A firewall should be put in place to insure impartiality and independence. [Recommended by an Ad Hoc Committee member]
3. In order to avoid the appearance of a conflict of interest, the person serving as Public Information Officer within the OGC must not be the person advising either the appellant or the administrator in charge of tenure reviews. [Recommended by an Ad Hoc Committee member]
4. The Faculty Senate should formally apologize to the five faculty members whose tenure cases were heard by the UTC in 2004 for the way their cases were handled. [Recommended by an Ad Hoc Committee member]
5. The UNT Denton institution should have its own legal counsel, apart from the OGC, which represents the UNT System. [Recommended by a Faculty Senate Member]
6. UNT should appoint an Independent Counsel or independent “Inspector General” type officer who operates independently from the OGC and makes independent determinations about the proper interpretation of UNT policies and procedures. [Recommended by a Faculty Senate Member]
7. The Faculty Senate should work with administrators to develop policy about what office or committee ensures that UNT policies are being followed and enforced, and this responsibility should not rest with the OGC. [Recommended from both Faculty Senate and ad hoc discussion.]

Respectfully submitted, May 4, 2008²⁸

Richard Fossey, Chair
Department of Teacher Education &
Administration

G. L. Seligmann
Department of History

Jacque Lambiase
Department of Journalism

Michael Nieswiadomy
Department of Economics

²⁸ In addition to the Ad Hoc Committee members whose names appear on this report, Gene Wright, Corey Ditslear, and Doina Farkas were appointed to the Ad Hoc Committee by the Faculty Senate. Drs. Wright and Farkas left UNT's employ before this report was drafted and did not take part in drafting this report. Dr. Ditslear did not participate in the preparation of this updated report.

APPENDIX A

Letter from UNT President Norval Pohl to Professor G. L. Seligmann dated

APPENDIX B

From: Nancy Footer [nfooter@unt.edu]
Sent: Sunday, April 06, 2008 1:41 PM
To: Fossey, Richard; Fossey, Richard
Cc: Wendy Wilkins; Bataille, Gretchen; Renaldo Stowers
Subject: Re: Part Two of Ad Hoc Committee's report

Richard:

Many thanks for sharing the committee's report in advance of the Faculty Senate meeting this week. Not surprisingly, I disagree with some of the conclusions. But certainly it is the case that UNT's policies do not support the position that the Provost is required to provide written reasons why she or he does not support a candidate for tenure. A desire for change in policy or practice in this regard should be addressed to Provost Wilkins.

Had the UTC asked me my interpretation of the policy I would have told them my position — and for that matter Gus Seligmann may indeed have asked me during the process. He conferred with me many times during the appeal period about the legal/procedural aspects of the proceedings. He never once accused me of being anything less than independent in the advice I rendered for him as Chair of the UTC. Since another attorney in the office worked with the Provost, I believe you would find many if not most in house public university counsel would say that the role I played was independent and in keeping with the role of counsel to a corporate entity such as a university, governmental agency, or a for or not-for-profit corporation.

A couple of minor technical points. It's the UNT System Office of General Counsel. And in Texas, it's the Public Information Act and not FOIA, which is the term used in many other states and by the federal government.

The committee's report points up what I've come to think of as a common misunderstanding on the part of many in a university community about what the role of in house counsel is. We're all obviously so busy doing what we do that we often fail to spend the time necessary to understand our respective roles and responsibilities. Once a dispute or disagreement arises, it's usually too late to form that common understanding and appreciation. As we discussed previously, there is an inherent tension between the faculty and the Office of General Counsel in a situation like UNT faced during the tenure decisions of 2004 and the ensuing appeals. Certainly litigation by faculty against the university can also contribute to this tension. And, most assuredly, the fact that the legal advice we render is confidential and protected by the attorney client privilege places the office at a disadvantage because we cannot defend or even discuss the advice we give. Despite all this, I applaud the Senate's interest in our office and hope to continue the dialogue so that perhaps one day more of the faculty will better understand our role and hold our office in the high regard we hold those who shape the future through teaching, research, and service.

Best, Nancy

Nancy S. Footer
Vice Chancellor & General Counsel
University of North Texas System

P. O. Box 310907
Denton, Texas 76203-0907
Telephone: 940.565.2717
Facsimile: 940.369.7026
www.untsystem.unt.edu/generalcounsel

APPENDIX C

From: Gus Seligmann [gus@unt.edu]
Sent: Monday, April 07, 2008 2:24 PM
To: Fossey, Richard; Ditslear, Corey; Farkas, Doina; Seligmann, Gustav; Lambiase, Jacqueline; Nieswiadomy, Michael; Richard Fossey
Colleagues,

I would like to comment briefly on Nancy Footer's comments in re our report.

She is quite correct when she notes that we conferred often, particularly at the beginning of the appeals process, about the nature of the process and how the UTC should proceed. It should come as no surprise that my two primary concerns were fairness and the avoidance of any lawsuits. More specifically I believed that if the fairness aspect was accomplished there would be no need to worry about lawsuits. It is also quite fair and accurate to say, as she does, that I valued her advice and found it quite fair and, to the best of my knowledge, unbiased. To me it was quite apparent that we had the same goals, perhaps for different reasons, but fundamentally the same goals. She is also right in noting that in any appeal of this nature there is the inherent problem of tensions arising quite naturally from the different sides represented in the processes. In short I had no problem with the office of the OGC.

Unfortunately, as it became clear later in the process my experiences were not universal. It also became to become clear during the first hearing that these hearings were going to be quite unlike any I had experienced in my prior service on the UTC. As a reminder to some of you this was my second term, removed by about a decade, as chair of the UTC. The difference was that these hearings were not occurring in an atmosphere of good faith. Never before had we had stonewalling and dissembling on the scale that was unfolding before us. Never before had faculty been forced to resort to FOIA's to get information from the appropriate administrative offices. Never before had faculty been blatantly told A. you can get the reasons for your dismissal from your Deans and dept heads when B. the Deans and Dept heads had not been given such information. And most tellingly, never before had such patterns of disingenuousness on the part of senior administrators and their staff operating with the apparent approval of and advice from the OGC been present. Ms Footer is, as I noted above, quite right when she notes that there are levels of conflict built into any disagreement such as this. What isn't noted is that in such prior conflicts the footprint of the OGC had been minimal and fundamentally even-handed, or even-footed. To the best of my knowledge none of the appellants felt this was true in these cases and I at least shared those feelings. I also felt that because of the nature of my position I could not actively intervene on the part of the appellants unless specifically asked for some sort of procedural support. And I suspect any faculty member who served as an advocate in past UTC hearings will testify that they never felt they had to resort to a blunt instrument such as a FOIA to get information relative to their appeal. This was simply not true in this set of circumstances. Yes, the levels of tension went up significantly following the first FOIA but the actions of the Provost, apparently supported by the OGC may have been the principal cause of the increase.

It is also true and should be so noted that the only lawsuit filed in any of these processes came very late in the proceedings. In short the unnecessary adversarial aspects of these hearings clearly preceded any legal actions.

It is, of course, possible to argue that tenure and promotion are not joined at the hip. Except they are at this university and at every other major university. In fact they are so joined here that the President in, I believe all, of his correspondence with Professor Peak, correspondence which I believe either originated in the OGC or was vetted by the OGC, consistently referred to his "tenure and promotion" even though he was being proposed for tenured at his current rank of Associate Professor. And even if this is not a clinching argument the sections of the UNT Policy Manual quoted in Professor Nieswiadomy's recent email are quite clear enough to make the argument on reasons offered by Ms Footer suspect. To be sure the UNT Tenure and Promotion document is not a model of clarity. However, in this case it says what it means. And if these arguments are not sufficient to the moment there is the additional argument of collegiality. Before anyone is tenured here there is a general requirement that the individual must have some understanding of what it means to function in a community of scholars. And as we all know one of the hallmarks of such a community is transparency. It does not seem to be to great a stretch to think that such an atmosphere should begin at the top, or at least be present at the top, particularly in matters crucial to ones future academic career. It should not be more difficult to get rid of a minor staff person then to get rid of a faculty member. And yet as Professor Linda Marshall, Chair of Psychology, pointed out at one of the hearings, quoted in the committee report, according to the Provost and supported by the OPGC it is. That is not right.

G.L. Seligmann
Department of History and sometime Chair of the UTC

APPENDIX D

From: Michael Nieswiadomy [miken@unt.edu]
Sent: Sunday, April 06, 2008 5:25 PM
To: Fossey, Richard; Ditslear, Corey; Farkas, Doina; Seligmann, Gustav;
Lambiase, Jacqueline; Nieswiadomy, Michael; rfossey@unt.edu; Fossey, Richard

Subject: Re: FW: Part Two of Ad Hoc Committee's report--Nancy Footer's response

Richard et al., I think that Nancy Footer is wrong when she says "But certainly it is the case that UNT's policies do not support the position that the Provost is required to provide written reasons why she or he does not support a candidate for tenure."

Here is my response:

The policy manual is not crystal clear. But there is language that suggests that the Provost should provide reasons.

1) Section 15.1.1 (3.22400) on the Hearing by the UTC is the only section that discusses hearings by the UTC. It has the guidelines that we use to conduct Tenure hearings but it seems to focus on dismissal for cause. It does state the Provost must provide a written statement. This section is less clear. A strict interpretation of this section would seem to imply that the manner for conducting a UTC tenure hearing is not clear. I think a reasonable person would use this section (as we have) for conducting UTC Tenure hearings, but if this was the only section discussing written reasons from the Provost, Nancy Footer would have a strong position.

2) Sec. 15.1.3 I. Introduction (last paragraph) states that "Thus, while this document addresses itself primarily to the question of policies for promotion, it should be emphasized that similar considerations must of necessity apply to appointments, the granting of tenure and the fixing of salary increments. It is essential that those at all levels of responsibility consider these decisions critically, with maturity, and with the realization that these decisions are basic to the building of a strong faculty."

Then later in IV. D. 4. it states "Notify those faculty members recommended by the department whose promotions were not approved; the faculty members may request the reasons for disapproval; with the consent of the faculty member, the reasons for disapproval of promotion by a dean or by the provost and vice president for academic affairs shall be transmitted in writing to the departmental chair and the chair of the department promotion committee" Based on this section, I think that Nancy Footer would lose the argument.

Do you agree?

APPENDIX E

From: Dan Peak [Peak@unt.edu]
Sent: Wednesday, April 09, 2008 12:31 PM
To: Fossey, Richard
Subject: Re: FW: Part Two of Ad Hoc Committee's report

Thanks, Richard

My perspective on Footer's "can't we all just get along" email is that she is explaining away her own responsibility for the tenure crisis that gripped UNT for years. The lawyer-speak statement "... it is the case that UNT's policies do not support the position that the Provost is required to provide written reasons why she or he does not support a candidate for tenure" is reminiscent of the clarity of leadership she provided during the tenure crisis; lucky for me that I already know her position--I can't make sense of her explanation. She should be required to explain it to the senate, and not tinker unaccountably with policy from her Gateway Center cocoon.

Footer is the senior attorney and is ultimately responsible for the "other attorney," Renaldo Stowers. His actions are her actions, and she should answer for them. Gus was heroic during the tenure crisis, and Footer can't blame him either. As for the "litigation" (am I responsible for UNT tension?), that is another denial of responsibility.

Litigation was a last resort, filed only when the statute of limitations was due to expire on some of Johnson's violations. OGC refused to enforce or even review my signed contract. Then, after my filing, the OGC delay and obfuscation process began in earnest. I experienced and documented the OGC's poor deportment during that period. It is a matter of record in my report to the Ad Hoc committee;

I hope the administration will be allowed to see not just the global OGC issues, but also how the OGC can violate UNT individual faculty members as it wishes.

By the way, the faculty authors of UNT tenure policy are still here. They can interpret what this policy means, and we can all read it for ourselves--notwithstanding a conflicting and gratuitous interpretation by the OGC with a clear conflict of interest. Footer showed up long after the policies were in force. She gave Johnson the OGC approval to void UNT policy and is now excusing herself from the consequences. Approving Johnson's changes, she was complicit in violating the UNT tenure policy of "long before." We know she did these things. We should not forget.

Thanks for your good work.

I hope the senate and the administration deals with the OGC in due course.
Regards

Dan

Daniel A. Peak, Ph.D.
Associate Professor
Department of Information Technology and Decision Sciences College of Business
Administration University of North Texas Denton, TX 76203 peak@unt.edu 940-
369-7210

