

Faculty Assembly Meeting
Minutes for February 28, 2017
3:30-5:00 pm
Blow Hall Board Room

Officers Present: Sophia Serghi (President), Cathy Forestell (Vice President), Chris Abelt (Secretary) and Eric Chason (Faculty Representative to the Board of Visitors)

Other Members Present: John Eisele, Mark Forsyth, Carl Friedrichs, Courtney Harris, Ron Hess, Mark Hofer, Rex Kincaid, Scott McCoy, Christy Porter, Patty Roberts, Megan Tschannen-Moran, Sibel Zandi-Sayek and Cynthia Ward

Members Absent: Danielle Dallaire, Steve Holliday and Tricia Vahle

Others in Attendance: Michael Halleran (Provost), Terry Meyers (Parliamentarian), Kiersten Boyce (Compliance and Equity) and Colleen Kennedy (Procedural Review)

Ms. Serghi called the meeting to order at 3:35 pm.

1. Approval of Minutes for January 31, 2017

The minutes were approved by unanimous consent.

2. Provost's Report

The Provost reminded the Assembly that Peter Vishton will give the Tack Lecture on March 22nd at 7 pm. The legislative session has ended in Richmond. There will be a cut of 5% to the College. The state budget includes a 3% raise for staff and a 2% raise for faculty. The faculty raise can be increased by another 1% if the institution funds it. COPAR will discuss the cuts with the Provost tomorrow. Deans prepared plans for 2% and 4% cuts last December. A bill to require a minimum of 70% in-state student proportion was defeated. It would have cost the College \$4.3M. A bill requiring that either the Rector or Vice Rector be a Virginia resident passed. On the capital side, the next stage of funding for ISC4 and the VIMS facility on the eastern shore were approved. Raises would be effective July 10th.

3. Consideration of changes to the Faculty Handbook from the FAFAC.

Ms. Tschannen-Moran presented a draft of a revision to section III H. of the Handbook. The draft is appended to these minutes. FAFAC was given three items to investigate: the policies of the Threat Assessment Team as they affect faculty, the process involved in suspending or reassigning a faculty member and the status of faculty member who is not able to return to work after a leave. While the FAFAC was working on these items, other administrative units were revising FMLA (family leave and medical act), fitness for duty and threat assessment policies and procedures.

FAFAC was hoping for guidance. Because they are preparing a new section III G., what is now III H. will become III I. The new section will fold in a process to deal with disabilities. There is a separate committee, which now includes Alan Meese, that is looking into the Threat Assessment Team policy. FMLA policy is centered at Human Resources, and it generally covers all employees. Most of it does not belong in the Handbook. The draft emphasized the importance of negotiation to resolve issues. Faculty with disabilities would be directed to Diversity and Inclusion for accommodations. The draft also introduces the idea of a faculty team (FAST – faculty assistance and support team) to conduct negotiations should initial attempts not reach a resolution. FAST will be composed of one member each from the Executive Committee, Procedural Review and Faculty Hearing, and an administrator appointed by the Provost and an *ex officio* representative from Human Resources. FAFAC questioned whether PRC should get involved if FAST negotiations are not successful. Ms. Serghi asked about including research as an essential job function since scholarly output can be variable. Ms. Forestall wondered where the ‘clear and convincing’ standard was in the draft. Ms. Tschannen-Moran replied that it is still present in the section where FHC gets involved. Ms. Kennedy clarified that this section is triggered by a request for an accommodation, by a performance concern from an administrator or by a direct threat. She suggested that the disability accommodation portion be separated from the termination procedure for a medical condition. Changing the Handbook can be a multi-year process. Ms. Boyce noted that the FMLA policy is driven by HR. Ms. Forestell emphasized the importance of being able to comment on such policies before there are put in place if they affect faculty. Ms. Boyce said the latter is the reason that FMLA policy has been delayed. Provost Halleran said the process for change comes in two parts: first approving the policy, then specifically amending the Handbook. Mr. Chason said that some parts of policies like FLMA can affect faculty rights specifically while other parts of the policy do not. There is an issue with coordinating general policies with the Handbook. Ms. Tschannen-Moran pointed out that the current Handbook is overly restrictive of faculty rights with respect to the FMLA policy. She suggested that the FMLA be discussed at the March FA meeting. Mr. Chason suggested that FAFAC write a memo to the PRC so that the current state of knowledge not be lost with the change in FA membership next year. Ms. Tschannen-Moran mentioned that FAFAC is also working on a new section III G. dealing with the process where the Provost sanctions a faculty member. FAFAC tried to be more supportive in situations where faculty cannot return to work after a leave.

Any changes to the Handbook must go to PPC. Mr. Chason suggested forming a working group. Putting too much effort into details at this point could be ineffective if PPC does not agree with the policies in general. Ms. Kennedy described the process for the last two substantive Handbook revisions. Mr. Chason reiterated that a memo to PPC would start with outlining general principles. Ms. Boyce thought that it would be a mistake to delay on making changes this year. Ms. Tschannen-Moran thought that changes to sections D and G would be relatively straightforward. Ms. Kennedy cautioned that section D needs to consider changes to FMLA carefully. In particular, the faculty fought hard to not define ‘family’ in the last revision. The draft FMLA policy does not include ‘domestic partner’ while the form requesting FMLA does. Ms. Ward noted that that while FAFAC started with a few narrow charges, the scope of the suggested changes has become unwieldy. She also supported the idea of a memo to PPC. She found some of the draft very technical while other parts were amorphous. Provost Halleran suggested that a working group composed of three members of the FA and three of the PPC might be an effective way to proceed. Ms. Tschannen-Moran summed up the discussion in terms of three action items: to review FMLA, to consider a new section G and to create an *ad hoc* group. She also mentioned that the FA has not looked at the Fitness for Duty policy that is part of the proposed new section I. Ms. Serghi recommended that that item be included in a memo. Mr. Abelt returned to the composition of FAST and recommended that there be an odd number of voting members. It was suggested that the administrative member also be *ex officio*.

4. Reports from Standing Committees

Executive Committee: Sophia Serghi

The executive committee was involved in the current FAFAC draft.

Liaison Committee: Cathy Forestell

Margaret Saha and several students gave a presentation to the BOV this month about the iGEM competition.

COPAR: Patty Roberts

COPAR will meet on Wednesday (3/1) to discuss the initial prototype budget.

Faculty Affairs: Megan Tschannen-Moran

See agenda item 3.

Academic Affairs: Christie Porter

The committee will meet with Michele Jackson, Associate Provost for University eLearning Initiatives, to follow up on possible academic issues.

5. Old/New Business

No new or old business was raised.

Ms. Serghi adjourned the meeting.

Prepared by Chris Abelt

Appendix

[NB: THIS SECTION IS PROPOSED TO REPLACE THE CURRENT SECTION III.H.] I. FACULTY WITH DISABILITIES OR MEDICAL CONDITIONS

A disability is a physical or mental impairment that substantially limits one or more of an individual's major life activities. (See William & Mary's *Employee Reasonable Accommodation Policy and Procedure* for the full definition of disability.) William & Mary's *Policy on Discrimination, Harassment, and Retaliation*¹ protects the rights of faculty with disabilities by prohibiting disability-based discrimination. Disability-based discrimination includes harassment, failure to provide reasonable accommodations for a person's disability as required by law, and any other violation of a disabled person's rights under applicable anti-discrimination law, such as improper disclosure of information about someone's disability or accommodation or interference with a faculty member's exercise or enjoyment of rights under the Americans with Disabilities Act (ADA). Complaints of discrimination or harassment are addressed under the *Discrimination Procedure*.²

William & Mary's accessibility website, www.wm.edu/sites/campusaccess, serves as an information hub for faculty and others. The site provides resources including guidance on

¹ See Section III.F.1.

² See Section III.F. of this *Faculty Handbook*.

disability rights, information about accessibility of specific buildings and facilities, and links to procedures for requesting accommodations.

1. **Disability Accommodations.**

Accommodations are modifications, changes or adjustments to job duties, job conditions, or working environment designed to allow a qualified person with a disability to perform his or her job and to enjoy the benefits and privileges of employment. Pursuant to the *Employee Reasonable Accommodation Policy and Procedure*, faculty may request accommodations from the Office of Diversity & Inclusion; Chairs, Deans, and other administrators generally are not authorized to approve or deny accommodation requests and should refer faculty to Diversity & Inclusion for services. Leave may be a form of reasonable accommodation under the *Employee Reasonable Accommodation Policy and Procedure*. The paid and unpaid leave available to faculty is described in Section III.D. Other possible accommodations include modifications to a physical workspace, adjusted work schedules, and specialized equipment or technology.

William & Mary encourages faculty who need or anticipate needing accommodations to initiate the process by contacting Diversity & Inclusion. In some situations, the need for an accommodation may not be identified or communicated until after a concern arises regarding a faculty member's ability to perform certain aspects of his or her job. In these situations, the appropriate administrator may share the concern with the faculty member and ensure that the faculty member is aware that he or she should contact Diversity & Inclusion if he or she is interested in requesting an accommodation, if applicable and without assuming that he or she has a disability or needs an accommodation.

If a faculty member discloses a disability in the context of an evaluation or other process, he or she is not entitled to retroactive consideration of the disability; the evaluation or other process may continue while an accommodation process is initiated, if appropriate.

2. **Right to Privacy Regarding Medical Information.**

Faculty have the right to privacy regarding their disabilities, Medical Condition (physical or mental illness, injury, disease or condition), and other health-related information. There are narrow circumstances in which the College may request such information: (a) when a faculty member requests accommodations, (b) when there is a reasonable belief that the faculty member may be unable to perform essential job functions due to a Medical Condition and (c) when there is a reasonable belief that a faculty member poses a Direct Threat due to a Medical Condition. These three situations are detailed below. Faculty members have the right to request the involvement of the Faculty Assistance and Support Team during this process, as provided below.

The situations below generally are applicable only to faculty for whom there are concerns relating to their current positions. If an administrator or hiring official has concerns regarding a faculty member's ability to perform or posing a direct threat in a different position, such as a department chair or dean position for which a faculty member may be applying, these concerns must be handled in accordance with applicable law and recruitment and hiring practices. Generally, the only applicable inquiry in a hiring, promotion, or transfer situation is to ask the applicant or candidate whether or not he or she can perform the essential functions of the position, with or without accommodations, and to refer them to Diversity & Equity if they request any accommodation.³

- a. Accommodation Request. If a faculty member requests an accommodation, he or she may be required to provide documentation of the disability and/or the need for accommodation, under the *Employee Reasonable Accommodation Policy and Procedure*.
- b. Reasonable Belief that Individual Unable to Perform Essential Functions. When there is a reasonable belief, based on objective evidence, that the faculty member is or will be unable to perform essential job function(s) due to a Medical Condition, the [administrative officer] may make inquiries or ask the faculty member to undergo a medical evaluation as provided in Section III.1.2.b.iii, below.

An "essential job function" is a fundamental function of the position. Teaching typically is an essential function of a faculty position. Conducting research is often an essential function of tenure-eligible and tenured positions.⁴

- i. Examples. The following examples help indicate what evidence gives rise to a reasonable belief that a faculty member is unable to perform his or her job. Each situation must be considered on a case-by-case basis, with careful consideration of all relevant available information.⁵
 - A faculty member has struggled, since joining William & Mary, to meet deadlines for grading and to attend department meetings. There is no indication of any medical condition. *This should be addressed as a performance concern using established procedures; no medical inquiry made.*⁶
 - A faculty member asks for leave because he is "stressed out and depressed." *This may be sufficient to constitute a request for accommodation (if needed) or*

³ For further information, consult the Office of Diversity & Inclusion.

⁴ See *EEOC Technical Assistance Manual: Title I of the ADA*, Section II. Essential job functions should be documented in position descriptions or position advertisements, and may be identified in consultation with the relevant Dean and program director or chair and the faculty member and in accordance with federal law.

⁵ These examples are taken from regulatory guidance provided by the Equal Employment Opportunity Commission (EEOC), which enforces the ADA. They have been modified to faculty situations.

⁶ *EEOC Psychiatric Enforcement Guidance*, Question 14, Example B.

FMLA leave, but alone is not sufficient to support medical inquiry (beyond that required (if any) to initiate leave).

- For the past four months, a faculty member has missed deadlines for committee work and department meetings and provided a student a letter of recommendation that had numerous obvious errors. When her Chair asks about the missed meetings, she voluntarily discloses that the medication she takes for an auto-immune disease has made her lethargic and unable to concentrate. *This gives W&M a reasonable belief that her ability to perform the essential functions of her job because of a medical condition and may make inquiries, such as asking whether this medication is new and if so, how long the side effects are expected to last, or to provide documentation from her health care provider explaining the effects of the medication on her ability to perform her job.*⁷
 - A faculty member broke her leg and was out on leave for four weeks, after which time she returned to campus on crutches. *The Dean or Chair may ask the employee how she is doing and express concern about her injury, but has no basis to believe that she will pose a Direct Threat or be unable to do her job. The Dean or Chair should check to make sure the faculty member is able to access her office and classrooms and make sure she is aware of her ability to get a temporary disabled parking pass from Parking Services.*⁸
 - A faculty member with epilepsy has a seizure at work in the classroom. He explains to his Chair that following a seizure he typically is very tired and needs to rest in his office several hours. He says that he will be fine the next morning and will not miss any classes. *These concerns are not sufficient to support medical inquiry. If students or other faculty inquire, the Chair should respond by saying that the faculty member is fine, unless the faculty member would like to provide more information.*⁹
- c. Direct Threat. When there is a reasonable belief, based on objective evidence, that a faculty member poses a significant risk of substantial harm to the health or safety of an employee or other members of the campus community that cannot be sufficiently mitigated through reasonable accommodation (if applicable) (a “Direct Threat”), the administration may make inquiries or ask the faculty member to undergo a medical evaluation as provided below.¹⁰

If the risk is a risk of violence, the threat may be identified by the Threat Assessment Team; if not, the administrative officer should consult the Threat Assessment Team. Interim action may be considered in accordance with Section III.G. The Threat Assessment Team may advise the administrative officer throughout this process as necessary to avoid escalation of a threat to safety. Actual threats or acts of violence made by a faculty member generally

⁷ See *EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* (“*EEOC Examinations Enforcement Guidance*”), Question 5, Example A.

⁸ *EEOC Examinations Enforcement Guidance*, Question 17, Example A.

⁹ *EEOC Questions and Answers about Epilepsy in the Workplace and the Americans with Disabilities Act*, Example 17.

¹⁰ For a definition of direct threat, see 42 U.S.C. 12111(3).

are more appropriately addressed as misconduct under Section III.F; this Section III.I is primarily for collecting medical information and addressing threats posed by Medical Conditions.

A faculty member's duties, responsibilities or access may be limited or modified pending completion of a Direct Threat assessment, to the extent permitted by and subject to compliance with Section III.G of this *Faculty Handbook*.

- i. Examples. The following examples help indicate what evidence gives rise to a reasonable belief that a faculty member poses a Direct Threat. Each situation must be considered on a case-by-case basis, with careful consideration of all relevant available information.
 - **[NB: a challenging example when translated into the university setting, may need further thought:]** A faculty member disclosed to her Chair that she has bipolar disorder and had a manic episode last year, which started when she was involved in an unusually busy research and high-stress period when coming up for tenure. During the episode, she engaged in behavior that posed a direct threat to herself and others through reckless driving, including driving to conduct interviews as part of her research. She was awarded tenure and took a short leave. She returned to work and there are no signs of manic behavior. Her Chair is concerned that an upcoming round of events will trigger another manic episode including driving. *There is no indication that the faculty member's condition has changed in the last year or that the manic episode was not precipitated by the unique stresses of the tenure run-up. The College may have an obligation, however, to speak with the faculty member to ensure she is aware of the College's policy on vehicular travel, of her right to request an accommodation (which potentially could include a driving-related accommodation). If the faculty member transports students, this could change the analysis and result in the College needing to make some further inquiry.*¹¹
 - A faculty member with a known psychiatric disability threatens colleagues. Shortly after his threats were reported, he was hospitalized for six weeks for treatment related to his condition. He attempts to return to work two days after his release with a note from his doctor stating "cleared to return to work." *Typically, a doctor-provided "cleared to work" is sufficient and no further inquiry may be made. In this situation, however, the administration has a reasonable basis to pursue additional information to address a Direct Threat concern, pursuant to Section III.I.c.ii below.*¹²
 - A faculty member who works in a laboratory discloses that she has cerebral palsy and restricted manual dexterity. *The College cannot assume that she will pose a risk of breaking vessels with dangerous contents, but may request additional information*

¹¹ *EEOC Psychiatric Enforcement Guidance*, Question 14, Example C. Alternatively, if the only threat concern arises from the employee's driving, the university could discuss with the employee the possibility of transferring the driving duty to another employee as an accommodation.

¹² *EEOC Enforcement Guidance* Question 17, Example B.

to help assess the faculty member's limitations and/or pursue reasonable accommodations. The administrative officer may therefore proceed under Section ii below to discuss the matter further with the faculty member, and request further information.¹³

3. **Addressing Fitness for Duty or Direct Threat Concerns; Inquiry and Investigation.** [NB: this section is an expanded version of the current III.H. The current III.H does not detail the formal investigation process; it just references III.F. We suggest cutting-and-pasting III.F. plus making some additions and modifications reflecting that investigating misconduct is different than determining if someone who likely has a disability (and so enjoys special legal protections) is capable of doing their job.]

a. General Procedural Matters.

- Alterations or modifications to the process may be made to accommodate faculty with disabilities. Such accommodations may include, but are not limited to, administrative assistance, additional time, and/or an alternative to the formal hearing process (section d, below). Faculty with disabilities who need reasonable modifications to address suspected misconduct are encouraged to contact the [ADA Coordinator](#) as early in the process as possible to identify and plan specific accommodations.
- A faculty member may request that a representative represent his or her interests in the process, or the administration may seek to work with a representative if a faculty member is unable to participate. [University Counsel will be consulted and caution exercised to ensure that a faculty member is not represented against his or her will.] If a representative is used, all references to the faculty member in this Section III.I shall be understood to include the representative.
- A faculty member's duties, responsibilities or access may be limited or modified pending resolution of the investigation, to the extent permitted by and subject to compliance with Section III.G of this *Faculty Handbook*.

b. Inquiry. If an administrative officer¹⁴ has a reasonable belief that the faculty member (i) is unable to perform the essential functions of his or her position, with or without accommodation, due to a Medical Condition, as described in Section 2.b above, or (ii) poses a Direct Threat, as described in Section 2.c above, he or she shall discuss the reasonable belief with the faculty member and provide him or her the opportunity to respond. This conversation may resolve the concern or result in the faculty member seeking an accommodation or requesting leave. The administrator and the faculty member may also reach an agreement that will resolve the concern, such as an agreement by the faculty member to stop the concerning conduct.

¹³ *EEOC Technical Assistance Manual: Title I of the ADA*, Section IV.

¹⁴ See Section III.F.1.

If the concerns relate to performance of essential duties and are not resolved,¹⁵ and if the faculty member does not identify the concerns as arising from a medical condition or disability, the administrator may address any performance concerns through established processes for evaluating performance or merit (e.g., merit evaluations, tenure review, post-tenure review) or, if the concerns are more significant, pursue a misconduct or neglect of duty investigation pursuant to Section III.F.

If the discussion with the faculty member does not resolve the matter, the administrative officer shall determine whether there is a basis to make further medical inquiries or to request a medical examination.

If further medical information is requested, the request shall be made in accordance with the ADA including narrow tailoring of the request to information relevant to assessing the faculty member's ability to perform his or her job or to assess the Direct Threat. Typically, this request will begin with asking the faculty member to provide relevant medical information or documentation. The administrative officer will also notify the faculty member that he or she may request the assistance of the **Faculty Assistance and Support Team (FAST)** at this stage (as described in Section 2.c below). If the information or documentation provided by the faculty member is insufficient, the administrative officer should explain why and allow the faculty member to address the matter such as by providing additional information.¹⁶

If the faculty member does not provide information or documentation sufficient to address the concern, after being provided with an opportunity to explain or provide additional information, and if the administrative officer continues to have a reasonable belief that the faculty member's currently is unable to perform the essential functions of his or her job or poses a Direct Threat, the faculty member may be **requested** to undergo a medical examination. The College may only request, from this examination, information necessary to determine whether the faculty member can do the essential functions of the job. Typically this requires ensuring that the health care provider has knowledge of the essential functions. Typically the faculty member may select the health care provider to conduct the medical examination, provided that the health care professional has the expertise to give an opinion about the faculty member's medical condition and the limitations imposed by it. If the College requests a faculty member to undergo a medical examination, the College is responsible for the costs of such examination.

¹⁵ If a matter is not resolved because a faculty member does not request accommodations under the applicable procedure or does not fulfil his or her obligations under that procedure, such as by failing to provide necessary documentation, the administrative officer may proceed forward under this Section iii. Reasonable time limits for engaging in or completing the accommodation process may be established, on a case by case basis in consultation with the Office of Diversity & Inclusion.

¹⁶ Documentation might be insufficient where, for example: (1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it; (2) the information does not specify the functional limitations due to the disability; or, (3) other factors indicate that the information provided is not credible or is fraudulent. See *EEOC Examinations Enforcement Guidance*.

If the matter is not resolved after medical inquiry or examination, or a faculty member refuses to provide information requested through a medical inquiry or to undergo a medical examination, the administrative official may submit the matter to the Provost for informal investigation pursuant to Section III.I.3 below. Upon the faculty member's request, which may be made at any point during this inquiry phase, the Faculty Assessment and Support Team (FAST) will convene; see Section c below.

If (i) after requesting medical information pursuant to Section III.I.2.b. or c. above, the administrative officer has a reasonable belief that a faculty member is unable to perform the essential functions of his or her job or poses a Direct Threat, or (ii) the faculty member has requested the assistance of FAST, the administrative officer shall document his or her specific concerns and the relevant, objective evidence on which the belief is based. Relevant, objective evidence may include medical information received, observations of the faculty member's conduct, information regarding the faculty member's duties, and applicable College policies or procedures. Relevance is determined based on whether and how it (a) relates to the essential duties of the faculty member's position or (b) creates a Direct Threat. This document will be provided to the faculty member, who shall have 10 calendar days to respond. The administrative officer, in consultation with FAST if applicable, may attempt to resolve the matter through negotiated agreement, or with the approval of the Provost, through the imposition of a restriction or limitation or modification of the faculty member's role, provided that the faculty member may reject any resolution that would constitute a major sanction and seek informal investigation.

If the concern is not resolved, the administrative officer may submit the communication, the response, and other relevant records to the Provost to initiate informal investigation or, if the faculty member has requested the assistance of FAST, to FAST. The faculty member shall receive a copy of these communications and may request that any investigation be conducted pursuant to Section III.F. The Provost shall consider any such request and determine the most appropriate investigation procedure.

- c. Faculty Assistance and Support Team. If a faculty member seeks the assistance of the Faculty Assistance and Support Team (FAST) as provided in Section b above, FAST shall be convened. This committee will be constituted of one representative of the Procedural Review Committee, one representative from the Faculty Hearing Committee, one member of the Faculty Assembly Executive Committee and [an administrator designated by the Provost to help ensure that the faculty member's ADA rights are respected]. The executive committee representative will serve as chair unless those duties are designated to another member of the committee. A representative from Human Resources will serve as an ex officio member of this committee to

provide information about various leave and insurance options.

The FAST will determine whether there is a basis to make further medical inquiries or to request a medical examination.

If further medical information is requested, the request shall be made in accordance with the ADA including narrow tailoring of the request to information relevant to assessing the faculty member's ability to perform his or her job. Typically, this request will begin with asking the faculty member to provide relevant medical information or documentation. If the information or documentation provided by the faculty member is insufficient, the FAST should explain why and allow the faculty member to address the matter such as by providing additional information.

If the faculty member does not provide information or documentation sufficient to address the concern, after being provided with an opportunity to explain or provide additional information, and if the FAST continues to have a reasonable belief that the faculty member currently is unable to perform the essential functions of his or her job or poses a Direct Threat, the faculty member may be **requested** to undergo a medical examination. The College may only request, from this examination, information necessary to determine whether the faculty member can do the essential functions of the job. Typically this requires ensuring that the health care provider has knowledge of the essential functions. Typically the faculty member may select the health care provider to conduct the medical examination, provided that the health care professional has the expertise to give an opinion about the faculty member's medical condition and the limitations imposed by it. If the College requests a faculty member to undergo a medical examination, the College is responsible for the costs of such examination.

If the matter is not resolved after medical inquiry or examination, or a faculty member refuses to provide information requested through a medical inquiry or to undergo a medical examination, the FAST may submit the matter to [**procedural review or formal investigation? Via Provost as typically is done?**].

d. Procedural Review; Settlement

If requested by the faculty member, the Provost shall submit the matter to the Procedural Review Committee for procedural review. The Procedural Review Committee may try to negotiate a resolution; should no settlement be reached, the Committee shall prepare a written report of its review. The report shall indicate the Committee's non-binding opinion as to whether the matter should proceed to formal investigation.

The report will be provided to the Provost and the faculty member. The faculty member shall have ten calendar days in which to submit a response to the Provost. The faculty member may also request a formal investigation as provided above, if applicable.

The Provost may attempt to resolve the matter through an agreed settlement. If the Provost and the faculty member are unable to reach a settlement, the Provost may initiate the formal investigation. **[or sometimes the Provost can here resolve things even without the agreement of the faculty member, so long as there are no major sanction.]**

e. Formal Investigation

If a matter is not resolved through inquiry or by FAST, the Provost shall submit the matter to the Faculty Hearing Committee specifying the particular issue(s) to be investigated through formal hearing. The Provost may designate an individual to represent the College's perspective during the formal investigation, who shall be considered a party for the purposes of this Section III.I.3.c. The Provost will provide the report prepared by the Procedural Review Committee, the faculty member's response (if any), and any relevant documentation of settlement discussions. The faculty member will receive a copy of all documentation provided to the Faculty Hearing Committee.

- i. Faculty Hearing Committee composition will be established through challenges and recusals as provided in Section III.F.5.
- ii. The Faculty Hearing Committee may, with the consent of the parties concerned, hold joint pre-hearing meetings with the parties in order to (1) simplify the issues, (2) effect stipulations of facts, (3) provide for the exchange of documentary or other information, and (4) achieve such other appropriate pre-hearing objectives as will make the hearing fair, effective, and expeditious.
- iii. Service of notice of hearing will be made at least twenty calendar days prior to the hearing. The faculty member may waive a hearing at any time before the hearing. If the faculty member waives a hearing, he or she may submit a written response, and the Faculty Hearing Committee will evaluate all available evidence and rest its recommendation upon the evidence in the record.
- iv. The hearing may be public only at the request of the faculty member, and the approval of the Faculty Hearing Committee, in consultation with the President. The faculty member will be permitted to have an advisor and/or lawyer of the faculty member's

own choice. At the request of the faculty member party, a representative of an appropriate educational association shall be permitted to attend the proceedings as an observer. Except for such simple announcements as may be required, covering the time of the hearing and similar matters, public statements and publicity about the cases by either the faculty member or administrative officers will be avoided so far as possible until the proceedings have been completed, including appeal to the Board of Visitors

- v. The burden of proof rests with the College and shall be satisfied only by clear and convincing evidence¹⁷ in the record considered as a whole. The Faculty Hearing Committee will not be bound by strict rules of legal evidence, and may admit any evidence which is of probative value in determining the issues involved. Reasonable effort will be made to obtain the most reliable evidence available.
- vi. The Faculty Hearing Committee will comply with applicable law, regulation, and regulatory guidance to ensure no violation of faculty rights under disability laws. The Committee may seek expert testimony regarding medical issues, ADA accommodations, or other legal or regulatory provisions, Direct Threat, or other relevant matters in which the Committee may not have subject-matter expertise. The Faculty Hearing Committee shall consider relevant medical information and evaluate other evidence.¹⁸
- vii. In assessing whether a Direct Threat is posed, the Committee will consider (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that the potential harm would occur; and (d) the imminence of the potential harm.¹⁹ The Committee shall consider any threat assessment provided by the Threat Assessment Team.²⁰
- viii. The Faculty Hearing Committee may grant adjournments to enable either party to investigate material evidence for which a valid claim of surprise is made and to prevent prejudice.
- ix. The faculty member has the right to suggest witnesses to be interviewed and/or called to the hearing, to submit documentary or other evidence for consideration, and to request that the Faculty Hearing Committee seek other evidence not in the possession of the faculty member.

¹⁷ Clear and convincing evidence does not require evidence that is beyond a reasonable doubt. Rather it is defined as that degree of proof which will produce a firm belief in the allegations sought to be established. Clear and convincing evidence thus is an intermediate standard requiring more than a preponderance of evidence, but less than the certainty required by evidence that is beyond a reasonable doubt. Clear and convincing evidence does not require that certainty.

¹⁸ In the event of conflicting medical information or opinions, the Faculty Hearing Committee will consider “(1) the area of expertise of each medical professional who has provided information; (2) the kind of information each person providing documentation has about the job’s essential functions and the work environment in which they are performed; (3) whether a particular opinion is based on speculation or on current, objectively verifiable information about the risks associated with a particular condition; and, (4) whether the medical opinion is contradicted by information known to or observed by the [College].” *EEOC Enforcement Guidance*, Item 12.

¹⁹ *EEOC Enforcement Guidance*.

²⁰ [add reference to TAT description in Handbook]

- x. The parties will have the right to confront and cross-examine all witnesses. Where the witnesses cannot or will not appear, but the Faculty Hearing Committee determines that the interests of justice require admission of their statements, the Faculty Hearing Committee will identify witnesses, disclose their statements, and if possible provide for written interrogatories.
- xi. A verbatim record of the hearing or hearings will be taken and a transcript will be made available to the faculty member without cost, at the faculty member's request.
- xii. The Faculty Hearing Committee shall render a formal finding based upon the evidence admitted at the hearing or hearings; the formal finding shall be based solely on the record as a whole, and shall be in writing. The formal finding shall reflect the majority opinion of the Faculty Hearing Committee, and shall contain a summary of the committee's proceedings and deliberations. It should also describe the policies and procedures under which the investigation was conducted, how and from whom information was obtained relevant to the investigation, the findings, and the basis for the findings. The Provost and the faculty member shall receive a copy of the formal finding and, should either one request it, a copy of the record of the hearing.

The Committee shall make Formal Findings as follows:

- The faculty member should be cleared to return to or continue full duty, without accommodation or restriction;
- The faculty member should be provided with temporary or longer-term modifications or accommodations for medical restrictions, in which case accommodations would be developed in accordance with the *Employee Reasonable Accommodation Policy and Procedure*;²¹ or
- The faculty member presents a Direct Threat or is unable to perform the essential functions of his or her position, for a period reasonably anticipated to be no longer [2 years?], in which case the faculty member would be placed on leave pursuant to Section II.D;²² or
- The faculty member presents a Direct Threat or is unable to perform the essential functions of his or her position, without anticipation resolution or recovery within [2 years], in which case the faculty member's appointment would be terminated.

²¹ The Committee may include recommendations as to specific accommodations, based on the informal investigation. If reasonable accommodations satisfactory to the parties are not established under the *Reasonable Accommodation Policy and Procedure*, and concerns remain regarding the faculty member's ability to perform the essential functions or a Direct Threat, the Provost [may return the matter to the Faculty Hearing Committee for reconsideration?].

²² If the faculty member's medical condition changes such that he or she is able to return to work (is fit for duty) within two years, he or she is entitled to return to the position. Faculty may request from the Provost an extension of this period, which will be considered on a case-by-case basis.

Upon receipt of the Committee's Formal Finding, the faculty member shall have ten calendar days to submit a response to the Committee's findings to the Provost. Should the Provost **agree** with the Committee's Formal Finding and recommendation for action, he or she shall so inform the faculty member, the Committee, and the President, in writing, formalizing the action to be taken.

Should the Provost **disagree** with the Committee's Formal Findings and/or recommendation about action, the Provost will determine the appropriate action to be taken by the College only after consulting with the Faculty Hearing Committee. The Provost shall then inform the faculty member, the Committee, and the President, in writing, of the action to be taken. The Provost shall include the findings and/or recommendation of the Faculty Hearing Committee in his or her report.

If there is a decision that a faculty member is unable to continue in his or her position, the faculty member shall be afforded all leave to which he or she is entitled (See Section II). A faculty member whose appointment is terminated also shall receive compensation in accordance with the following schedule: at least three months, if the final decision is reached by March 1 (or three months prior to the expiration) of the first year of service; at least six months, if the decision is reached by December 15 of the second year (or after nine months but prior to eighteen months) of service; at least one year, if the decision is reached after eighteen months of service or if the faculty member has tenure. On the recommendation of the Provost, the President may offer payments beyond the schedule outlined above if warranted by the length and quality of service by the faculty member.

The faculty member may appeal a termination or any other action that is considered a major sanction (see III.F.1.b.viii.) on procedural grounds to the Procedural Review Committee (per III.F.5.a.) or on any grounds first to the President and then to the Board of Visitors (per III.F.5.b.). A faculty member who believes that his or her rights under the Discrimination Policy were violated through the process also may file a complaint pursuant to the Discrimination Procedure.