

**LEGAL ISSUES FOR CONSIDERATION BY
ACADEMIC ADMINISTRATORS AND PEER REVIEW COMMITTEE MEMBERS
PARTICIPATING IN THE HR-23 PROMOTION AND TENURE REVIEW PROCESS**

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The purpose of this document is to enable academic administrators and peer review committee members to better understand their respective duties and responsibilities under University Policy HR-23, the statutory right of promotion and tenure candidates to review certain portions of their promotion and tenure dossiers, and the University's policy with respect to indemnification and defense of academic administrators and peer review committee members participating in the HR-23 promotion and tenure review process.

Legal Obligation to Comply with HR-23 Procedures

The University is legally obligated under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to conduct promotion and tenure reviews in strict accordance with the provisions of HR-23. All academic administrators and peer review committee members participating in the promotion and tenure review process must be thoroughly familiar with the provisions of HR-23 and the Administrative Guidelines for HR-23.

As a participant in the HR-23 process, you should understand and follow the HR-23 procedures applicable to your academic unit.

Become and remain informed about HR-23.

1. Read University Policy HR-23, the Administrative Guidelines for HR-23 and any applicable academic unit statement of criteria and expectations that elaborates on the HR-23 criteria.
2. Understand what you have read and be certain to ask questions if you do not understand the procedures you are required to follow.

Follow the specified procedures.

1. Promotion and tenure evaluations (e.g., academic judgments) are to be based exclusively on the HR-23 criteria.
2. The academic administrator and peer review committee at each level of review must prepare a report recommending or not recommending the promotion and tenure candidate for promotion and tenure based upon the administrator's, or peer review committee's, assessment of the candidate's performance under the HR-23 criteria.
3. Each review must be independent of all other reviews and must reflect the academic administrator's, or peer review committee's, independent academic judgment with respect to the promotion and tenure candidate's performance under the HR-23 criteria.

Legal Challenges to Promotion and Tenure Decisions Under HR-23

In today's litigious society, unpleasant decisions often bear the bitter fruit of legal challenges and related litigation before federal or state administrative agencies, and in federal and state courts. Negative promotion and tenure decisions are no exception to this societal trend.

A legal challenge to a negative promotion and tenure decision may be based on one or more of the following grounds:

1. **Procedural error:** Aggrieved candidate alleges that the HR-23 procedures were not followed, and therefore breached, during the review process.
2. **Discrimination:** Aggrieved candidate alleges that the negative decision was based on the candidate's membership in one or more protected classes under federal or state law, or University policy (e.g., race, sex, sexual orientation, religion, disability, age, etc.).
3. **Arbitrary or capricious decision:** Aggrieved candidate alleges that the negative decision was made in an arbitrary or capricious manner.

Procedural challenges are avoidable: They may be avoided by you becoming and remaining informed about HR-23, and following the specified procedures. If a procedural challenge is meritorious because one or more academic administrators or peer review committees failed to follow the HR-23 procedures, the aggrieved candidate's remedy will include another tenure review in strict accordance with the HR-23 procedures.

While a promotion and tenure candidate who has received a negative decision may believe that the decision was made for improper or illegal reasons, and thus may be inclined to challenge the decision on substantive grounds (e.g., discriminatory or arbitrary and capricious decision) even though all applicable procedures were followed, it is instructive to note that:

1. An academic judgment made in good faith is not arbitrary or capricious.
2. An academic judgment made in good faith constitutes a legitimate, non-discriminatory reason for the challenged decision.
3. Administrative agencies and courts do not wish to serve as "super" tenure review committees, and historically, they have not injected themselves into the academic arena properly reserved for those individuals participating in the HR-23 process.

Promotion and Tenure Candidate's Statutory Right of Access to Dossier

In 1978, the General Assembly of Pennsylvania enacted Act 286, the Personnel File Inspection Act. The Act authorizes an employee, or the employee's designated agent, to inspect the employee's personnel file maintained by the employer.

An "employee" is defined as anyone currently employed, laid off with reemployment rights or on leave of absence. Applicants for employment are not "employees" having inspection rights under the Act. Former employees have inspection rights for a reasonable period of time after the termination of their employment relationship.

The Act defines "personnel file" to include any application for employment, wage or salary information, notices of commendations, warning or discipline, authorizations for

deduction or withholding of pay, fringe benefit information, leave records, and employment history with the employer, including salary information, job title, dates of changes, retirement record, attendance records and performance evaluations.

Any of the foregoing documents or records (**including e-mails**) are considered to be part of the personnel file, regardless of where or how they are maintained by the employer. Because e-mails are subject to inspection under the Act and are discoverable in the context of litigation proceedings, academic administrators and peer review committee members should be mindful of the content of e-mail communications at all times.

The definition of “personnel file” does not include records of an employee relating to the investigation of a possible criminal offense, letters of reference, documents that are being developed or prepared for use in civil, criminal, or grievance procedures, medical records or material used by the employer to plan for future operations.

Upon request and at reasonable times, an employee, or an agent designated by the employee, may inspect the employee’s own personnel file used to determine his or her own qualifications for employment, promotion, additional compensation, termination or disciplinary action.

The Act does not require the employer to allow the employee or designated agent to remove the file or any part thereof, although the taking of notes by the employee or designated agent is permitted. Under University Policy HR-60, which implements the Act’s provisions, a University representative must be present while the employee or designated agent inspects the file, and a copy of the file will be made available to the employee or designated agent upon reasonable request.

Pursuant to the Act, the following portions of a promotion and tenure candidate's tenure dossier constitute a personnel file subject to review by the candidate after completion of a promotion and tenure review cycle:

1. All reports and recommendations prepared by academic administrators under HR-23;
2. All reports and recommendations prepared by peer review committees under HR-23; and
3. All other portions of the tenure dossier, with the exception of all documents in the section entitled "External/Internal Letters of Assessment," containing "letters of reference" prepared by third parties external to the University. However, to the extent that a letter of reference is prepared in reliance upon a University promise to pay an honorarium or other compensation in exchange for the letter, the document would be accessible for review by the candidate.

**University Indemnification of Academic Administrators and Peer Review
Committee Members Participating in the HR-23 Process**

The University Board of Trustees has authorized indemnification of University employees, including academic administrators and peer review committee members participating in the HR-23 process, in accordance with Pennsylvania law.

Indemnification will be provided for actions taken in the course of University employment, including participation in the HR-23 process, provided that the University determines that the employee acted in good faith and in a manner the employee reasonably believed to be in the best interests of the University, and provided further, that a court of competent jurisdiction has not determined the employee's actions are prohibited from being indemnified by the University under Pennsylvania law.