INFORMALITY AND FAIRNESS: AN EXPERIMENT WITH ACADEMIC DUE PROCESS AT RUTGERS

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Academic Due Process: Rutgers' Experiment In Informality and Fairness*

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INTRODUCTION

Until recently Universities conducted their internal affairs in an informal manner. Faculty members had correspondingly few legal rights.

This informality which was permitted under the law of "Private Associations" arose out of one of the purposes of the university: to assist the faculty member to develop as professor, as a thinker, as a writer, as a contributor to the public welfare. Universities select people who appear to have these capacities and provide an environment where they may develop. Such a setting is necessarily informal. It recognizes the individuality of faculty members and intrudes into their lives only to the extent necessary to the university or desired by the faculty member. This requires an informal tradition, a consensus of what is
expected, and a consensus on when it has been delivered. The informality was permitted by law, but it was occasioned by the desire to provide the opportunity for individualized professional development.

The pressures which have caught up all institutions since the end of World War II have challenged this informal tradition. University personnel opposed the excesses of Senator Joseph McCarthy in the late forties and early fifties. They became targets for Congressional investigations. Out of that experience the First, Fifth, and Fourteenth Amendments were invoked to establish a formal legal basis on which to protect faculty members from external sources such as Congressional committees. The AAUP since 1940 has been encouraging the adoption of standards to protect academic personnel from the vagaries of the informal operation of the university.

The growth in governmentally supported research created a host of problems for this informal tradition, including the creation of "second class citizenship" among those employed on "soft money" for such research.
In the sixties the unionization of faculty members reached higher education. Unions sought to reduce the area of "managerial discretion" and to clarify and crystallize rights to promotion, tenure and other employment conditions. At the same time universities adopted "modern management techniques," which required more formality in documentation of personnel decisions. The equal opportunity obligation further contributed pressure toward formality in personnel matters, as reports and justifications concerning personnel actions were required.  

These tendencies toward formality were further aggravated by developments in the 1970's. Higher education came into ferment. As language requirements were dropped or modified, there were great pressures to reduce the faculties in language departments. Clinical education became central in legal education and there resulted pressures to change the student-teacher ratio. Finally, recession led to reduced support for institutions of higher education. Universities considered economy measures which included a re-examination and toughening of appointment and promotion
practices. The cumulative weight of these developments challenged the capacity of the university to maintain the informality and "human space" for growth and experimentation which it had nurtured in quieter times. Increased formality might be necessary to meet some of these new concerns but in squeezing out the flexibility of the informal process, it created a new set of problems. The new risk was that the universities would become strongholds of bureaucrats and formalists as distinct from reservoirs of talented people. This risk exists because qualitative judgments are difficult to include in a formal evaluation system. Therefore such systems tend to advance not necessarily the most able, but those most adept at meeting formal quantifiable requirements.

This risk is heightened by the concept of tenure — lifetime job security, in a job with minimum formal requirements. Life tenure is a target worthy of the best efforts of petty bureaucrats as well as the creative energies of talented academics. Meanwhile the outer world prepared to reconsider tenure and to subject academics to periodic reviews of performance which would probably heighten emphasis on quantity rather than quality of performance. Within the universities, among the younger faculty who had not lived under the siege of Joseph McCarthy and who were in daily contact with some senior professors whose claim to academic excellence was tenuous, there were growing doubts as to the value of tenure.

In this setting Rutgers University, like many others, sought to accommodate the pressures toward formality while maintaining informality.
The experiment began in 1971 with the adoption of the first collective bargaining agreement between the University and the AAUP. It was carried on with a high degree of self-awareness. The President of the University, Edward Bloustein, was an attorney and former law professor. The original chairman of the committee which is to be described here, Willard Heckel, was Dean of the Rutgers School of Law in Newark. Both were quite conscious of the fact that they were evolving new institutional forms in accordance with a common law tradition. 7

The AAUP-Rutgers agreement of 1971 defined a grievance as "any dispute or difference concerning the claim to violation of any provision of this agreement or the claim of violation of established university regulations and procedures regarding tenure and promotion."

The procedure called for informal adjustment as Step 1 between those "directly affected." Step 2 was an appeal to the dean or the director. Step 3 was a hearing before the Committee of Review of the College, which consisted of two members elected by the faculty and two appointed by the dean. The Committee of Review had existed prior to the collective bargaining era. It had been used for informal handling of grievances or disciplinary matters involving faculty members. It had been an advisory body which did not hold formal adversary hearings. The collective bargaining agreement converted these informal committees into trial bodies to hear grievances. The agreement provided for the presentation of witnesses and documentary evidence; granted the rights of
examination and cross-examination.

An appeal from the decision of the Committee of Review lay to a new institution created by the agreement; the University Appeals Committee (UAC) the work of the UAC in connection with grievances against denials of promotion and/or tenure is the primary focus of this paper. Initially, the committee consisted of six persons, three selected by the University and three by the AAUP. In 1974 the contract was amended to provide that those six should select a seventh person as chairman who would vote in case of a tie. The decision of the UAC "shall be considered advisory to the President and to the Board of Governors."

The President under general university regulations had the power to recommend to the Board of Governors a revised decision concerning promotion and/or tenure. The 1976 agreement provided unresolved disputes between the President and the UAC would be submitted to the University Senate for its recommendation to the Board of Governors.

Rutgers is the State University of New Jersey. It was originally a private institution, became a land-grant institution in the 1960's and a state university in the 1940's. It is organized into three branches. The primary branch and the seat of the university administration is in New Brunswick. The other two branches of the university are in Camden and Newark.

The graduate programs in law, business, nursing and criminal justice are located in Newark and are not duplicated in New Brunswick but the law program is duplicated in a separate school in Camden. The Camden branch, the smallest, has programs in law,
business and recently in criminal justice, and has within the last year
developed a general graduate program. Some Camden and Newark personnel
believe that they are treated as "second-class citizens" by the central
administration in New Brunswick. University officials maintain that
they give full attention to the Newark and Camden schools. This is one
of the tensions which pervades the University.

A description of the normal process of promotion and tenure
is necessary for an understanding of the issues to be discussed here.
The process normally begins in the department of the candidate. The
history and accomplishments of the candidate are described. Tenure members
of the department make a recommendation on a detailed rating form. The
department chairperson also fills out a rating form. The promotion
material, now called the "promotion packet," is sent to the Dean or
Director of the unit; to the Section, consisting of all faculty in the
discipline in the University regardless of location; and to the New Brunswick
chairperson, with respect to most candidates from the New Brunswick campus.
The Dean refers the application to a college-wide Appointments and Promotions
Committee, which rates the candidate. The Dean then rates the candidate
and makes a recommendation. The Section and the New Brunswick chairperson
also makes written recommendations.

All of these recommendations are assembled in the Office of
the Assistant Vice President for Academic Affairs and are placed before
the Promotion Review Committee, called the "Summit" Committee.
That committee, consisting of the Senior Vice President for Academic Affairs, the Provosts of the three campuses, the Director of Research of the University, and the Director of the Graduate Program, often reviews two hundred promotion packets in a short time during the early spring, making recommendations to the President, who in the normal course adopts them. Tenure decisions are recommended to the Board of Governors which nominally makes the decisions. The Board of Governors normally approves the President's recommendations. The last point in the regular process where serious individualized judgment is regularly attempted is at the "Summit" Committee.

The procedure, as outlined by the University, is as follows:
General Pathway of Academic Promotion

BOARD OF GOVERNORS

PRESIDENT

PROMOTION REVIEW COMMITTEE
CHAIR BY THE SR. V.P. FOR ACADEMIC AFFAIRS

OFFICE OF ASSIST. V.P. FOR ACADEMIC AFFAIRS
(Dr. Carter R. Smith)

PROVOST OR ASSOC. V.P. FOR ACADEMIC AFFAIRS*

Section (When applicable)

New Brunswick Chairperson**

Dean or Academic Director

DEPARTMENT CHAIRPERSON

A & P Committee

*Whichever applies
**Applicable only to Cook, Douglass, Livingston
and Rutgers Colleges and those University
College departments in N.B. which have a
relationship with the N.B. Federated Depts.

Indicates original materials

Indicates copies of originals

+Dean sends materials to either Assoc. V.P.
or Provost whichever applies.
1. ISSUES RAISED IN THE PROMOTION AND TENURE CASES

The University Appeals Committee commenced operations in the fall of 1972. During the three academic years between then and June 1975, the committee considered 39 cases alleging improper denial of promotion and/or tenure and of reappointment. Of these the University Appeals Committee sustained denial in 19 cases; recommended that the decision be reversed and tenure and/or promotion or reappointment be granted in 10 cases; and recommended other affirmative relief in 10 cases. The President sustained a-1 denials by the committee and concurred in 8* of the 10 recommendations to grant promotion or tenure, and 7** of the 10 recommendations to grant other affirmative relief.

The written opinions of 1972-1975 of the Committees of Review, the UAC, and the President, do not disclose a pattern of evolving principles. The issues raised during the first year recur in the latter years without firm resolution. The entire period seems to be one of groping with quite similar problems. This may be partly due to a time lag in which a change recommended during the first year may not take effect until another year passes. Grievants who are affected by the old approach in the second year will raise the same issues, reaching the committee in the third year.

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* President denied one recommendation; another grievant was promoted with tenure through the regular process.

** President denied one recommendation; in another case agreement was reached between the parties before he acted; and in the third instance the UAC returned the grievance to the Committee of Review for a full hearing.
(1) **Scope of Review:**

The question of the extent of authority of the UAC was raised in the first case (71-1) in the fall of 1972, and in the last case in 1975 in slightly altered form. The question is whether the UAC may recommend promotion or tenure for a grievant if the committee believes that result is warranted on the merits, or whether the UAC is limited to "procedural" concerns leaving questions of "academic judgment" beyond the scope of review. This is the academic version of the "management prerogative" issue, with which the private collective bargaining sector has had much experience.

The AAUP had taken the position that the committee may recommend promotion if promotion seems warranted on the merits, while the University has taken the position that the committee may not reverse "academic judgment" and can at most insist that a matter be reconsidered by fair procedures. When one turns to the contract to unravel this problem, one is immersed in ambiguity.

As noted earlier, a grievance is defined as "any dispute or difference concerning the claimed violation of any provision of this agreement or the claimed violation of established university regulations and procedures regarding tenure or promotion."

The following sentence of the grievance procedures states that the agreement "in no way diminishes the responsibility of faculty, department chairmen, and of deans, directors, and other appropriate administrative officers for the exercise of academic judgment." The University has relied on this sentence for the proposition that the UAC may not concern itself with merits of an "academic judgment." In its first recommendation of November 17, 1971, in the case of 71-1, the UAC wrote:
.... There is a fundamental disagreement between Dean ... and this committee over the jurisdiction of the committee. It is his belief that under the Grievance Procedure, not only this committee but the Committee of Review of a unit of a University may not deal with substantive matters but rather is limited to procedural matters. We do not so view that meaning of Chapter VII Paragraph (1) which defines a grievance as a dispute involving a claimed violation of established University Regulations and Procedures regarding tenure or promotion. By virtue of this sentence we are empowered in our recommendation to the President to weigh matters of substance. It is pointed out that this gives the President an independent evaluation which he may accept or reject. The contract between the University and the AAUP envisaged such a detached evaluation of the operation of the internal machinery of a particular unit of the University. ....

Dr. Bloustein accepted the recommendation on the merits, but stated:

.... I disagree with the view expressed in your letter that the Committee is "empowered in its recommendation to the President to weigh matters of substance". In my opinion, this flies in the face of the express language of the agreement between the AAUP and the University to the effect that

"It is understood that this agreement in no way diminishes the responsibility of faculty, department chairmen and of Deans, directors and other appropriate administrative officials for the exercise of academic judgment." (VII-1)

and to the effect that

"The University Appeals Committee must hear the case with concern for due process as defined in Step 3 above." (VII-2)

This language seems to be to preclude substantive judgments on your part. Moreover, I have been advised by those who participated in the drafting of the contract that the exclusion of the Appeals Committee from the area of academic judgment, was their considered and conscious intent.

Thus, the University's position is that the "academic judgment" language, coupled with the provisions of the grievance procedure that the
Committee of Review and the UAC must "hear the case with concern for due process," means the jurisdiction of the committee extends only to procedural matters and not to substance.

The UAC has accepted the University's position at least to the extent of insisting that a candidate's claim must be based on more than the assertion that the candidate "deserves" promotion. There must be a violation of "procedural rights." A candidate who establishes only procedural violations without showing that his claim is meritorious may receive a ruling that the procedural violations were not prejudicial. At most, such a candidate will receive a recommendation for further consideration of qualifications. However, if the candidate shows both a "clear case" on the merits and a significant violations of procedural rights the UAC may recommend promotion or tenure. This is done by a review to determine if there was any evidence to support a negative finding on promotion or tenure. The UAC stated:

... the possibility was raised that, ... there would be denial of due process if the record on which the Promotion Review Committee acted in denying promotion/tenure to a candidate who had unanimous recommendations below, contained nothing which would support the negative judgment ... . The committee determined that it would not review the merits of the decision to promote or not to promote because that function is not vested in it under the collective bargaining agreement. However, the committee is charged into examining the promotion review process with a concern for due process. It is the view of the committee that due process requires that
the judgment be made on the basis of the record that is presented to the decision maker and that a judgment which is not based on the record is one which denies to the applicant for promotion or tenure essential procedural fairness.

Thus, the position of the UAC is that where there is evidence to support a judgment either way, the committee will not recommend a promotion based on its own view of the evidence. This is in part the acknowledgment of the argument of the University, but in part it is a recognition of the great difficulties in evaluating the significance of activities in fields where committee members do not have personal expertise. For example, in one case (75-9), the committee concluded that the negative recommendations for promotion from the department were the result of intense personal antagonisms. The committee's recommended remedy, accepted by the President, was as follows:

This committee will not substitute our own judgment on Prof. . . . qualifications. We are not competent to do that. In some circumstances, we might remand the matter back to the Committees of the College for reconsideration in a calmer light. We do not believe that it would be possible to do that under these circumstances because the same personalities by and large remain in the College and it would be an exercise in futility to remand the case to the same people under circumstances which are essentially unchanged.

Under these circumstances we believe that only a judgment of professionally competent peers from outside the University would provide a sound basis on which the President should proceed with respect to a recommendation on the question of tenure for Prof. . . . We therefore recommend to the President that he appoint a committee of visitors from outside the University who are competent in the field, who will render a fair and professional
judgment on Prof. . . . qualifications. It would be appropriate if the President consulted, among others, the present dean . . . who is recently arrived and was not present during the period under consideration in this case.

The President accepted this recommendation.

The recognition by UAC of its inability to assess qualifications diminishes the risk that it would substitute its judgment for that of the Promotion Review Committee in cases of conflicting evidence. Therefore, the issue of the "right" of the committee to substitute its judgment may be overblown.

The UAC has recommended promotion and tenure only where (1) there have been procedural defects and (2) the "academic judgment" has already been made in favor of the candidate. See Sec. 1(3)(B) infra.

During the three years of the committee's existence, its members have maintained a comfortable personal relationship with each other. The AAUP appointees and the University appointees have not viewed themselves primarily as advocates for the position of the appointing body in deliberations. Rather, they share the common traditions of the University and have evaluated claims within that tradition. There has never been a 3-3 division of the committee, and since the selection of a seventh member as chairman, there has not been a tie necessitating his vote. Given this common concern for the maintenance of academic values by all of the appointees, the likelihood that the committee would seek to become a super-appointing committee is quite remote.
(2) **Definition of "Academic Judgment"**

In addition to the uncertainties concerning the distinction between "substance" and "procedure," there is yet uncertainty relating to the term "academic judgment." The University contends that this term includes the total range of concerns of the University and is not limited to the assessment of personal professional qualifications of candidates for promotion/tenure. Thus, the quality of the unit of the University which sought the promotion; the reputation of the dean and faculty; the likelihood that recommendations are the result of faculty politics rather than academic excellence; the desirability of expanding or constricting the particular unit, are all taken into account by the Promotion Review Committee. Under this view, a fully qualified candidate might be rejected for "institutional" reasons.

This issue has been faced sharply in only one case (73-7), in which promotion and tenure was opposed by the dean in order to determine whether "an otherwise qualified academic could be denied promotion and/or tenure for reasons of General University Program not related to the qualification of the candidate."

The UAC said:

The University Appeals Committee fully recognizes that the University must keep in mind the number of students in a given area in making a decision to promote a faculty member to tenure. It is noted, however, that the University Regulations (Sec. 3.30) do not include this as one of the factors to be considered in a recommendation for promotion. These factors are: teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and
general usefulness to the University... the dean lists the declining enrollment in Italian as the major factor in his initial decision not to recommend promotion. The list of criteria to be used in making a recommendation for promotion can hardly be considered to be inclusive and could, therefore, include program needs as one of the peripheral considerations. However, to make program needs the major factor in a recommendation for promotion is contrary to present University Regulations.

The President's opinion vigorously opposed this view:

... Although the degree of institutional need for a faculty member's specialty is not explicitly stated in University Regulations as a criterion for either retention or promotion, it has long been an implicit and an important consideration in such decision-making processes, both at this University and all others of national stature. Therefore, it seems to be in the best interests of the University to take exception to the University Appeals Committee statement in paragraph #2, page 4, that "The list of criteria... could, therefore, include program needs as one of the peripheral considerations [italics mine]." To the contrary, if the University is to remain a strong, viable entity aspiring to excellence in every quarter, the need for someone's professional services no less than the quality of those services must remain an important subject of careful and continuing scrutiny.

Thus the underlying tension remains. The UAC's position in the last decision of 1974-75, that of the 46 rejected candidates who had affirmative recommendations, was that the Promotion Review Committee had to have "evidence on the record" to reject such candidates. The formal record which is compiled for promotion relates only to the professional qualification of the candidate. It does not relate to those general institutional considerations discussed above, and there is no other forum in which a candidate may explore or comment on those considerations even though they may underlie a decision.
The UAC has encouraged a clarification of this issue by urging a more definite statement of the duties of faculty members employed in "non-traditional" areas and a more definite statement of reasons from the Summit Committee for denial of promotion/tenure. In the above mentioned decision, it noted:

We also note a continuing difficulty in the lack of clarity of the mission of the individual faculty member. It is difficult to measure, at the terminal point, performance along a way which was never, clearly mapped out. This problem arises in particular with people who engage in activities which depart from the traditional pattern of new academics.

In another case (75-1), the UAC said:

. . . we are very concerned with the inadequate explanation given by the Summit Committee in its decision denying the promotion and tenure of Dr. . . . We believe that the Summit Committee should be required to evaluate the material before it in the same manner as other reviewing bodies in the University and to explain in more detail than was done here, why they took their action.

President Bloustein wrote:

Finally, the decision making and reporting procedure followed by the Promotion Review Committee is a matter which must be decided by the Committee itself. I cannot by fiat impose a specific format on that Committee. I will, however, submit the Appeals Committee recommendation to the Promotion Review Committee for its consideration.

These steps would lay a more precise foundation for disposition of some of the more general problems discussed here.

My personal view of this issue is that, if "general considerations" not relating to the personal performance of the individual faculty member are to determine whether he or she will obtain promotion and/or tenure, then the faculty member must have some opportunity to address these considerations.
The faculty member may wish to challenge the accuracy of the assumptions, to indicate alternative possible ways of approaching the situation, to otherwise deal with these general matters. At some point in the future, this issue is quite likely to arise. At present, there exists no method by which the faculty member can address these matters during the promotion process.
(3) Remedies for Violation: Promotion or Reconsideration

As a result of the decisions described above, the committee has focussed on "procedural" defects in the appointment process when it evaluates a denial of promotion or tenure. However, the line between substance and procedure is shadowy, and the problem of distinguishing what is appropriate for the committee to examine, and what is not, continues to plague the appeals process. When the committee finds that a violation of regulations in the promotion process is prejudicial, the question of remedy arises. There are two possible remedies. One is to remand the case back into the procedure and to have it processed again. This approach does not involve the committee in the "merits" of the case. A second course is to recommend that a promotion be granted. This requires the committee to conclude that a promotion is warranted. The committee has utilized both methods.

A. Further consideration

In one case (75-12), the committee concluded that the promotion process had been tainted because of change of standards during the time that the candidate was being considered. (See discussion, infra, p. 47.)

The committee recommended that he be given two one-year appointments so that during the second year he could be re-evaluated under contemporary standards. The committee explained its recommendations as follows:
We make this extraordinary recommendation because on the one hand we are satisfied that Dr. ... was denied procedural due process as required by the University rules and regulations, but on the other hand we are unable to conclude that his performance up to this point warrants the granting of tenure under standards applicable to the University. We believe that there is no effective alternative to deal with this problem other than giving Dr. ... this additional period of time.

The President concurred.

Similarly, in another case (74-8), the committee found:

... that the recommendations that reached the Summit Committee may not have emphasized adequately Prof. ... contribution to his professional field in terms of creative activity; ... .

The University Appeals Committee therefore, recommends to the President that the Dean be requested ... to resubmit to the Summit Committee the complete promotion file of Prof. ... together with additional data provided by the Dean and by Professor ... concerning the importance of creative activity in Engineering Design and Professor ... role as a creative engineer.

In the case of 74-6 (see discussion, infra, Part II (12), the UAC recommended that a negative report, concerning a candidate, by the A&P Committee be set aside:

... the ... decision by the A&P Committee was based in part on allegations that Prof. ... was insensitive to Blacks, Women, and Jews; such allegations were crystallized in a memorandum prepared by Dean ... .

These allegations suggest anti-social conduct on the part of Prof. ... of such magnitude, that, in our judgment, he should have been apprised that
they were going to be part of the consideration of his
case by the A&P Committee and given an opportunity to
rebut them before the A&P Committee. On the contrary,
he did not have notice that these inflammatory issues
would be considered by the A&P Committee.


Now that Prof. . . . is aware that allegations of
his lack of sensitivity to Blacks, Women, and Jews may
be used in his evaluation, he should be given an oppor-
tunity to add to the file any statements or documents
which he wishes, bearing on these matters.


While, reversing the decision of the Committee of
Review in this case, we are not recommending tenure, and
we are not expressing or implying any conclusion whatsoever
concerning the merits of the May 10th recommendation for


A remand by the UAC, requiring that the candidate go through
the promotion process anew, does not conflict with the University's
position that the UAC should not be involved in matters of academic judg-


B. Recommendation for advancement

The UAC found in one case (75-3) that the College A&P Committee
which made a negative recommendation had failed to give weight to the
fact that the candidate had been assigned specific duties by the dean and
the department. He had carried them out with distinction. Except for the
A&P Committee, all units in the promotion process had recommended tenure.
Repeating on these positive recommendations, the UAC said:
Although the Committee of Review recommends that the Promotion Review Committee reconsider its decision "in the light of the full evidence available" there seems to be no point in further proceedings in this matter. Under the circumstances of the case, we believe that the recommendations of the department, section and dean make it clear beyond any doubt that Professor ... has met the standards of performance expected of him. We recommend that the President recommend to the Board of Governors his promotion to Associate Professor with tenure.

President Bloustein wishes a clarification of this position and the Appeals Committee view was set forth in a letter to him of April 25, 1975 as follows:

We understand that it is your position that when this committee recommends that you make a positive appointment action, as we did in Prof. ... case, and you agree that there was a violation of the collective bargaining agreement in the processing of the promotion matter, you will normally remand the matter back to that stage in the promotion process for reconsideration in the light of our decision; that thereafter, the promotion process will go forward again. You are not convinced by our opinion as to why it would be futile to take such action in Prof. ... case, and therefore plan to remand the case to the Appointments and Promotions Committee, unless we can convince you that such a step would be pointless.

We have rarely made such positive recommendations to you, for we too, are fully aware of the implications of the grant of tenure at this university. However, in the case of Prof. ..., we feel we are on solid ground; the academic judgment in support of his promotion has been made by his academic peers; the conclusion that he has performed in accordance with the understandings with the Dean, who is charged by the regulations with shaping the role of the faculty member, is solidly grounded in evidence before the Committee of Review and this committee; and the circumstance that Prof. ... turned down a tenure offer at another university to
continue his work with Rutgers provides additional assurances of the solidity of the judgment that he should be awarded tenure.

In such a case, to conclude that your "conventional response" will be to ask the Appointments and Promotions Committee to re-examine the matter is to miss the point; that all of the necessary judgments for tenure have been made by the appropriate bodies within the university. The Appointments and Promotions Committee disagreed, but it acted on an erroneous view of the situation. The Promotion Review Committee simply followed the Appointments and Promotions Committee judgment. Therefore we considered this case to be one in which you should exercise your power to recommend promotion and tenure without further referrals back to the appointments and promotion process. The evidence in support of Dr. ... is all in the record now; and it, in our view, warrants the action recommended.

The President accepted the recommendation of the committee.

In a case (75-1), the UAC, having found a series of procedural defects, said:

We now come to the question of remedy. Dr. Smith [The University representative] recommended that the matter be referred back for further consideration this year by the appropriate committees and finally by the Summit Committee. We consider this proposal totally inappropriate under the circumstances of this case.

Dr. ... has received an overwhelmingly strong recommendation for promotion and tenure by the section. A copy of this recommendation is appended to this opinion. He has further received, albeit after the fact as far as the Summit Committee was concerned, the approval of his A&P Committee upon the receipt of additional information .... To require a return to either of these forums would be inappropriate in light of the previous discussion. In addition, the Committee of Review
has recommended promotion and tenure . . . .
Under these circumstances the only possible
negative recommendation concerning the promo-
tion and tenure of Dr. . . . could come from the
Dean . . . the Dean's . . . conduct in attempt-
ing to influence the A&P Committee and in sitting
on the matter in the Summit Committee leads us
to conclude that his views should not be allowed
to carry further weight. We will not recommend
a remedy which would cause Dr. . . . promotion
and tenure issue to come again before Dean
. . . . Putting aside Dean' . . . views, we
are in a situation where the academic judgment
has in fact been exercised by all the relevant
parties in a manner favorable to Dr. . . . Under
these circumstances we see no utility in any
further proceedings below the Presidential level.
We believe the President should recommend to the
Board of Governors that Dr. . . . be promoted to
Associate Professor with tenure. We wish to
emphasize that we are not substituting our
academic judgment for that of the College. In
fact we rely heavily on the judgment of the
section, the revised judgment of the A&P
Committee and the Committee of Review that
Dr. . . . is qualified for promotion and tenure.

Dr. . . . was awarded promotion and tenure through the regular
promotion process shortly after the UAC decision. The President ruled that
this made the issue moot.

In another case (72-7) the UAC found that a negative judgment of the
Dean had been based on an erroneous requirement of a Ph.D. degree (see discussion
Part II (9a), infra) and that the remaining academic judgments had been positive.

While University policy discourages tenure
appointments at the Assistant Professor level and
normally requires a doctorate or its equivalent for
a tenure appointment, the Committee of Review held
that in view of the length of service and the positive
peer evaluation, the circumstances warranted such an
appointment in the present case. We do not find this
to be an arbitrary or plainly erroneous decision.
The University Appeals Committee notes the efforts of University College to change the emphasis of its overall program from undergraduate to upper level and graduate study, with a corresponding change in faculty standards. The University College Committee of Review considered this point and held that ... in carrying out a substantial change in program direction, the college should give appropriate weight to length of service and peer evaluation of present faculty members. We find this to be a reasonable rule. Its application by the Committee of Review in this case, with a result favorable to Professor ..., is not arbitrary in our judgment nor in conflict with established University policy.

The President accepted the recommendation and recommended tenure for Dr. ...

..., stating:

The major issue in this case is the recent change in the "statement of mission" of University College and its applicability to Professor ... The faculty-approved mission of graduate courses with a concomitant emphasis on increased scholarly training and scholarly activity on the part of the faculty. The Appointments and Promotion Committee and the Dean found ... qualifications and level of scholarship inconsistent with this mission, and further felt that the Ph.D. rather than the Ed.D. the appropriate degree.

The Division of Administrative Studies found that: (1) the MBA had been the appropriate degree during most of Professor ... career, (2) the Ed.D. was an appropriate degree, and (3) the favorable evaluation of Professor ... scholarly preparation, teaching effectiveness, scholarly productivity, and general usefulness to the University was such as to warrant an appointment as Assistant Professor with tenure.

The Appeals Committee, in reviewing all the evidence before it, found that in carrying out a substantial change in program direction, appropriate weight had not been given to length of service and to the evaluation made by present faculty members. I do not find this unreasonable under the particular and unique circumstances of this case and hereby accept their recommendation.
In the initial UAC case (71-1), a recommendation for tenure had two bases, one of which was that the Dean and the Committee of Review were in favor of tenure. In the following year, in case (72-1), the department and section had recommended promotion and tenure. A positive recommendation had been made initially by the dean and was later withdrawn on what the UAC found to be improper grounds. The UAC recommended tenure. The recommendations were accepted by the President in both cases.

Thus, where the UAC is satisfied that positive "academic judgments" (meaning review of the academic qualifications of the candidates) have been made at important levels within the university and that there has been significant error in connection with negative recommendations which contributed to denial of promotion/tenure, the committee will recommend promotion and/or tenure. This is done only where there is solid evidence that those actually involved in the academic process had positively recommended promotion or tenure. The UAC considers that this approach does not involve substituting the committee's judgment for the "academic judgment" of the University. The committee has taken the position that it is supporting academic judgment when it makes such recommendations. In adopting this line of analysis, of course, UAC is utilizing the term "academic judgment" to refer to the professional qualifications of the candidate, not to those more general institutional concerns discussed above.

This analysis leaves it open for a grievant to argue for promotion or tenure where he or she has received favorable recommendation from any
of the units in the promotion process. Many cases involve conflicting recommendations. How does the UAC respond to such arguments?

The clearest case of conflicting recommendations the committee has thus far heard is one (75-3) in which the department and the Dean both recommended positively on the grounds that Prof. ... had done exactly what was expected by the University, whereas the college A&P Committee recommended negatively because of the lack of sufficient scholarly work. The UAC found that the A&P Committee recommendation had not taken into account adequately the assignment that Dr. ... had been given by the dean.

Reg. 2.87 provides:

Under the dean of the college or school of which his department is a part, it shall be the duty of a department chairman ... to see that adequate supervision, advice and training are afforded new members of the department ... .

Under this regulation UAC stated that the University should respect the assignment given to Dr. ... by the University officials charged with that responsibility. Thus the UAC discounted the judgment of the A&P Committee because it was based on a failure to respect the University's own regulation. While accepting the result recommended, the President suggested that the UAC analysis was incomplete because it subordinated the role of the college A&P Committee, set out in Reg. 4.24, to that of the dean.

In another case (72-1), where the Dean made a negative recommendation, it was found to be based on factors which should not have been taken into account (i.e., the "pestering" of the Dean by the candidate) and therefore it was disregarded by the UAC.
The UAC tends to be impressed with section judgments on general academic competence. However, it has several times expressed its reservations with the limited way in which the section judgments are reported.

II. THE PROCESS THAT IS DUE

Within the framework described above, the committee has evolved a fairly sharp conception of the procedural rights of candidates for promotion and tenure.

(1) Notice of Impending Review

In one case (74-5) the UAC held that:

The Committee does feel strongly that the Department Chairman should have been sure that he had a complete record of the appellant's performance for the departmental review. The appellant should have been notified of the time frame in which the evaluation was being carried out and asked to see that the department had all the relevant material on which a proper evaluation could be made.

The committee however held in that case that the error had been cured by the fact that when Prof. ... did find out that the review was underway, he submitted additional material. This material was not found persuasive by his departmental colleagues. (Blumrosen dissented on the grounds that the grievant was entitled to prior notice so that he could "have his academic activities viewed as a whole and at one time.")

The committee suggested that the candidate had an obligation to supply such evidence as he wished to present to the committee at least as soon as it became clear that this position was under review. "There is no
doubt that at this point he clearly understood his position, and he had a clear responsibility to provide all documents he wished the department to review."

President Bloustein in accepting the decision of the Appeals Committee said:

I would remind all department chairpersons of their responsibility to evaluate, periodically, the members of the department, and to make sure that a candidate's entire record is available for departmental review. Faculty members need also to be reminded that they have a continuing obligation, to themselves and the University to keep their departmental colleagues apprised of their progress and accomplishment.

(2) **No Right to a Formal Oral Presentation**

In the same case the committee denied the contention that academic due process required that a candidate be allowed to make a formal presentation of his credentials and activities to the tenured members of the department.

"Such formality seems unnecessary in the operation of a department."

(3) **Department Must Deal with the Merits**

Normally the initial recommendation for promotion and/or tenure comes from the department. There will be a vote of the tenured members of the department. An explanation for the vote and the weighting and evaluating of the 5 factors for promotion is done by a member of the department or by the department chairman. While recognizing the interplay between the judgment about the personality of the candidate and judgment about the teaching and research, the committee has required that the departmental judgment insofar as feasible, be based on the merits of the work. To put it negatively,
if a claimant can demonstrate the judgment of the department was so
tainted by personal likes and dislikes as was the case in 75-9, the UAC
will not give weight to such a judgment.

We believe the tensions, frustrations, and personal
antagonisms that were disclosed in the transcript and
which we observed in part at this hearing, did in fact
prevent the quality of reasoned judgment from being
exercised by either the department or the A&P Committee.
This University should not rely on such basis in making
decisions with respect to promotion and tenure.

This committee will not substitute our own judgment
on Prof. ... qualifications. We are not competent to do
that. In some circumstances we might remand the matter
back to the Committees of the College for reconsideration
in a clearer light. We do not believe that it would be
possible to do that under these circumstances because
the same personalities by and large remain in the College
and it would be an exercise in futility to remand the
case to the same people under circumstances which are
essentially unchanged.

The same principle was applied in the case of 72-1 where the
Dean of the college had changed his recommendation from positive to negative.

There the UAC said:

According to Section 3.30 of the University Regula-
tions, the criteria for promotion are "teaching effective-
ness, scholarly or creative activity, research accomplish-
ments, professional activity, and general usefulness to the
University." The reasons which Dean ... gives in his letter
of April 15, 1971 for withdrawing his recommendation of tenure
for Dr. ... do not properly conform to the criteria of the
University Regulations. Many of the factors were apparent
at the time the original recommendation was made. Some
factors clearly assumed greater importance after the
original recommendation was made. Dean ... decision
to withdraw his recommendation for tenure may have been
colored by what Dean ... described as "pestering" by Dr.
... about his case.
The burden is on the candidate to demonstrate that the relations within the school were so difficult that a reasoned judgment on the merits was not possible.

(4) Dean May Not Have Multiple Influence

The departmental recommendation goes forward to the dean. The dean is also advised by the college A&P Committee. In case (75-1) the dean sat with the A&P Committee that was going to advise him and encouraged them to make a negative recommendation. He then made a negative recommendation based in part on what the A&P Committee had told him. The UAC said:

The committee is of the view that the activities of Dean ... in influencing the A&P Committee were inappropriate. The A&P Committee's judgment is to be independent of that of the dean. The dean is to make an independent judgment taking account of the advice of the A&P Committee. Efforts to influence the A&P Committee by any dean are improper and undercut the integrity of the A&P Committee judgments.

This view was disputed by the President who said:

... The A&P Committee, under University Regulations 4.24 is advisory to the Dean. Interaction between a Dean and the A&P Committee is not an uncommon practice in many units of the University and is not in itself inappropriate. Whether such interaction constitutes "undue influence" must be decided according to the extent and type of interaction on a case by case basis however. I cannot agree with the Appeals Committee that "efforts to influence the A&P Committee by any Dean are improper and undercut the integrity of A&P Committee judgments."

In that same case the dean was also the acting director of Graduate Studies and as a consequence sat on the Promotion Review Committee. The UAC considered this to be inappropriate also.
Dean ... in his capacity as the Director of Graduate Studies ... also sat on the Summit Committee. We deem that act on Dean ... part also to be inappropriate. We do not believe that the dean of a college should sit with the Summit Committee while the committee is considering the appointment and promotion of members of his college. The dean's opportunity to express his view is afforded in the separate papers which he forwards. His presence at the Summit Committee provides an opportunity for him to exercise additional informal and undue influence on the course of the appointment and promotion process.

The President in effect acquiesced in this decision, noting:

... the composition of the Promotion Review Committee (referred to as the Summit by the Appeals Committee) is determined by University Regulations. In the 1974-75 academic year, the two Deans who, because of their other responsibilities, serve as members of the Promotion Review Committee have voluntarily abstained from participating in tenure/promotion decisions from their units.

The essence of the UAC's position is that the individuals in the University, whatever their capacity, should not be able to cloak their views with respect to promotion or tenure in the guise of decisions at the different levels of review thus giving an erroneous impression as to the number and significance of that view. The judgment of the section is an exception to the above rule because members of the department are also members of the section.

(5) **Section Judgments**

Section judgments have been challenged before the UAC on the grounds that they are biased in favor of New Brunswick as against Newark and/or Camden, or that the section may be making a judgment which is appropriate for the New Brunswick operation but inappropriate for Newark and/or Camden. These questions may arise for example where a unit of the University has its main research activity in New Brunswick as the case with the Physics Department but
has physics faculty members at the other two campuses. It is argued that the New Brunswick faculty which has access to research tools and equipment should not pass judgment on the capacities and qualifications of the faculty operating under different conditions in Newark and Camden. Thus far the UAC has not decided that question because no case has included evidence supporting the allegation that such bias was involved.

Normally the UAC will give heavy weight to section judgments particularly with respect to the quality of scholarship because the section will usually include academics who do not have close personal relationships with the candidate. However, in the case of '73-4 whose primary activity was teaching, the UAC admonished the section for its failure to give adequate weight to the specific tasks assigned. The UAC said:

There is evidence in the record on which the Committee of Review could reasonably reach the decision that the role of the English Section was not fully in accord with the University policy on evaluating recommendations for promotion and tenure. There is evidence that the English Section did not consider all of the candidate's qualifications in making its evaluation, but concentrated on scholarship. This is particularly inappropriate in evaluating a recommendation for a position which has a much higher weight given to reaching effectiveness than to scholarship. There is evidence in the record that the members of the English Section had not carefully reviewed Dr. ... qualifications before making its recommendation. There is also evidence in the record that the English Section did not thoroughly review Dr. ... qualifications during its meeting. We sustain the Committee of Review on this point.
(6) College A&P Committee Must Take Account of Past Practices and Specific Assignments

In case (75-3) discussed elsewhere (pp. 19, 35) the UAC held that the college A&P Committee had failed to respect the specific work assignment given to and carried out by Prof. ... Similarly, in case (72-6), the UAC held:

The evidence of scholarly activity had not previously been presented to the Appointments and Promotions Committee or to the Committee of Review. However, the Chairman of both committees stated that in the absence of a Ph.D. and publications, such evidence would not have made any difference in their decisions.

Because Professor ... professional work had not been reviewed, the Appeals Committee requested that the Committee of Review examine this work, seeking whatever professional advice they might feel was appropriate. The Committee of Review sought the advice of the Appointments and Promotions Committee, which, on June 28, 1972, found that none of the work "was either of scholarly merit nor had any relationship to his academic preparation or responsibilities." On June 30, 1972, the Committee of Review concluded that the work "does not constitute (1) a significant original contribution to your field ... or (2) an appropriate substitution for the scholarly competence normally represented by a doctoral dissertation."

The Appeals Committee felt that although there had been extensive evaluation by peers outside Professor ... field, there still had not been evaluation by peers in Professor ... field. Accordingly, the Appeals Committee requested that the [appropriate] Section review Professor Goehringer's work. On September 28, 1972, the ... Section found that Professor ... has professional qualifications in his field" and that "the material submitted as evidence of scholarship in the field of ... does not meet the requirements of alternative evidence in the absence of a doctorate in Mr. ... field."

(7) Summit Committee Procedure

The Promotion Review or Summit Committee has been criticized by the UAC for stating its reasons in very summary form. The UAC has stated
that the Summit Committee must evaluate all of the material presented to it and make a determination on the evidence (see the more extensive discussion in Part I (2), supra). So in a grievance involving 46 rejected candidates who had positive recommendations from all of the components below, the UAC stated as follows:

In addition, the possibility was raised that, even if budgetary considerations could not be identified as involved, there would be a denial of due process if the record on which the Promotion Review Committee acted in denying promotion tenure to a candidate who had unanimous recommendations below, contained nothing which would support the negative judgment. The University agreed to submit the materials which had been presented to the Promotion Review Committee to the University Appeals Committee, in confidence, for its examination. The committee determined that it would not review the merits of the decision to promote or not to promote because that function is not vested in it under the collective bargaining agreement. However, the committee is charged into examining the promotion review process with a concern for due process. It is the view of the committee that due process requires that the judgment be made on the basis of the record that is presented to the decision maker and that a judgment which is not based on the record is one which denies to the applicant for promotion or tenure essential procedural fairness.

Three members of the committee examined all 46 files. Where those three all concurred that there was a serious possibility of action by the Promotion Review Committee which was not based on the record, the entire committee considered the matter. There were five such cases. After review, the committee concluded that three such cases did exist, in which there was no evidence in the file which warranted the conclusion of the Promotion Review Committee.

However, the mere fact that all recommendations were positive does not in of itself indicate the strength of those recommendations. In case (75-11), the UAC stated:

... it was certainly understandable that the Promotion Review Committee would decline to promote on
the basis of the record before it. The positive recommendation of the department, while it was a unanimous recommendation, was weakly stated. No "outstanding" areas of activity were identified. The recommendation of the A&P Committee which was negative, of course, did not mark any areas "outstanding". The positive recommendation of the dean also did not identify any areas as "outstanding". The overall impression created by the documents is that the departmental recommendation was mild, the supportive recommendation of the dean was mild, and there were two negative recommendations:

The UAC in another case criticized the Summit Committee for failure to explain the rationale for its denial of promotion or tenure.

we are very concerned with the inadequate explanation given by the Summit Committee in its decision denying the promotion and tenure of [75-J]. We believe that the Summit Committee should be required to evaluate the material before it in the same manner as other reviewing bodies in the University and to vote and to explain in more detail than was done here, why they took their action.

President Bloustein wrote:

Finally, the decision making and reporting procedure followed by the Promotion Review Committee is a matter which must be decided by the Committee itself. I cannot by flat impose a specific format on that Committee. I will, however, submit the Appeals Committee recommendation to the Promotion Review Committee for its consideration.

(8) Evaluation To Be Based on Specific Assignments

Under the University regulations 3.30 the qualification for promotion and tenure are:

Promotions to higher ranks may be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general usefulness to the University. The weight to be given to each of these factors will be determined in the light of the duties required and to be required of the appointee.
Those responsible for academic appointments, reappointments and promotions are directed by regulation 60.2a to:

(1) base their recommendation on professional qualifications, as defined in paragraph 3.30, page 50.9, without discrimination because of race, religion, sex, national origin, or views on any subject; (2) seek excellence; (3) utilize the judgments of faculty peers, normally including some faculty at other institutions where the position ordinarily carries tenure; (4) utilize opinions of students, especially those with majors in the appropriate department.

And Sec. 2.87 requires department chairmen under the supervision of the dean "to see that adequate supervision and advice and training are afforded new members of the department".

While there is considerable vagueness in the 5 standards set forth in 3.30, the UAC has on a number of occasions stated that the standards are reduced to specificity when the dean or department director has channelled the activities of a faculty member in a specific way pursuant to 2.87. Subsequent failure to acknowledge these specific directions by other components in the promotion review process constitutes a denial of academic due process. The President has not acquiesced on this conclusion.

In case (75-3) a candidate received positive recommendations from the Dean, the department and the section, but a negative recommendation from the A&P Committee because of inadequate publications. The UAC said:

... It is clear from the documentation before us that Professor ... performed in the manner recommended by the dean who encouraged him to remain at Rutgers in 1972, in face of an offer of tenure at the University of .... His departmental colleagues approved of his performance and the University itself, in supporting the Puerto Rican program, gave implicit support to
the work he was doing. In the course of these duties which were perceived as of great value to the University, Dr. ... may have diverted time and effort that would otherwise have been devoted to scholarly publication. Nevertheless, the Spanish section of the University voted unanimously (9 members present) in favor of promotion and tenure and called attention to the "quality of his scholarly publication."

The A&P Committee, in unfavorably reviewing his performance, obviously considered the level of publications to be of greater concern than did the dean and the department. Section 2.87 of the University regulations requires the department chairman under the supervision of the dean "to see that adequate supervision, advice and training are afforded new members of the department ...." Such supervision was provided in this case and Dr. ... reasonably relied on that supervision in performance of his duties. We conclude that it is unfair for a faculty member to be judged for promotion by the application of different weights to the various criteria for promotion than those which were utilized throughout his academic career by the dean and the department.

(See the discussion of case (75-3), supra pp. 19, 32.)

In the case of (73-4) the same problem arose. The UAC stated:

There is evidence in the record upon which the Committee of Review could reasonably reach the decision that the University had not followed established policy on promotion and tenure in deciding to terminate Dr. ... appointment. In particular, according to University policy ... each position must be weighted and evaluated on the basis of the duties assigned to that position by the Department and College. The emphasis given to scholarly productivity by the University does not appear to be consistent with the relative weights (5,3,3,4) given to teaching effectiveness, research and scholarship, professional activities, and general usefulness by the Department and the Dean. Nowhere does the record clearly show that the University argued that those weights were inappropriate. We sustain the decision of the Committee of Review on this point.

On April 22, 1975 the UAC wrote President Bloustein as follows:

The second issue that has come to our attention repeatedly is the problem of different weights being assigned by the different units involved in the promotion process
to the five categories on which persons are evaluated for fitness for promotion and tenure at Rutgers.

Our concern is first that the weights are lightly assigned to begin with. No administrator appearing before us provided a rational, logical basis for the assignment of these weights. Secondly, we are greatly concerned that different weights will be assigned by different units in the evaluation process and we know that this has happened. This process of assigning different weights may create great unfairness to faculty members who perform on the basis of one set of expectations as reflected in one set of weights and are evaluated on the basis of another set of expectations as reflected in another set of weights. The weighting process is not done until the evaluation process is undertaken at the end of the term of the faculty member. If the weighting process is to be meaningful at all, and we have some doubt as to whether that can be worked out, then the weights to be expected of the faculty member should be assigned at the beginning of his or her term after consultation, rather than be applied after the fact at the end of the term.

9. **Change in Mission.**

The University has on occasion undertaken to shift or change the emphasis on activity in a given unit. Two cases have raised the question of the appropriateness of utilizing the newer standard at the time of promotion when the candidate was employed under the older standard. One was the (73-7) case discussed on pp. 14-15, supra, in which the President insisted on the maintenance of maximum flexibility thus disagreeing with the UAC. The other was the (73-8) case, in which the candidate sought to compare his treatment with that of instructors hired several years earlier. The UAC rejected this attempt, stating:

With respect to the merits of the contention of Mr. ... that he was not treated in an even-handed manner, ... we will not consider a comparison between Mr. ... situation and the cases of instructors re-appointed for a longer number of years back in the
1960's. The claim of even-handed treatment cannot be successfully used to freeze patterns of appointment developed years ago and make them binding in the present. Departments, Colleges and the University must have flexibility to change their appointments patterns in order to improve their institutions. So long as no detrimental reliance on a particular pattern is shown, and there is none here, we will not consider these older practices as in any way binding on the University.

See also University Regulations 3.93.

(10) Where There Has Been a Change in Function of the Institution, the Promotion Decision Must Take into Account Service in Previously Emphasized Activities

In the case of (72-7) the UAC noted that he was 51 years of age, had taught for 15 years with 11 of those years at Rutgers. He was in the Department of Management at University College. He did not have a Ph.D.

For most of the time that he had been teaching, the M.B.A. had been considered the terminal degree in his field. His departmental recommendation for promotion was rejected because "University College has adopted a statement of mission which indicates a change in direction for the college, with increased emphasis on upper division and graduate level course". The UAC said:

The University Appeals Committee notes the efforts of University College to change the emphasis of its overall program from undergraduate to upper level and graduate study, with a corresponding change in faculty standard. The University College Committee of Review considered this point and held that ... in carrying out a substantial change in program direction, the college should give appropriate weight to length of service and peer evaluation of present faculty members. We find this to be a reasonable rule. Its application by the Committee of Review in this case, with a result favorable to Professor ..., is not arbitrary in our judgment nor in conflict with established University policy.
The UAC recommended that Dr. ... be given tenure. In accepting the recommendation, President Bloustein wrote:

The major issue in this case is the recent change in the "statement of mission" of University College and its applicability to Professor .... The faculty-approved mission of graduate courses with a concomitant emphasis on increased scholarly training and scholarly activity on the part of the faculty. The Appointments and Promotions Committee and the Dean found ... qualifications and level of scholarship inconsistent with this mission, and further felt that the Ph.D. rather than the Ed.D. the appropriate degree.

... ...

The Appeals Committee, in reviewing all the evidence before it, found that in carrying out a substantial change in program direction, appropriate weight had not been given to length of service and to the evaluation made by present faculty members. I do not find this unreasonable under the particular and unique circumstances of this case and hereby accept their recommendation.

In the case of (75-6), the UAC stated as follows:

The candidate contends that during his 11 years at Douglass, following the tradition of Douglass, he concentrated on teaching and other activities relating to the operation of the College and did not concentrate on publication. Therefore, his publication record was weak. During the latter part of that 11 year period he alleges the mission of Douglass College changed to a more general mission and with less special emphasis on undergraduate teaching. He alleges that he was caught in the changed mission and is now being judged by different standards with greater emphasis on scholarly writing and a lesser emphasis on teaching, than was the understanding with which he began and continued his association at Douglass College. He contends that he should not be penalized because of a change in the mission of the University which placed lesser weight on the teaching activities in which he engaged, to the satisfaction, in his view, of his department chairman, the dean and other members of his department.

The UAC, one member dissenting, concluded that:
Dr. ... contends that he began to undertake more extensive scholarship and publication activity when he became aware of the shift in the mission of Douglass College. There are some similarities between this case and the case of (75-3) previously decided by this committee. However, in this case, in contrast to (75-3) case, it is clear to the committee that Dr. ... knew or should have known that the tradition of teaching, rather than research and publication which had previously existed at Douglass College, had eroded and no longer reflected the realities during his first term as an Assistant Professor. His reappointment was turned down by the Section which was a further indication of lack of scholarship achievement. Dr. ... indicated that he became aware of the change in the situation sometime between 1969 and 1971. While we recognize the importance of protecting a faculty member against a change in policy which then fails to weigh adequately the work that he did at a time when it was in accord with the University policy, we nevertheless conclude that the change of the policy at Douglass occurred several years before the Promotion Review Committee decision, and that Dr. ... had adequate time to demonstrate his scholarly abilities if he were going to do so.

A similar argument was made in the case of (75-7), who was in the same department as Dr. (75-6). The UAC said:

This committee is concerned with the problem of change in standards in a department which may adversely affect a faculty member who performs in a manner which is believed to be appropriate, only to find that other aspects of the work of a professor are weighted more heavily by a reviewing body. In this instance, however, we believe that Dr. ... was fully aware of the requirements of publication. He was so advised by two departmental chairmen and was not misled or in doubt as to what was required of him. Therefore, we reject the claim that he was adversely affected by a change in standards. Dr. Martin Oppenheimer, dissenting, believes that Dr. ... was caught in a change in standards which Dr. Oppenheimer believes inappropriate.
(11) Where There Has Been a Change of Mission, the Existing Faculty Must Be Given an Opportunity to Fit Into the New Mission

In a rather complex case (73-10) involving a faculty member in the Agricultural Extension Service who was not reappointed because of a change of mission of the Extension Service, the UAC found as follows:

".... The initial peer evaluation did not evaluate her performance in her own field, but only considered her for the changed position in Home Economics, and at the hearing of the UAC, Dean ... focussed intensively on the changed nature of the program, and on the right of the University to alter program priorities.

In light of President Bloustein's May 19 Memorandum, Ms. ... was entitled to a conventional peer evaluation rating her performance in the field of activity to which she had been assigned. This was finally done, and the Peer Committee concluded as follows:

"In conclusion, it is the opinion of the Home Economics department faculty peer group that ... possesses superior abilities in some areas as noted in this evaluation and that she carried out a number of community development programs in Bergen County in an effective way. Her work was not without its shortcomings and these are also noted in this report."

In the light of that conclusion, and in the ordinary course of University affairs she would have been reappointed. The CAES contends that this could not have been done because there was no program to which she could have been appointed. She applied for and was considered for the 4-H position, but was given no special consideration, on the basis of her past performance. Assuming generally comparable qualifications, failure to give special consideration because of past successful performance in the University in a closely related activity within the CAES is itself a denial of academic due process. One who has performed well within the University community for three years as an Associate Professor is entitled to be treated not as a stranger seeking initial employment,
but as one who has already earned by performance extra consideration for continued association with the University. Such an individual should not be treated as one among many in the labor market.

Thus, the University Appeals Committee unanimously concludes that Ms. ... was entitled on the basis of peer evaluation, to special consideration for reappointment if there were any activity in the College which was continued after March, 1971, which called, in general, for the skills and abilities for which she had been employed initially, and which she had successfully demonstrated. We cannot determine at this time whether such skills and abilities have in fact continued to be utilized within the CAES in a manner which would entitle her to reappointment. The 4-H Urban Affairs position appears to involve a position of skills closely related to Ms. ... qualifications which would indicate that she should have been given preferential consideration for that position. We understand that the position has been filled, and that the occupant of the position has a one year appointment. We do not know whether, had the CAES offered this position to Ms. ..., they could have done so in a manner to give her a full tenure appointment.

In the case of (75-12) the candidate alleged that he was caught in a shift in the mission of the Physics Department in the direction of scholarship and advanced work and away from the individualized teaching to which he had given most of his time. The UAC found:

There was in fact a change in standards of judgment used with respect to Dr. ... arising out of the replacement of Dean (A) by Dean (B). This committee is convinced that during the time that Dean (A) was dean, the department was in fact carrying forward the emphasis on teaching which was the basis of the activities of Dr. .... Dean (B)'s judgment was that research and scholarly work was to be weighted more heavily. This change in weights attributable to the 5 factors for promotion at or near the end of Dr. ... service certainly prejudiced him.
The UAC recommended that the candidate be given two additional years and released time in which to demonstrate his abilities in the research area. The President concurred in the recommendation. See also University Regulations 3.93.

(12) University Not Required to Afford Special Assistance to Facilitate Publications

In the case of (75-2) the UAC dealt with the connection between research facilities and publications as follows:

The University Appeals Committee has considered the claim of absence of adequate research facilities as an explanation for Dr. ... lack of publications. We are concerned that faculty members hired into a unit of the University which does not have research facilities, have no organized channel of access to facilities which are located elsewhere. However, Dr. ... was aware of this lack of organized assistance in his research for two years before he determined that his data developed in previous research would not result in a publication. He then sought to change his orientation from experimental to theoretical. We believe he shared an obligation during that two year period to press more intensively for research facilities or assistance. This seems to be the common practice among the science faculty.

(13) Notice of Specific Deficiencies

Where there is a specific deficiency on the part of the candidate that is likely to influence the outcome, he or she is entitled to notice of that deficiency. In one case (74-6) allegations that a candidate had expressed insensitivity to blacks, women and Jews in class, had been made to the Dean. After the A&P Committee of the college recommended promotion, the Dean appeared before it and discussed these allegations without having previously notified the candidate of the problem. The committee reversed itself and
recommended against promotion. On the basis of the reveral, the Dean declined to recommend promotion and tenure. The UAC recommended that the negative report of the A&P Committee should be set aside.

We make this recommendation, because, in our view, the reconsideration on May 16th of the May 10th decision by the A&P Committee was based in part on allegations that Prof. ... was insensitive to Blacks, Women, and Jews; such allegations were crystallized in a memorandum prepared by Dean ... for the May 16th meeting.

These allegations suggest anti-social conduct on the part of Prof. ... of such magnitude that, in our judgment, he should have been apprised that they were going to be part of the consideration of his case by the A&P Committee and given an opportunity to rebut them before the A&P Committee. On the contrary, he did not have notice that these inflammatory issues would be considered by the A&P Committee.

Now that Prof. ... is aware that allegations of his lack of sensitivity to Blacks, Women, and Jews may be used in his evaluation, he should be given an opportunity to add to the file any statements or documents which he wishes, bearing on these matters. This must be done immediately.

(14) The Candidate Is Entitled to the Transmission of His or Her Full Dossier to All of the Components of the Promotion Process.

For reasons of mechanical failure or otherwise there have been cases in which the full record of the candidate’s activities has not gone forward to the various components of the promotion process. The UAC has held that the failure to send forward the bases on which the evaluation can be made constitutes a defect requiring a remedy.

In the case of (75-1), the UAC stated:
It is clear that the file of promotion papers prepared by the department chairman did not go forward in full to all of the parties who needed the information to act. Specifically, we believe that the A&P Committee did not have before it all of the material which the section had, nor did the A&P Committee have the material which the Summit Committee had. This tends to explain to us the difference between the first recommendation of the A&P Committee which was negative, and the recommendation of the section which was heavily in favor of the appointment and tenure of Dr. ....

Obviously, if the process is to operate fairly, all of the information which goes forward should be communicated to all of the parties who need it.

(15) Eligibility for Tenure

In several cases the UAC recommended and the President accepted the distinction between University funded and grant funded lines (hard and soft lines) as establishing eligibility for tenure. The President upheld the UAC stating:

That, through long-standing practice, the policy has been established and understood that faculty members supported by other than regularly budgeted funds are not eligible for the conferral of academic tenure, although they are eligible for promotion to higher rank.

That promotion to associate professor does not in and of itself confer academic tenure unless tenure is specifically granted by the Board of Governors.

That, the distinctions which customarily have been made between faculty on "hard" as opposed to "soft" money are appropriate because the University deliberately has never adopted the total position of the national AAUP in respect of tenure.

However, because of the ambiguity in the treatment of candidates, the UAC recommended and the President approved tenure. The UAC stated:
There is some evidence that the University has not exercised its right to distinguish between grant and line faculty with any degree of clarity or regularity. Some of the official notices, where they exist, indicate the grant relationship and some do not. Some of the faculty members were shifted from grant to line positions, or a combination thereof, with only a slight overall distinction between the overall situations.

All would seem to agree that only the Board of Governors can formally confer tenure and that they have not done so in the case of the grievants.

The University Appeals Committee notes that both grievants had been strongly encouraged by University administrators to expect transfer to line ("hard money") positions (and the granting of tenure). Indeed, in his brief dated October 31, 1973, accompanying his appeal to this Committee, Dean ... recognizes this fact in his statement, "The commitment was made by the Dean ..., and he failed to fulfill that commitment even though he had the opportunity to do so."

In view of the commitment by a former dean to these two faculty members, the University Appeals Committee unanimously recommends that Prof. ..., and Prof. ... receive regular line ("hard money") positions at the rank of Associate Professor with tenure, and further recommends that the resources of the Graduate School of ... be used to implement this recommendation. In making this recommendation the Committee invites attention to the fact that new lines in the School of ... "have become available with some regularity over the past several years" and that currently assistant professors on "hard money" are being recommended for reappointment for second 3-year terms. The Committee further notes the testimony of Dean ... indicating that there is no question about the competence of the two grievants.

The recommendation of the University Appeals Committee should not be construed to indicate an opinion that Dean ... bound the University in an area in which the Board of Governors has sole authority. The Committee does, however, express the opinion that the University Administration shares some responsibility for the commitment, however, unwise, of its former dean and, in fairness, should act to reassure two faculty members who have apparently served the University well.
The President stated:

It is also in the best interests of the University to accept the findings of the Appeals Committee in respect of the following issues:

That clear, unambiguous contract letters are essential to orderly and equitable personnel administration and their regular issuance is required by University Regulations; and,

That distinctions between grant and regular line faculty should be made clearly and consistently in personnel practice across the University.

III. CLAIMS OF DISCRIMINATION

Given the social and legal climate in the 1970's, it was inevitable that whenever a member of a minority group or a woman is rejected for promotion or tenure, the candidate would examine the circumstances carefully to determine whether the decision had been influenced by race, color, religion, sex, or national origin. A number of the grievances involve such allegations. The cases include those of (71-1), (72-1), (72-3), (72-5), (73-8), (73-10), (74-6), (74-7), (75-2), (75-5), (75-12) and (75-13). Thus the claim of discrimination was in 13 of the 39 cases, or exactly one third.

The question of whether a claim of discrimination was cognizable under the grievance procedure arose first in case (72-3) in the context of the controversy (described in Part I of this paper) over whether the committee had jurisdiction of matters of substance, or was limited to matters of procedure. The committee contended in that case that they had jurisdiction over the discrimination claim because it was a matter of substance.
Dr. ... came to this University in July, 1962 as an Assistant Professor Economics under a two year contract. He was promoted in 1964 to an Associate Professor of Economics with tenure. Dr. ... complaint is the failure of the Department of Economics of ... College to promote him to the rank of Professor of Economics. His contention is that he has been denied promotion because of bias and prejudice in the Department of Economics and he contends that he has been treated in a discriminatory manner when his case is compared with others in the Department.

Dr. ... had a hearing before the Committee of Review of ... College in April, 1970. Since, after the lapse of another year the Department again did not recommend Dr. ... for promotion, on July 28, 1971 he invoked step three of the Grievance Procedure by asking Dean ... to present his case before the Committee of Review of ... College. He made it very clear to Dean ... that the issues he wanted to present to the Committee of Review were substantive and not procedural, challenging the action of the Department of Economics. Dean ... had refused to refer Dr. ... case to the Committee of Review because under date of August 6, 1971 he takes the position that the Grievance Procedure step three does not apply to matters of substance.

As in the case of (71-1) we believe that Dean ... is in error with regard to the Grievance Procedure. Once more we reiterate that in our judgment the Grievance Procedure provided for in the contract between the University and the AAUP supersedes any inconsistent procedure provided in the University Regulations. To limit the jurisdiction of a Committee of Review of a college sitting under step three and of this University Appeals Committee sitting under step four to strictly procedural matters alone would make the Grievance Procedure a mockery. Every case would present a dispute as to whether or not it was procedural or substantive, resulting in massive confusion. Many important substantive questions are disguised as procedural.

The President maintained the distinction between procedure and substance but found that the question of bias went to the procedure:

I consider the question of bias in failing to make an appointment to be a question of procedure in that it
Involves invoking an illicit consideration in the decision process, in violation of concepts of due process and equal protection. By this interpretation, the University Appeals Committee acted appropriately in making its recommendation to me, and the AAUP-University contract provisions of Step 3 apply.

Since (72-3), in all cases in which the claim of bias has been made, there has been unanimity between the UAC and the President that the claim is a most serious one and is entitled to careful and searching examination of the record.

However, the UAC and the President have not found discrimination in any case, although relief has been afforded to the grievants in 6 of the 13 cases.

Part of the problem that the grievants had had in presenting cases of alleged discrimination involves the availability of University records for the purpose of comparing the treatment of one faculty member with another.

One concept of discrimination holds that it is improper for an employer to treat persons who are similarly situated differently because of race, color, religion, sex, or national origin. To establish discrimination of this type, it is necessary for the complainant to identify the person or persons with whom he or she claims to have been unfavorably treated. In case (72-3) the UAC wrote:

He also is entitled to examine the files of other members of the Economics Department. This is the only way he can prove his charge of bias, if he is able to establish it.

One member of the UAC dissented:
I do object to the inspection of the files of other members of the Department of Economics. I believe that this is an invasion of the privacy of those faculty members whose records are opened for inspection.

... Dr. ... evidently feels that an inspection of the files of the other members of the Department of Economics will show that different, and perhaps less rigorous criteria, were used in the recommendations for their promotions. What is to prevent the next appeal from claiming that the files of all of the members of the faculty of ... College must be made available to prove a case?

I am not unsympathetic to Dr. ... case, nor to others who will have similar cases in the future. If I felt that justice for Dr. ... depended on the right to inspect the files of other members of the Department of Economics, I might not have written this dissent.

The President rejected the interpretation of the majority of the UAC.

Three of the four members of the Appeals Committee sitting in the case further held that Dr. ... and his AAUP representatives are entitled to examine the personal files of other members of the Economics Department. I must disagree that such files should be regarded as "pertaining to the case" within the meaning of the contract or that it is relevant documentary evidence to which the appellant is entitled. I cannot believe that the AAUP or the University would have bargained away the rights to privacy and confidentiality of faculty in such a wholesale fashion as this. The targential nature of any evidence of bias against Dr. ... which might conceivably be produced by such an examination does not outweigh these fundamental rights. Such a broad "fishing expedition" into the confidential files of faculty colleagues is insupportable under the circumstances.

This exchange between the UAC and the President involved a general claim to examine the personnel files of all other members of the department without specifying the particular individual who might be involved in the claim of disparate treatment. In a much later case, the UAC, without re-
ferring to (72-3), dealt with a similar claim in a different way.

In the (75-2) case, a claim of discrimination was made without identifying the person involved and the UAC stated as follows:

We have considered statements by Dr. ... and the record before us with respect to a possible denial of evenhanded treatment as compared with another faculty member. The matter was not raised specifically, and we consider the suggestion too general in nature to require further consideration. While will committee will entertain and carefully examine allegations of denial of evenhanded treatment, such a claim should be made as early in the process as possible, and should be asserted in as much detail as possible. (See our opinion in the (73-8) case.) It has been our experience that when such a claim is seriously put forth, the grievant generally knows in considerable detail the similarities in his performance and that of the faculty member of the college whom he alleges was treated more favorably.

Thus cases (72-3) and (75-2), read together, stand for the proposition that the grievant making a denial of equal treatment claim is not thereby entitled to access to all of the personnel files of other members of the department. The concept was further sharpened in case (73-8) in which an attempt was made to compare his situation with a series of instructors appointed in earlier years. The UAC rejected this effort.

With respect to the merits of the contention of Mr. ... that he was not treated in an even-handed manner, ... we will not consider a comparison between Mr. ... situation and the cases of instructors reappointed for a longer number of years back in the 1960's. The claim of even-handed treatment cannot be successfully used to freeze patterns of appointment developed years ago and make them binding in the present. Departments, Colleges and the University must have flexibility to change their appointments patterns in order to improve their institutions. So long as no detrimental reliance on a particular pattern is shown, and there is none here, we will not consider these older practices as in any way binding on the University.
However, the President's decision in case (72-5) has been construed by the administration and various deans to preclude access to the files of other faculty members for the purpose of comparison even when the other faculty members have been identified. As a result of this the committees of review which hear the cases in the first instance have been unable to make comparisons. For example in case (74-7) the Committee of Review said as follows:

This Committee, in the absence of the authority to obtain the necessary documentary evidence, cannot evaluate the charge that the 1972-73 Committee on Appointments and Promotions granted a reappointment to another faculty member in the same department who had fewer publications than Dr. ....

The UAC in that case stated as follows:

The University Appeals Committee held (November 22, 1971) that "if the allegation is, as it is in the (72-3) case, that improper factors were used in denying a promotion under University Regulations, then that is a substantive question which comes within the Grievance Procedure." President Bloustein wrote in his decision on this case (January 2, 1972): "I consider the question of bias in failing to make an appointment to be a question of procedure in that it involves invoking an illicit consideration in the decision process, in violation of concepts of due process and equal protection. By this interpretation, the University Appeals Committee acted appropriately in making its recommendations to me, and the AAUP-University contract provisions of Step 3 apply."

In the (73-8) Grievance the UAC held unanimously (December 26, 1973) that the question of "even-handed treatment" properly comes within the Faculty Grievance Procedure, although the UAC held by a vote of 4-2 that the charge of failure to provide even-handed treatment was not substantiated. President Bloustein reviewed this decision (February 12, 1974) and took no exception with this interpretation of the Grievance Procedure.
Testimony before the UAC by Dean ... and Prof. (74-7) indicated that the Committee of Review had been advised that the question of discriminatory treatment of one faculty member with respect to another could not be raised before the Committee of Review. We uphold in the strongest possible terms, the earlier decision of this Committee and of President Bloustein that the issue of bias may properly be raised in the Faculty Grievance Procedure.

In the (72-3) Grievance the UAC held (March 28, 1972) that in a case involving a charge of bias, the grievant is entitled to examine the files of other members of his department. President Bloustein subsequently held in that case (April 24, 1972) that the files of other members of his department were not to be made available to either the grievant or to his AAUP representative.

Notwithstanding the University's refusal to make available to a grievant the files of other faculty members, a grievant is clearly entitled to present evidence or testimony which may be relevant to the establishment of a charge of bias. To block the introduction at a hearing of the comparative qualifications of one faculty member with respect to another would deny the grievant any opportunity to establish the charge which he is clearly entitled to raise under the grievance procedure. Even under the President's identification of bias as a "procedural" issue, this Committee finds that the introduction of what is sometimes referred to as "Substantive material" may be absolutely necessary to establish the "procedural violation" of bias. We address this matter here in some detail because there appears to be a misunderstanding about the implications of allowing the issue of bias to be raised in the Faculty Grievance Procedure. We recommend that appropriate administrative steps be undertaken to clear up this misunderstanding.

In the present case the grievant claims discriminatory treatment of his case compared with that of another faculty member. However, he points to no basis for bias other than academic judgment, and we find no such basis in the record. On this point we disagree with the Committee of Review and find that there is not substantiation of the charge in this case.

The President stated as follows:
I agree with the University Appeals Committee that issues of alleged bias properly may be raised in the grievance procedure. At the same time, in view of a disagreement on the means and limitations upon pursuing grievances of this kind, I accept the advice of the Committee that appropriate administrative steps need to be taken to clear up the conclusion and resolve the disagreements in this area.

However, no such steps were taken and in subsequent cases the University has continued to adhere to the proposition that personnel files of other faculty members will not be made available for comparative purposes.

The result is that unless the Committee of Review or the UAC has access for some other reason to the files of other faculty members, it is virtually impossible for a faculty member to produce the evidence on the basis of which a serious claim to denial of equal treatment can be made.

In one case in which the UAC did have access to files of the other professor because that other professor had also filed a grievance (the (73–7) case), the UAC made a comparison of the cases and divided 4 to 2 on the question of whether there had been a denial of equal treatment, the majority finding that there had been none. The (73–8) case was the only case in which there was a thorough comparison of the files and records on the relevant points of the two candidates.

The remaining cases, like the (74–7) case, tend to dispose of the claim of denial of equal treatment on the grounds of lack of evidence.

Three points should be made in connection with this situation.
1. It does not serve the interest of the University. Evidence of the treatment of some other identified person is often indispensable to prove denial of equal treatment. The withholding of the evidence on that matter by the University, at the same time as it makes ringing declaration of the availability of the grievance procedure to remedy discrimination, produces a situation in which a principle of equal opportunity is negated by the refusal to permit evidence to be developed in connection with it.

The complainant's rights in a court case alleging discrimination are not circumscribed by the evidence that the University chooses to make available through the grievance procedure. Should the complainant pursue his or her discrimination claim into court or agency proceedings under civil rights laws, the University will be compelled to make such evidence available. Thus, the denial of access to the evidence in the first instance prevents the UAC from making a full and fair evaluation on such evidence as will later be available in the same matter between the same parties. This necessarily encourages piecemeal litigation to the disadvantage of both the University and the grievant.

There may have been a misunderstanding of the scope of the President's decision in the (72-3) case. That case was a response to a general claim of the right to examine personnel files in the department. The President has not responded specifically to the question of making available the personnel files of a particular individual as to whom a claim of denial of equal treatment is made, based on activities within the
time frame which the UAC set forth in the (73-8) case.

2. The UAC has not dealt with the question of proof of discrimination by the use of statistical evidence. This is strange in light of the developments of law in the field of employment discrimination. In the case of Griggs v. Duke Power Company the Supreme Court held that discrimination under Title VII of the Civil Rights Act of 1964 could be established by showing the "consequences" of the employer's actions and that proof of improper motivation was not necessary. Consequences are shown by statistics and therefore as the Court said in McDonald Douglas v. Green, a pattern of discrimination may be inferred from statistics which demonstrate the restriction or exclusion of minorities. See Blumrosen, Strangers in Paradise: Griggs v. Duke Power Company and the concept of discrimination, 71 Michigan Law Review 59 (1972) and note 11.

The failure to attempt to prove a case of discrimination by statistics is even more marked in light of the fact that the University has an elaborate affirmative action program which requires the gathering of the very kind of statistical information which would be relevant in a showing of discrimination. But in no case has the grievant sought to introduce affirmative action materials into an alleged discrimination case.

This is a particularly important matter for grievants since the Supreme Court in McDonald Douglas v. Green has held that the evidence of statistics will facilitate a finding of discrimination in otherwise ambiguous circumstances.

This statistical evidence, as is true of the files of others, may be used in evidence in subsequent court proceedings regardless of its ex-
clusion in intra-university hearings. This in turn may lead to inconsistent results. discussed supra Sec. 11(11), in case (73-10) this was apparently the situation. The UAC gave Prof. ... a limited form of relief based on specific evidence. It did not have before it the record of the sex patterns of employment in the Agricultural Extension Service. This limited form of relief involved a re-examination of open positions during the time during the time she was reappointed. When this re-examination did not produce a position for her, she took the case to the New Jersey Division on Civil Rights. The Division on Civil Rights did engage in a investigation which included a statistical analysis of the labor force in that unit and then concluded that there was probable cause to believe that the University had discriminated against Ms. .... The Division was prepared to take the case to public hearing. The University settled the matter on the courthouse steps by giving Ms. ... tenure. This case is a good illustration of the importance of having the evidence that will be utilized by agencies and courts in a discrimination matter available to the grievant and the UAC while the matter is still within the University.

3. Even when comparative evidence is available, the grievant may not be able to establish the lack of equal treatment. Each faculty member's career is quite distinctive. There will usually be very substantial grounds on which the University can explain and justify the difference between the treatment of Prof. A and Prof. B. As is true in the court cases involving employment in jobs with a high degree of discretionary activity, the candidate may be unable to demonstrate that there was in fact an equivalence with the person who was better treated. Making available the evidence
on this point will lead to finding of no discrimination if the University has legitimate grounds for treating two persons differently. However, the only assurance the University does have of such grounds is the examination and comparison of the performance records and credentials of the various candidates. Otherwise the University's assurances appear hollow and may not stand in the face of litigation.14

The foregoing discussion has not reached the question of identifying discrimination once all the evidence has been presented. This is a perplexing task in light of the multi-faceted process of promotion and general standards which the University applies.

The legal rule is clear: the forbidden factors need not have been the sole cause of the denial; it is enough if they were a contributing factor. King v. Laborers 6 Cir. 1971

But how far into the chain of personal circumstances may the factor of race or sex be pursued? This question divided the UAC in case (73-8). Grievant contended that he was denied even-handed treatment compared to another professor because he was not (1) given a notice of favorable recommendation, and (2) was not afforded an opportunity to submit new information concerning his progress toward a Ph.D. The other professor was given such notice and opportunity because he had personally pressed for them with the department chairman. Grievant had not. Four members of the committee determined:

We ... conclude that the difference in treatment of the two cases, with respect to providing a written notice of the favorable recommendation to (73-3) and not (73-8), and with respect to providing an opportunity
to submit favorable material after the notice of termination had been given (73-3), but not (73-8) were due partly to differences in temperament of the two men and partly to reasonable differences in administrative procedure in a complex educational institution.

Two members dissented:

... we conclude that the differences in treatment in the two cases, with respect to providing a written notice of the favorable recommendation to (73-3) and not (73-8), and with respect to providing an opportunity to submit favorable material after the notice of termination had been given (73-3) but not (73-8), were due largely to differences in temperament of the two men. (73-3) was rather obviously aggressive, and did not hesitate to seek to solidify his position in the first instance, and then to improve it once the notice of termination had issued. (73-8), on the other hand, acquiesced in the decision once it had been made. Thereafter, the gulf between their treatment widened as others became involved in the situation.

... Universities, like other institutions, must expect a degree of self-assertiveness on the part of academic personnel to assure that opportunities are in fact taken advantage of (73-3) was vigilant concerning his interests, and diligent in pressing them. (73-8) was not. (73-8) comes to the University from another culture, and with the concerns which black persons have in our time as to whether their interests will be honored in a largely white institution. We can assume that the combination of cultural background making him unfamiliar with informal methods of handling matters (such as (73-3) obtaining leave to file further information after his notice of termination) and his uncertainty as to whether he would be treated appropriately in light of his color, contributed to Mr. (73-8) decision not to challenge the decision not to reappoint him.

... The University differs from other institutions in many ways, not the least of which is its dedication to
enhancing the expression of the unique qualities of individuals through education. Thus we believe that it is appropriate to hold the University to perhaps a higher standard of concern for the situation of one who, like Mr. (73-8), find himself on unfamiliar ground within the institution, because of racial or cultural differences. The standard of concern to which we hold the University is that insofar as it is practical, the University should see that the advantages that the familiar have with the informal web of information are made available to those who are unlikely to know of them because of their past history or particular personalities. We make clear that this is a standard of concern, a procedural standard. It is not a difference in standard of judgment. (73-3) and (73-8) were entitled to be judged by the same standard and, on the evidence presented, they were. However, (73-3) was afforded an opportunity not make available to (73-8), to further his case beyond the termination date. (73-8) was not. This was due, as we have said, largely to (73-3) aggressiveness. But (73-3) "knew the system," and apparently (73-8) did not.

... We therefore conclude that he did not have an opportunity which (73-3) did have, to present later evidence of progress. We know that such evidence did come into existence (the Antioch program), but was not evaluated by Dr. ... as (73-3) was. We express no opinion as to how Dr. ... should have evaluated the evidence, but the opportunity for evaluation should have been made available to (73-8).

The result of the entire course of development is that in no case has the UAC found that there has been discrimination. It may be that concern for this problem did influence the decision making process because in a number of the cases noted at the outset relief was granted or recommended on other grounds. They include cases (71-1), (72-1), (74-6), (73-10), (75-12) and (75-13). Thus in roughly half of the cases in which discrimination was alleged, a form of relief was granted albeit on other grounds.
In view of the seriousness of the charge of discrimination there is a tendency on the part of all involved to deal with the matter on some other grounds if that can be done.

IV. GROUNDS FOR TERMINATION

This section will deal with the situations in which the University's decision not to reappoint, or grant tenure, was upheld by the UAC.

Preliminarily there arises the question of burden of proof, or burden of persuasion when a candidate presents himself or herself up for promotion and tenure. What is the presumption? Is it that a candidate who has not been disciplined prior to the application is entitled to be promoted or to get tenure if routine performance has been adequate, or is the presumption the other way, that the candidate must demonstrate outstanding qualities, and if so, to what extent.

The University regulations and the process of promotion appear to leave the burden of persuasion on the supporter of the candidate to demonstrate that the candidate has met the standards for promotion. However, in the case of Dr. (72-7) the UAC, dealing with a change of mission, upheld a finding that the promotion review process had not given adequate weight to length of service of a faculty member. (See p. 38, supra.) In case (73-10) the committee admonished the University, "One who has performed well within the university community for three years as an associate professor is entitled to be treated not as a stranger seeking initial employment but as one
who has already earned by performance extra consideration for continued association with the university. Such an individual should not be treated as one among many in the labor market." From these two opinions it appears that longevity itself is a factor weighing in the favor of a candidate at least if the unit concerned is considering whether to promote or to hire a new candidate. This is a manifestation of the commonly accepted industrial relations principle of promotion from within, barring unusual circumstances or extraordinary candidates from outside.

However, if the candidate is not outstanding in at least one of the five areas of activity, it is unlikely that he or she will be able to secure a reversal of the denial of promotion or tenure. The outstanding rating is one of five available in the university promotion process. In the normal case of a faculty member with conventional teaching responsibilities, outstanding ratings both in the fields of teaching and in scholarship and research would appear to be virtually a prerequisite to a successful challenge if there is a denial of promotion and tenure. Denials of promotion on grounds of inadequate publication have been upheld in the cases of (74-7); (75-2), (75-7), (75-10), and (75-11). In the (74-10) case the committee said:

Although Prof. ... had given some papers at meetings and had some proprietary technical reports, he had no publications in any professional journal. It is further noted that in his resume prepared in 1962, he indicated that he would receive the Ph.D. in 1963. He did not actually complete his dissertation for the Ph.D. until 1970. Prof. ... testified before the University Appeals Committee that these
factors were considered by him as a member of the Appointments and Promotions Committee.

We agree with Dean ... that an evaluation of the likelihood of a subsequent recommendation to promotion with tenure is a factor in a recommendation for the reappointment of an Assistant Professor. Therefore it is consistent with University Regulations to consider all the factors in the faculty member's professional development in making such a recommendation.

The question of whether outstanding teaching would outweigh the lack of publications, is not clearly answered in the opinions. In the case of (71-1), the first case decided by the UAC, the President recommended promotion purely on the grounds of demonstrated teaching ability.

In the course of my investigation of this case and on the basis of a thorough review of the record, I have concluded that Professor ... should be retained at the University because, under existing standards, she deserves a tenured appointment.

In order to match the needs of our times, the modern American university must have a diversified faculty, a faculty of varying competencies. One need not denigrate traditional scholarship and the necessity to have such scholarship amply represented on our faculty, to believe as I do that teaching skills must also be strongly represented. With many or even most, traditional scholarship will go hand in hand with effective teaching; with some faculty one or another of these competencies will be more significant. Both are, however, important.

One other point needs to be made as well: published articles are not the only significant criteria of scholarship. Long years of effective teaching are only possible where a faculty member remains intellectually alert and has a mastery of the scholarly skills. Over a period of time, at a given level of teaching proficiency, teaching is itself proof of scholarly capacity.

In reaching the decision I do, I want to make it abundantly clear that I do not intend in this case or any other to substitute my judgment of professional competence for that of a faculty member's colleagues.
In case (73-4), the UAC found:

... There is evidence that the English Section did not consider all of the candidate's qualifications in making its evaluation, but concentrated on scholarship. This is particularly inappropriate in evaluating a recommendation for a position which has a much higher weight given to teaching effectiveness than to scholarship. There is evidence in the record that the members of the English Section had not carefully reviewed Dr. ... qualifications before making its recommendation. There is also evidence in the record that the English Section did not thoroughly review Dr. ... qualifications during its meeting. We sustain the Committee of Review on this point.

The President said in recommending tenure:

I would like to point out, however, that the position of Assistant Professor with tenure is founded upon evidence of extraordinary capacity in a limited field of professional competence and it holds no opportunity for advancement without considerable enlargement of professional skills. Moreover, I note that, in my judgment, although teaching skills of extraordinary character may occasionally outweigh other professional limitations and support granting tenure, teaching effectiveness is itself rarely sustained over a period of time without a substantial commitment to scholarly pursuits.

In case (75-7) the UAC recommended denial of the grievance with the following statement:

Dr. (75-7) contention that his teaching was not given sufficient consideration in his evaluation is not sustained by the record. There was a high evaluation of his teaching. Dr. ..., the New Brunswick Department Chairman, however, views teaching and scholarship as related and since Dr. ... view of Dr. (75-7) scholarship was negative, that influenced the manner in which he viewed the teaching and may have influenced the language used in his rating report which was forwarded to the Promotion Review Committee.
Thus, there is a very substantial view which relates teaching and research and scholarly publications. A rejection on the grounds that the candidate did not excel in both areas is likely to be sustained by the UAC.

This principle forces attention to the adequacy of the evaluation of teaching and scholarly performance. We have already noted that the faculty member is entitled to notice that he or she will be evaluated and to an opportunity to present all matters in his or her favor. This normally would include a biographical sketch and copies of published work. The UAC has held that the failure to communicate fully to the various review bodies in the University the contents of the biographical sketch was a serious procedural error. The question of who will evaluate the scholarly work has arisen in a number of cases.

The candidate is entitled to propose the names of persons who will then write confidential letters of recommendation to the University. The question has arisen as to whether or not the candidate is entitled to access to these confidential letters. This question which turns on an interpretation of the language of the AAUP-University agreement has vexed the parties since the beginning of the relationship and is not currently resolved.

The members of the department in which the candidate functions may have sufficient expertise to make an evaluation of the work even though they may not be precisely in the same field as the candidate. Thus, in case (75-10) an evaluation made by another member of the department whose work was in a related and overlapping area was held by the UAC
to be a sufficient evaluation even though it was negative. The UAC insisted on establishing that in fact there had been an independent evaluation of the scholarly work it remanded the matter for a special hearing to determine if such evaluation had taken place. In that case, Dr. (75-10) contended that the A&P Committee should have undertaken an independent evaluation of the scholarly work rather than rely on the judgment of the faculty member. The UAC said:

While it would have been within the authority of the A&P Committee to have sought outside opinion with respect to an unpublished manuscript, we do not believe that it was part of their obligation to do so. We believe that A&P Committees are entitled to rely on the judgment concerning publication made by outside institutions and outside journals, as a basis for making their own evaluations particularly in fields with which they are unfamiliar as individuals. We also note that Dr. . . . did not seek to facilitate the process of securing an outsider's judgment.

The A&P Committee delayed nearly half a year in making its assessment of Dr. . . . fitness for reappointment in order to provide additional time for him to bring his publications to maturity. We think that the burden rests at least in part on an applicant for reappointment to be prepared at the time of the personnel decisions to demonstrate the academic proficiency which the University requires.

There is no evidence in the record that Dr. . . . sought to provide any independent unbiased judgment about the quality of his paper. In the situation where the demonstration of scholarly activity or research accomplishments depends upon an unpublished manuscript, the burden of providing an independent evaluation falls at least as heavily upon the applicant as it does upon the committee for concluding that Dr. . . . publications were inadequate and therefore we conclude that the committee's judgment denying reappointment cannot be challenged on procedural grounds and must be allowed to stand.
A candidate for promotion may supply an independent evaluation of his work. His failure to do so will entitle the University to rely on evaluations which are in fact developed. Thus while it may be desirable that there be some outside evaluations (which would be embodied in the confidential letters of recommendation which the candidate does not see,) the UAC has not required that each component in the promotion process each engage in an independent evaluation of the material.

A number of cases the involve allegations that there has been a failure to give adequate weight to the quality of the work done by the claimant. In most of these cases, the UAC has held that where there are differences of opinion as to the quality of the work, the committee would not substitute its judgment and would sustain the University denial of promotion. However, in the case of (75-1) where the Dean had made a negative recommendation and the section, the department, and the A&P Committee made a positive recommendation, the committee recommended that the promotion be granted and said:

. . . . We wish to emphasize that we are not substituting our academic judgment for that of the college. In fact we rely heavily on the judgment of the section, the revised judgment of the A&P Committee and the Committee of Review that Dr. . . . is qualified for the promotion and tenure. We recommend that the decision of the Committee of Review be sustained.

So long as the evaluation of teaching ability is done on the basis of the best available evidence, the UAC presumes that the department has more intimate knowledge. Many units of the University do not yet have
regularized student evaluation procedures. Some of the material about teaching effectiveness comes from the judgment of other faculty members.

The committee stated in case (75-10):

The summary of the results of the student questionnaire which Dr. (75-10) presented to the University Appeals Committee were favorable. However, given the circumstances in the College at the time the A&P Committee met, it was for the A&P Committee to accept the statements of colleagues of Dr. (75-10) concerning the quality of his teaching and to weigh those statements in conjunction with statements made by Dr. (75-10). The task of weighing the various perceptions of Dr. (75-10) teaching abilities is at the heart of the academic judgment made by the A&P Committee which this committee may not normally review. We hope that the quality of such judgment will be improved throughout the University. But we do not believe that the A&P Committee committed a procedural error in this case by taking account of and giving weight to Dr. ... statements.

The committee has also held that clearly established evidence of poor teaching will justify the denial of promotion and tenure. In case (75-13) the committee said:

...we believe that the Appointments & Promotion Committee was entitled to emphasize the question of teaching effectiveness. Therefore, the extent of the consideration of other matters is not a crucial matter in this proceeding.

... The ... Report reflected a disastrous situation in the classroom - incredibly bad teaching, bad judgment on the part of Dr. ... which would well have warranted the Appointments & Promotion Committee in concluding that in the absence of extraordinary strength in other areas, there was no reason to have continued Dr. ... on the faculty.

Suspension for Poor Performance

In the same case, the University believed that the teaching performance of Dr. ... was so poor that he should be suspended from classroom
teaching during his terminal year. The suspension was carried out on the basis of evidence that was accumulated for the decision to deny him promotion and he was not given an independent opportunity to address the question of suspension. The UAC, upholding the finding that teaching was poor and that was the reason why he was not to be recommended for promotion and tenure, nevertheless held that the suspension was improper.

... The first contention of the grievant is that the decision to take a faculty member away from all teaching is the functional equivalent to a dismissal from the University and that therefore if the University plans to take such an action, it should follow the procedures leading to dismissal of tenured or non-tenured faculty which are set forth in University Regulation 3.94 et seq.

Those procedures envision the initiation of a complaint at the departmental, college or University level; a recommendation to the President of the University that proceedings be instituted leading to dismissal; and the convening by the President of a hearing tribunal consisting of 5 elected members of the University Senate. Each party would be entitled to challenge members of the proposed panel for cause. And after the hearing, there would be a recommended decision to the Board of Governors of the University. Oral and written arguments would be permitted before the Board of Governors. The Board of Governors would make a final decision, the only instance in the University system in which the Board of Governors would itself sit.

These procedures obviously were not followed nor even approximated and therefore if 3.94 is required to be applied in this instance, the University clearly violated its own procedures.

The University contends however that they were not required to follow 3.94 because they did not dismiss Dr. .... They simply did not assign him to teaching duties while continuing to pay his salary. The University contends that 3.94 is not appropriate for suspension and that under 2.87, the
general provision setting forth that the administrative officers of various units of the University are entitled to administer, to supervise, to assign classes and evaluate performance, the administrators are entitled to make a judgment that the classroom teaching of the professor has been so bad that the professor should not be assigned to classroom teaching activities at all. This judgment may be made without prior notice or hearing to the applicant.

The University Appeals Committee is unanimously of the opinion that the University carried out the suspension of Dr. ... in a manner which violated the AAUP-University Agreement. ... The committee members, however, differ as to the nature of the violation.

Committee members Fisher and Robbins agree with the contention of Dr. ... that Section 3.94 of the University Regulations should have been applied in his case. The removal of Dr. ... from the central function of teaching is, in the view of these members, the functional equivalent of a dismissal. The serious loss of professional reputation; the very real, but difficult to measure, humiliation involved in the removal from teaching, and the possibilities of abuse involved in a unilateral determination to suspend from teaching and the consequent danger of the threat or use of suspension as a restraint on academic freedom (a situation which we do not believe is present in this case) leads to the conclusion that the rigorous procedures set forth in 3.94 should have been applied. These members realize that the procedures are difficult; but believe that they were designed to require the closest scrutiny before such a drastic action as total dismissal or total suspension from the central function of teaching is taken.

Committee members Haskins, Weigend, Whitney and Chairman Blumrosen disagree with the view that Section 3.94 applies. The suspension in this case had a maximum duration of one year because the judgment had already been made to terminate Dr. .... Secondly, the suspension was with full pay and did not involve a financial sacrifice by Dr. .... Thirdly, it is clear that the suspension was in fact based on the establishment of Dr. ... poor performance as a
teacher. The procedures in Section 3.94 seem inappropriate to a suspension involving these three factors. Therefore, we reject the argument that 3.94 was the only method by which the withdrawal of teaching responsibility could have been accomplished in this case, and believe that the position of the University that 2.87 provides an appropriate basis for making a determination of suspension is correct.

While the committee is divided on the question of whether 3.94 applies, we are unanimously of the view that, if it does not. 2.87 does apply. Under 2.87, the University was not required to undertake the formal dismissal procedures. However, we unanimously reject the suggestion that the University was free under 2.87 to undertake the suspension in this case unfettered by a concern for due process. We believe that such unfettered discretion would be contrary to the spirit of the University regulations and contrary to the due process clause of the Fourteenth Amendment which is binding on this University as a state instrumentality. Our charter is to review the procedures followed with a concern for due process. We conclude that the concepts of procedural due process are incorporated by reference into the contract between the University and the AAUP, and that the procedural requirements of due process are applicable to actions of University personnel taken under 2.87.

... The University did not accord to Dr. ... any prior notice of its intention to suspend him from classes and provide an opportunity to meet with officials involved and attempt to dissuade them from this course of action. The University's action is understandable in human terms. Dr. ... had rebuffed many opportunities to consult with those same officials in connection with the review of his classroom performance, with the preparation of the ... Report and with his appearance before the Appointments & Promotion Committee, and finally, shortly before the suspension, in connection with an opportunity to respond to another letter of complaint from a student. Undoubtedly the University officials involved, had they thought of the matter, would have concluded that it was futile for them to provide Dr. ... with still another opportunity.
However, due process rights do not turn on such judgments regardless of how well founded. The cost to the University of according Dr. ... prior notice and opportunity to consult were minimal. The decision was rendered in July. Classes were not to start for some time. Thus regardless of the level of frustration of University personnel, we conclude that Dr. ... was denied due process in the decision to suspend him from classes taken without prior notice and opportunity to consult on his part. We do not suggest that he was entitled at that stage to an adversary hearing with the opportunity to confront and cross-examine witnesses. We do not believe that he was. However, the opportunity to dissuade the administrators from taking punitive action is of great value even when not accompanied by the formal trappings of a trial-type hearing.

V. ASSURING THE OPERATION OF THE GRIEVANCE PROCEDURE

There are a number of procedural problems which have been ironed out in some of the UAC decisions and in subsequent actions by the administration which deal largely with the grievance procedure itself.

(1) Administrators May Not Refuse to Forward a Grievance Matter to the Committee of Review because He or She Believes that It Is Not Timely or is otherwise Non-Meritorious.

In case (73-8) where the Dean had refused to forward a grievance because he viewed it as untimely, the UAC stated:

... We concur with the position enunciated in a recent University memorandum which makes clear that a Dean may not refuse to forward a grievance to the Committee of Review because of a belief that it is not meritorious, grievable, timely, etc., as Dean ... did in this case.

The President substantially concurred.

It is also in the best interests of the University to accept the position of the University Appeals Committee, ...

That the dean or director of an academic unit is required to forward a grievance to the local Committee of Review,
when such action is requested and is procedurally correct, regardless of his or her opinion on the merits of the complaint.

2. All Files concerning the Grievant Must Be Available to the Grievant

The Dean may not determine that a particular matter is not relevant to the hearing, nor may the Dean require the grievant to specify, without having seen his or her file what matters he or she believes to be relevant. In case (75-5) the committee said:

We note a serious defect in the proceedings following the decision not to grant tenure by the Promotion Review Committee. Dr. ... sought, as he had a right to, access to his file to prepare his case for the Committee of Review. Full access to the file was denied to him by Dean ... who raised a series of questions as to what parts of the file Dr. ... was to see. We reiterate that it is the faculty member's right to see his or her entire file excepting only for confidential letters, as a part of the preparation of the faculty member's case. It is not appropriate for any administrative official to insist that the faculty member identify in advance those parts of the file that he or she wishes to see. We determine that all parts of the file may be relevant to the faculty member's preparation of the case.

The President, however, neither approved nor disapproved the UAC's view stating:

The viewpoint of the University Appeals Committee on the issue of access to an individual personnel file is clear. At the same time it should be noted that the subject continues to be debated at the bargaining table. For that reason I think it best not to take a position on the issue.

In the (75-8) case, the committee said:

In this case again as in some previous cases, University officials failed to allow full and unrestricted
access to the personnel file of a grievant save only for the protection of confidential letters. We repeat that it is absolutely essential for the University officials concerned with the processing of a grievance to allow unrestricted access to the entire personnel file of the grievant except for confidential letters. The procedure for University officials to follow when a grievant wishes to see his file is to remove only confidential letters of recommendation from the files; to turn the file over to the grievant and allow him or her to peruse it; to examine and copy any documents in the file which the grievant feels are relevant to the case. It is improper for any University administrator to make any determination as to what documents are relevant or not relevant to the case, or to request the faculty member to list relevant documents to be examined.

We examined very carefully the question of whether Dr. ... was prejudiced in the preparation of his case by the difficulties that he confronted in examining the file. We agreed to proceed only when he and his AAUP representatives both clearly indicated that there had been no prejudice to him because in fact he had achieved his objective of full examination of the file after considerable difficulty in connection with this matter in the future if the University officials are advised by the President that they must make the entire file available without any hesitation or delay after the removal of confidential letters.

It restated its view on April 22, 1975 as follows:

... We believe it is improper for any University official to deny access to any part of a personnel file other than confidential letters of recommendation, to a grievant in a procedure. We have so stated on a number of occasions. However, informal administrative implementation or interpretation of this policy has resulted in delays and difficulties for grievants which are inappropriate; create exacerbating situations, and generally raise questions concerning the credibility, reliability and good faith of the administration. This interferes with the orderly administration of the grievance procedure. We urge you to instruct administrators that they are
obligated to turn over the entire file to the employee in the grievance procedure, having removed confidential letters of recommendation, and that there is no room for any determination of relevance or irrelevance in connection with the contents of the file. When a grievance is filed, all files anywhere in the University should be brought together in the Dean's office and made available to the grievant.

We believe that it would be wise personnel policy if the personnel files of individuals in the University are to be available for inspection, upon request, by those persons. If it were known that that would be the case, then we believe that the files would include only matters which would reflect the reasoned judgment of persons submitting documents. We believe that such a procedure would be in accord with modern concepts of disclosure of relevant and important information.

(3) Any Coercion or other Attempt to Influence People Not to Participate in the Grievance Procedure is itself Grounds for Setting Aside a Prior Determination

In case (75-1) the committee said:

There was evidence presented to the Committee of Review which was accepted by that committee that Dean ... made efforts to discourage the grievant from filing the grievance and to discourage persons from testifying before the Committee of Review. Such a course of conduct is totally inappropriate. The rights of members of the faculty to utilize the grievance procedure are to be respected by all within the University.

President Bloustein wrote:

... , the grievance procedure encourages informal resolution of a potential grievance; all parties including Deans and AAUP are encouraged to seek collegial and amicable solutions whenever possible. Attempts to discourage the bringing of a grievance are not per se improper. Clearly, discouraging a grievance by the use of coercion or threat is not within the spirit of collegiality. It is not clear that coercion and threats were used; the facts brought out at the hearing are not inconsistent with an attempt on the part of the dean to counsel a faculty member.
The committee responded:

We agree that different impressions can be obtained from the process of informal adjustment; and that one man's persuasion may be another's coercion. However, in light of the judgment of both the Committee of Review and this committee that Dean ... overreached, we are at a loss to understand how you arrived at the conclusion that the Dean did not behave improperly. We consider it important to underscore the right of the faculty member to utilize the grievance procedure without undue influence; and are concerned lest your comments be construed to countenance such conduct.

(4) The Committee of Review Must Afford Due Process; Its Failure to Do so is Reviewable by UAC in connection with the Complaint concerning Denial of Promotion/Tenure

In two cases candidates alleged that the Committee of Review had failed to afford a fair and full hearing. In one case, it was alleged that a dean had improperly influenced persons not to testify. The University argued that any such failure was not properly cognizable by the UAC. The committee said:

... The representative of the University, Dr. Smith, suggested that any alleged improprieties in connection with the proceedings before the Committee of Review should not be considered by the University Appeals Committee because they occurred after, and hence could not have influenced, the decision of the Summit Committee. We disagree. A grievant before this committee may raise any question concerning the propriety of the behavior of officials of the University during the course of the proceedings before the Committee of Review which might improperly affect the faculty member's right to a fair and impartial review of the decision concerning his or her promotion or tenure.

In case (75-10) the Committee of Review, on remand to consider specific issues, had not allowed the candidate to examine certain documents or cross-examine a witness. The UAC said:
However, at the special hearing held by the Committee of Review, Dr. (H) submitted a set of notes made by him during the course of his review of (the Grievant's) monograph. Neither (the Grievant) nor his representative were permitted by the committee to review the notes, or use them as a basis for cross-examination of Dr. (H).

In declining to allow (the Grievant), or his representative, to read the notes and to cross-examine Dr. (H) concerning the circumstances under which they were prepared, and other matters relating to the contents, the Committee of Review denied to (the Grievant) due process rights guaranteed in Step 3 of the grievance procedure under the collective bargaining agreement.

(5) The Committee of Review Must Give Reasons

In case (75-10) the Committee of Review stated:

The Committee of Review finds no valid basis for grievance on account of actions taken at the department or Committee of Appointments and Promotions levels in relation to the reappointment of Prof. ... as Assistant Professor; nor does it find fault with the decision of the dean not to recommend such reappointment.

The UAC found:

We recommend to the President:

1. that the Committee of Review's judgment be upheld, but

2. that the committee be admonished henceforth to present its judgment in the specific manner which is required under the University-AAUP contract.

However, we point out to the University and the AAUP that when a Committee of Review's decision does not state the specific reasons for its action, the grievant or the university may request that the Committee of Review state its reasons or, alternatively, may proceed directly to the University Appeals Committee.

(6) Supplementary Hearings

Where a defect in procedure by the Committee of Review has prevented the development of facts which the UAC deems important, it may order a supplementary hearing before one of its members, or it may remand to the
Committee of Review. Experience in remanding to Committees of Review has been uniformly poor. One case (75-10) demonstrates both aspects of this matter.

At the close of the hearing the University Appeals Committee remanded the matter to the ... Committee of Review to obtain evidence concerning two points:

1. What was the basis of the conclusionary statement by the A&P Committee that "the evidence presented (as new evidence this year) from ... does not indicate that Dr. ... has scholarly publications sufficient to warrant reappointment . . . ?

2. Was a qualitative judgment made by the department with respect to the book, and is there any documentation establishing that such an evaluation was made?

The University Appeals Committee has received the report of the ... Committee of Review dated April 3, 1975 regarding the above two matters and that report is attached to this opinion. This committee believes that the report provides a satisfactory answer to question 1. above.

However, at the special hearing held by the Committee of Review, Dr. (H) submitted a set of notes made by him during the course of his review of (the Grievant's) monograph. Neither (the Grievant) nor his representative were permitted by the committee to review the notes, or use them as a basis for cross-examination of Dr. (H).

In declining to allow (the Grievant), or his representative, to read the notes and to cross-examine Dr. (H) concerning the circumstances under which they were prepared, and other matters relating to the contents, the Committee of Review denied to (the Grievant) due process rights guaranteed in Step 3 of the grievance procedure under the collective bargaining agreement. To cure this defect in the proceeding before the Committee of Review and allow (the Grievant) the opportunity which he should have been afforded at the hearing to cross-examine Dr. (H) in connection with the notes, the University Appeals Committee delegated to the chairman the function of holding a hearing at which (the Grievant), or his AAUP representative, would have an opportunity to cross-examine Dr. (H) based on the notes and to make such further
statements as (the Grievant) wished to make with respect to the notes, their contents and conclusions to be drawn therefrom.

The University Appeals Committee made it clear that this was a limited hearing intended to provide to (the Grievant) that opportunity that he was denied by the Committee of Review and did not constitute a re-opening of the case in general. It was not intended to permit the introduction of new evidence or the presentation of any other witnesses.

The hearing was held by the chairman on May 8, 1975. His report is also attached to this opinion. This committee is satisfied that a qualitative judgment with respect to the book was made by the department based on this report.

(7) Termination of Jurisdiction of the UAC

One grievant (74-7) sought reconsideration by the UAC after the President had ruled on the recommendation of the UAC. The UAC chairman wrote:

The view of the entire University Appeals Committee is that once it has submitted its recommendation to the President and the President has acted with respect to the matter, the University Appeals Committee has no further jurisdiction.

Under these circumstances, any further steps that you may seek to take cannot include requesting this committee to reopen its decision.

The position was broadened in a later case (75-8), where the committee wrote:

... the position of the University Appeals Committee is that once it has submitted a recommendation to the President, it has no further jurisdiction and cannot unilaterally reopen its decision.16
VI. THE EMERGENCE OF THE RIGHT OF INFORMAL CONSULTATION

The structure described here reflects an effort to organize and rationalize a very informal process. All members of the UAC wished to maintain the informal atmosphere of the University because of the advantages to the human being working within the University and the enhancement of individual freedom that informality brings. At the same time, the committee was aware that informality can breed arbitrariness. Formal procedures are our classic guarantee against arbitrary action, but the emergence of formal procedures can then transform the University from an institution designed to facilitate the expansion of knowledge into a bureaucratic organization serving more mundane purposes. The dilemma that has pervaded all of the cases has been over how to preserve or recognize the rights to fair treatment, which necessarily implies some degree of procedural regularity, formality and review, while at the same time retaining the openness that was characteristic of the University in its more informal days.

The last major opinion of the committee in 1975 attempted to address this question in a very complex setting. (The Grievant) (75-3) had been advised that he would not be recommended for promotion and tenure because of poor teaching and bad classroom experience. In addition he had been suspended from teaching by the University without being given a separate opportunity to address the appropriateness of the suspension. The committee's judgment that the suspension was improper has previously been quoted. See p. 68, supra. In the concluding part of the opinion, the committee gave further explanation for its decision:
But the University at its best is an informal institution and it is for that reason that we think our decision is of great importance. As minorities have broken the barrier of exclusion from University employment, they have begun to face the second generation problems of whether they will be promoted, whether they will be given tenure and accepted as full members of the academic community. We are aware that many minority faculty members are confronting difficulties in securing reappointment, promotion and tenure. We are further aware that in dealing with such problems there is a natural tendency to insist on formal process because the history of informal arrangements has been that they have worked out to the disadvantage of minorities. Many minorities believe with some justification in history that only by the formal protection of law and legal process will their rights be secure.

But this belief overlooks the fundamental nature of institutions of higher education which at their best provide informal settings in which teachers, scholars and students may explore and may make their contributions to the improvement of society. Thus we face in this case an arguable conflict between the interest in equal employment and promotional opportunity which seem to require formal procedures and the nature of the educational institution which, more than most others, does recognize that when formal procedures are resorted to, there has already been a failure of that understanding which is one of the aims of the institution. Thus our holding that due process does require informal consultation is a reflection that the solution of the problem of the newly arrived minority faculty members can only be reached through the use of all concerned of the informal processes at which the University is at its best.

We are not naive enough to believe that the requirement of the use of informal processes will wipe out generation of suspicions. We note, for example, that among black members of the legal teaching profession there has been a serious nationwide meeting to deal with the question of non-reappointment and that out of that meeting came a set of suggestions for the actions of black faculty which when examined are the advice that any senior faculty member would give to any junior faculty member as to how to proceed with the career in the legal teaching profession.

These experiences which many universities are now undergoing and will undergo in the next years underscore, in our view, the desirability of early and extensive
Informal exchanges between nearly arrived black faculty members and their white colleagues. We believe that it is only through such a search for understanding which is the hallmark of the university that the transition to an integrated institution can be successfully accomplished. It is unforgivable for a university to fail to understand these problems. Therefore, we hope that this analysis will be of some value in dealing with what may be a recurring problem. This analysis would avoid a confrontation between those who would insist that equal opportunity requires formality and those who would insist that the continuity of the educational institution requires informality.
This paper represents the author's views and synthesis of the operation of the Rutgers Grievance procedure, 1972-1975. While drafts were circulated to both the University, the AAUP and the other members of the University Appeals Committee for comment, the views expressed here do not necessarily reflect the position or opinion of any person or institution other than the author. This is not an official or authorized document.

** Professor of Law, Rutgers the State University of New Jersey. A.A., J.D. University of Michigan; Chief of Conciliations, U.S. Equal Employment Opportunity Commission, 1965-1967, member, Panel of Arbitrators, American Arbitration Association, Federal Mediation and Conciliation Service, Member, Rutgers University Appeals Committee, 1974, Chairman, 1974 to date.

1. See Chafee, the Internal Affairs of Associations Not For Profit, 3, Harv. L. Rev. 993 (1930).

2. See Lester, Antitbias Regulation of Universities, Ch 2, (Carnegie Foundation, 1974).


5. See Kerr, op cit, supra Note 1, Ch. 2.

6. See Lester, op cit, supra Note 3, ch. 4, 8.

7. In a five page letter opinion in the first grievance (72-1) in June 1972, President Bloustein attempted to set out some guidelines for processing promotion and tenure applications within a "common law" case-by-case approach. The general part of his opinion reads:

Without any intention of establishing fixed rules for this kind of case, I want to note some of the lessons to be drawn from this tenure proceeding.

(1) Letters of recommendation should be had before, not after an appointment is made.

(2) A two-year appointment during which tenure is to be decided upon is a risky business, only to be undertaken where there is overwhelming assurance of success.

(3) Faculty members who have reservations about an appointment or a promotion should voice these reservations before a decision is made. The collegial notions of not "rocking the boat," of searching for "concensus," and of presenting a "united front" to a Dean are outmoded.
(4) A decision on matters affecting a colleague's career should only be taken where there has been ample opportunity to get at all the relevant facts. Postponing a decision for a reasonable period of time is always better than making it subject to having it reopened. Reopening a decision, except under the most extraordinary circumstances, gives the appearance of capriciousness and untoward influence, even where, as here, the appearance is devoid of substance.
(5) A member of a department making a recommendation should not participate in the decision of the Appointments and Promotions Committee which advises a Dean on that recommendation.

(6) Once an appeal from a decision on promotion has been taken, a department should not reconsider it.

(7) No faculty member has a right to tenure, and the burden of proof, if there is to be one, is on the individual seeking tenure.

(8) Although the capacity to work effectively with colleagues is a valid consideration in deciding upon the grant of tenure, the evidence on this score must be substantial and it must be weighed most carefully. As we all know, a number of our most valued colleagues may be characterized as emotional prima donnas. Moreover, the stress of being involved in the tenure process is itself very heavy. Both of these factors should be taken into account before a judgment of emotional unfitness for tenure is made.

(9) A grievance procedure is salutary and necessary within the University. It is important to understand the nature of such a procedure, however. Most academic grievances differ from most traditional labor grievances in that they are not directed against management or the administration; an academic grievance is usually directed by one faculty member against a group of others—his peers—who have evaluated him. Thus, the University is frequently not in an adversary position vis-à-vis the grievant. Its only interest is in seeking a just result and in insuring a just process of decision.

(10) Although "appearances" are rightfully disdained in favor of "substance" and "reality" in many contexts, when decisions are made affecting the career of one's colleagues, the appearance of a just and rational process is as important as the reality. Men and women must feel they have been justly dealt with; that appearance is of the very essence of the just result they seek. It engenders trust and assures stability and acquiescence in the decision.

I am sorry to have had to burden the decision of this grievance with this set of observations. I believe, however, that drawing appropriate guidelines for our future course of conduct on a case-by-case basis in the course of deciding individual grievances may help us build a common law of academic due process.
The latter area has provided the major portion of the activities of the UAC. A few "group grievances" have been processed, but they are not the focus of this study.

### UAC membership:

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<tr>
<th>Year</th>
<th>Chairman</th>
<th>AAUP Appointees</th>
<th>AAUP President</th>
<th>University President</th>
</tr>
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<tr>
<td>1971-72</td>
<td>WILLARD HECKEL (Dean, School of Law, Newark)</td>
<td>GEORGE K. HORTON</td>
<td>JAMES R. WATSON (Professor of Political Science, Rutgers College)</td>
<td>EDWARD J. BLOUSTEIN</td>
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<td></td>
<td>HANS FISHER (Professor and Chairman, Nutrition, Cook College)</td>
<td></td>
<td>CAROL E. WEILL (Professor of Chemistry, NCAS)</td>
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<tr>
<td></td>
<td>ALLEN B. ROBBINS (Professor of Physics, Rutgers College)</td>
<td></td>
<td>VIRGINIA P. WHITNEY (University Librarian)</td>
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<tr>
<td>1972-73</td>
<td>ALLEN B. ROBBINS (supra)</td>
<td>EDITH NEIMARK</td>
<td>JAMES R. WATSON (supra)</td>
<td>EDWARD J. BLOUSTEIN</td>
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<td></td>
<td>THOMAS J. REYNOLDS (Chrmn, Analytical Tools Dept., GSBA, Newark)</td>
<td></td>
<td>VIRGINIA P. WHITNEY (supra)</td>
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<td>1974-75</td>
<td>A.W. BLUMROSEN (Professor of Law, School of Law, Newark - resigned 5/74 when he became acting Dean)</td>
<td>RICHARD W. LAITY</td>
<td>HAROLD H. HASKIN (Professor of Zoology, Rutgers College)</td>
<td>EDWARD J. BLOUSTEIN</td>
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<td>Successor Chairman ALLEN B. ROBBINS (supra)</td>
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<td>GUIDO G. WEIGEND (Associate Dean, Rutgers College; Professor of Geography)</td>
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<td>HANS FISHER (supra)</td>
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<td>VIRGINIA WHITNEY (supra)</td>
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<td>MARTIN OPPENHEIMER (Professor of Sociology, Livingston College - appointed 5/74)</td>
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<td>HANS FISHER (supra)</td>
<td>THEODORE WALDEN</td>
<td>HAROLD H. HASKIN (supra)</td>
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<td>MARTIN OPPENHEIMER (supra)</td>
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<td>ALLEN B. ROBBINS (supra)</td>
<td>VIRGINIA P. WHITNEY (supra)</td>
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Selected A. W. BLUMROSEN as chairman
10. See p. supra.

11. This is only one of three concepts of discrimination currently utilized. See E. C. Phillips v. Martin Marrietta _______ U.S. _________ (1971).

The broader concept currently approved by the U.S. Supreme Court holds that practices, procedures or tests which have adverse consequences to protected classes are discriminatory unless justified by business necessity. See Griggs v. Duke Power Co. 401 US 424 (1971); Albemarle Paper Co. v. Moody, 95 S.Ct. ______ (1975). This test is applicable in individual cases through the process of proof outlined in McDonnell Douglas v. Green, 411 US 792 (1973). See generally, Blumrosen, Strangers in Paradise:Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich L. Rev. 59, 67 (1972).

The "equal treatment" test remains a viable legal standard and some in the academic community view it as the primary standard. See Lester, op cit note 3 supra at p. ______. This incorrect statement of the law flaws Lester's analysis. Nonetheless, many cases are evaluated by the equal treatment standard.


13. Lester, op cit, supra, note 3, notes this point at note 2, p. 32.

14. See Alexander v. Gardner-Denver _______ U.S. _______ N. 21, for a listing of factors which influence the weight which courts will give arbitration opinions.
15. For example, to deal with the problem of fairness in evaluating a faculty member based on his understandings with his or her dean as to the precise role he or she is to play, the University is now developing a procedure whereby the specific mission of a faculty member will be agreed to at the outset of employment. While this will limit arbitrary disregard of such understandings by the University, it may also inhibit the faculty member from changing his/her direction of growth and development into new channels which emerge after the appointment. Yet in a healthy growth situation, a faculty member is likely to reshape and sharpen objectives after a few years of teaching. The initial understanding may inhibit such activity.