

8.5 Promotion and Tenure Decision Appeal Procedure

8.5.1 Persons Eligible to File an Appeal

An appeal hereunder may be filed by any candidate for promotion or tenure at Mines as described in either of the categories below, hereinafter referred to in this appeal procedure as the "Candidate."

- A. Any tenure-track faculty member whose application for tenure has been denied by Mines; or
- B. Any academic faculty member whose application for promotion to a higher academic rank has been denied by Mines.

8.5.2 Notice of Appeal

A Notice of Appeal is a written document in letter or memorandum form prepared and filed by the Candidate to initiate an appeal hereunder. The Notice of Appeal must contain, at a minimum, a concise statement of the matter being appealed as well as the specific grounds for the appeal set forth in sufficient detail to provide Mines with reasonable notice of the substance of the appeal. In all tenure decision appeals, the Notice of Appeal must allege one or more of the specific, appealable issues listed in Section 8.5.4.A.1 below. In promotion decision appeals, the Notice of Appeal must allege one or more of the specific appealable issues listed in Section 8.5.4.A.2.

8.5.3 Procedure for Initiation of Appeals

A. Place to File Notice of Appeal

A Notice of Appeal shall be addressed to and filed with the office of the Provost, who shall be presumed to be acting on behalf of Mines throughout the appeal. At the time the Notice of Appeal is filed with the Provost, the Candidate shall also file a copy thereof with the Office of Legal Services.

B. Time Limitations

All appeals filed pursuant to this procedure must be filed with the Provost and the Office of Legal Services no later than ten business days following receipt by the Candidate of notification of the tenure or promotion decision constituting the subject matter of the appeal.

If the last day to file a Notice of Appeal, or any other document pursuant to this Appeal Procedure, happens to fall on a weekend, a holiday, or any day on which Mines is closed, the Notice of Appeal or other document shall be due on the next Mines business day. If a Notice of Appeal is not filed in a timely manner, the Candidate shall forfeit all rights of appeal conferred hereunder. The Provost shall notify the Candidate in writing if a Notice of Appeal is not received in a timely manner.

C. Extension of Time Limitations

For good cause, the Candidate may request in writing from the Provost an additional amount of time within which to file a Notice of Appeal. However, in order to be considered, a Request for Additional Time must be filed within the time limit for filing the Notice of Appeal. The Provost shall possess the authority to issue a final ruling on such a request.

D. Fulfillment of Notice of Appeal Requirements

An attorney from the Office of Legal Services shall examine the Notice of Appeal to determine if the requirements set forth in Section 8.5.2 and 8.5.3 have been met. If the attorney determines Mines that the Notice of Appeal has not fulfilled the requirements, he or she shall inform the Candidate of the deficiencies in writing within ten business days. The Candidate shall then have the opportunity to correct and refile the Notice of Appeal within ten business days from the date of the attorney's communication to the Candidate. If the attorney concludes that the refiled version of the Notice of Appeal is still deficient, the Candidate may request that the refiled version along with a written recommendation of the attorney be forwarded to the hearing panel for a decision. In that event, the hearing panel must examine the Notice of Appeal and decide that: (1) the Notice of Appeal is not deficient, and the appeal may proceed to hearing; (2) the deficiencies contained in the Notice of Appeal are not fatal to the appeal, which may proceed to hearing; or (3) the deficiencies contained in the Notice of Appeal are fatal to the appeal, which must therefore be dismissed. If the Notice of Appeal is dismissed, it may not be refiled.

8.5.4 Appeal Standards

A. Reviewable Issues

When both promotion and tenure applications are denied, only the tenure decision may be appealed on the grounds for tenure decision appeals as set forth below.

1. Tenure Decision Appeals

The grounds for appeal shall be limited to one or more of the following: (1) in the conduct of the tenure review, there were violations for the established procedures and practices of the Candidate's department or Mines, and such procedural errors were of sufficient magnitude that they likely affected the outcome of the tenure review; and (2) an alleged breach of a significant contractual obligation by Mines that has materially impacted the Candidate's ability to successfully earn tenure at Mines.

This appeal procedure is not designed to resolve allegations of unlawful discrimination made by employees. Any appeal that contains such allegations must be filed as a complaint under Mines' Unlawful Discrimination Policy and Complaint Procedure.

2. Promotion Decision Appeals

The grounds for appeal shall be limited to one or more of the following: (1) in the conduct of the promotion review, there were violations of the established procedures and practices of the Candidate's department or Mines, and such procedural errors were of sufficient magnitude that they likely affected the outcome of the promotion review; and (2) the decision was so inconsistent with the evidence in the record that it must be deemed arbitrary and capricious. The term arbitrary and capricious describes actions that have no reasonable basis in law, fact or reason, or are so lacking in rational connection to the relevant factors as to constitute an abuse of discretion. A determination is arbitrary and capricious only if it is one no reasonable mind could reach. This appeal procedure is not designed to resolve allegations of unlawful discrimination made by employees. Any appeal that contains such allegations must be filed as a complaint under the

Unlawful Discrimination Policy and Complaint Procedure set forth on the Board of Trustees Policy web page.

In the case of an appeal based on an allegation that the decision was so inconsistent with the record as to be deemed arbitrary and capricious, the scope of the positions and arguments that the Candidate and Provost may present to the hearing panel will be limited to the same information that was reviewed at the time of original promotion review, as well as the recommendations deriving from the original promotion review process as set forth in Handbook Sections 8.1.9, 8.2.4, 8.3.4 or 8.4.4. Therefore, the principal evidence presented at the hearing will be the Candidate's promotion application dossier (with contents conforming to the relevant provision of the Academic Procedures Manual), recommendations from the Candidate's Departmental Promotion Committee, Department Head, University Promotion and Tenure Committee, Dean, and Provost, and the professional credentials of the Candidate. New information regarding the Candidate's professional credentials and any additional external or internal evaluations that had not been made available in the original promotion review process are outside the scope of the hearing panel's review on appeal. Additionally, confidential information regarding other Mines promotion and tenure applicants will not be permissible evidence at the appeal hearing.

B. Burden of Proof

The Candidate shall bear the burden of proof in all appeals heard pursuant to this procedure.

C. Standard of Proof

The standard of proof for all appeals heard pursuant to this procedure shall be the "preponderance of the evidence" standard, as it is generally applied in civil cases. This standard shall be deemed met if the hearing panel believes that it is more likely than not that the facts at issue occurred. The "facts at issue" shall include all facts that are required to be proven by the Candidate in order to prevail.

D. Role of Hearing Panel

The role of the Hearing Panel is limited to evaluating only the reviewable issues listed in Section 8.5.4A.

8.5.5 Initial Hearing Panel Selection Criteria

All appeals filed hereunder shall be heard by a hearing panel chosen through the process specified in subparagraph A immediately below from the pool of tenured faculty at Mines who hold the academic rank of full professor.

Retired faculty are ineligible to serve on the hearing panel even if they are presently working for Mines as transitional appointees.

A. Hearing Panel Selection Process

An initial hearing panel of eight members shall be chosen on a random basis from the applicable tenured faculty pool under the supervision of the Associate Vice President for Human Resources. Panel members may be excused by the Associate Vice President for Human Resources on account of conflict of interest, health, or unavoidable absence from campus. The Candidate and the Provost shall each disqualify two of the hearing panel members. The disqualifications exercised by the parties shall proceed in an alternate fashion beginning with the Candidate. Of the remaining panel members, the one chosen last shall serve as an alternate

hearing panel member. The other three panel members shall constitute the hearing panel for the appeal. An excused hearing panel member shall be replaced by another faculty member from the applicable pool chosen in a random drawing prior to the exercise of any disqualifications by either party.

B. Selection of Chief Panel Member

The panel members shall elect a Chief Panel Member from their number to preside throughout the remainder of the appeal.

C. Authority of Chief Panel Member

The Chief Panel Member shall have the authority to: (a) issue orders to compel discovery; (b) make rulings on objections; and (c) issue any other orders necessary to control the conduct of the hearing and prohibit abusive treatment of witnesses, including removal of disruptive individuals from the hearing room.

D. Role of Alternate Hearing Panel Member

Generally, the alternate member shall observe, but not actively participate in, all of the proceedings in the case and be prepared to substitute for a panel member who becomes unavailable during any stage of the case due to death, illness, or unavoidable emergency. However, with the approval of both parties, the alternate member may be allowed to participate in the Hearing, e.g., by asking questions of the parties and other witnesses during the proceedings.

8.5.6 Legal Representation

A. Role of Legal Counsel

Either party may engage the services of an attorney to assist in document preparation or case preparation, and may consult with an attorney during the appeal hearing. However, an attorney may not enter an appearance or actively participate in the hearing or speak on behalf of either party at the hearing.

B. Peer Counsel

The Candidate may designate a peer counsel in writing to provide moral support or actual representation during the hearing. If so designated and to the extent authorized by the Candidate, the peer counsel may speak on behalf of the Candidate, examine witnesses, deliver opening and closing statements, etc.

C. Legal Advice for the Panel

An attorney from the Office of Legal Services or the Assistant Attorney General assigned to represent Mines shall provide the desired level of legal advice to the panel throughout the proceeding.

If this representation arrangement creates a conflict of interest, a "conflicts counsel" from the Attorney General's Office shall be engaged to perform this function.

8.5.7 Pre-Hearing Procedures

A. Acknowledgment of Notice of Appeal

As soon as practicable after receipt of the Notice of Appeal and completion of the examination of legal sufficiency, the Provost shall send a letter to the Candidate acknowledging timely receipt and the legal sufficiency of the Notice of Appeal. This subparagraph shall not apply if the Notice of Appeal was untimely or legally insufficient.

B. Setting of Hearing Date

After a Chief Panel Member has been chosen, a hearing date shall be set with reasonable consideration given to the schedules of the individuals concerned. The Chief Panel Member shall set a date for the hearing, which shall occur no more than thirty calendar days after the date upon which the hearing panel was selected, except when any portion of this thirty-day period falls within Mines' summer session. In this event, the deadline for setting the hearing date shall be extended to thirty calendar days following the commencement of Mines' fall semester. The Chief Panel Member shall inform the parties and other hearing panel members of the hearing date. Once set, the hearing date may be rescheduled only with the concurrence of the Candidate, the Provost, and the Chief Panel Member.

C. Pre-Hearing Discovery

Informal discovery, or the voluntary exchange between the parties of information relevant to the case, is encouraged. If the parties cannot resolve such issues informally, up to ten business days prior to the hearing date either party may request the Chief Panel Member to enter an order compelling discovery upon a showing of the relevance of the requested information and the necessity of such information to case preparation. The other party may oppose such request by showing that the requested information is irrelevant, unnecessary to case preparation, or privileged according to law.

D. List of Hearing Issues

After examining the position statements of both parties, the hearing panel shall prepare a list of issues to be resolved through the hearing and distribute such list to the parties no later than three business days prior to the hearing date. The list of issues generated pursuant to this subparagraph shall be binding upon the subsequent hearing and shall form the standard against which all relevancy arguments shall be weighed.

8.5.8 Position Statements**A. Contents of Position Statements**

Each party shall file a Position Statement containing the following components:

1. **Position Summary:** A concise statement summarizing the case from the position of the submitting party;
2. **List of Issues:** A list of issues the party wishes to have resolved through the hearing;
3. **List of Witnesses:** A list of witnesses to be presented at the hearing along with a summary of the anticipated testimony of each witness;
4. **List of Exhibits:** A list of exhibits to be presented at the hearing; and
5. **Copies of Exhibits:** Copies of each exhibit the party anticipates presenting at the hearing.

B. Deadlines for Position Statements

Each party shall prepare and file a position statement with the hearing panel and provide a copy to the opposing party no later than five business days prior to the hearing date. If the hearing date is rescheduled, these time limits shall apply to the rescheduled hearing date.

C. Limitations Imposed by Position Statements

Neither party shall make an argument during the hearing that is inconsistent with the arguments set forth in the position summary section of his or her position statement. Neither party shall introduce any witnesses or exhibits at the hearing that are not listed in his or her position statement, except that a party may request the Chief Panel Member to permit additional witnesses or exhibits in order to rebut an argument or position asserted by the other party during the hearing. At the Chief Panel Member's sole discretion, such additional testimony or evidence may be introduced during the hearing at a time and in the manner prescribed by the Chief Panel Member. All exhibits listed in the position statements shall be deemed genuine and admissible unless successfully challenged prior to the hearing.

D. Amendments to Position Statements

Up to three business days prior to the hearing date, either party may request the chief panel member to permit amendments to his or her position statement upon a showing of good cause and lack of prejudice to the opposing party. Any party filing an amended position statement shall provide a copy thereof to the opposing party no later than the filing deadline imposed by the order permitting the amendment.

8.5.9 Hearing Procedures**A. Presumption of Open Hearing**

Subject to limitations imposed by the capacity of the hearing room, the hearing shall be open to the public. For good cause, either party may request that the hearing be closed to the public. The chief panel member may grant such a request only if the non-requesting party does not object.

B. Sequestration of Witnesses

Upon the request of either party, the chief panel member shall direct that all individuals scheduled to appear as witnesses in the hearing may not be present in the hearing room except when actually testifying.

C. Order of Presentation

The Candidate shall make his or her presentation first. After this presentation is concluded, the Provost shall make his or her presentation. Rebuttal presentations by either party may be permitted at the discretion of the chief panel member. At the conclusion of the Provost's presentation, the Candidate shall be permitted to make a closing statement. At the conclusion of the Candidate's closing statement, the Provost shall be permitted to make a closing statement.

D. Presentation Procedure

During a party's presentation, that party may testify, examine other witnesses, or submit documents as evidence to the hearing panel. Arguments should not be made by a party or a representative of a party during the presentation, but rather should be reserved for the closing statement. Hearing panel members may interject questions at any time. The parties should be given equal periods of time within which to present their respective cases, as determined by the Chief Panel Member. However, either party may waive any portion of the time allotted to them.

E. Witness Examination Procedure

The party on whose behalf the witness has appeared shall directly examine each witness. Upon the conclusion of the examination of each witness, the opposing party shall be permitted the right of cross-examination. The Chief Panel Member may permit redirect and re-cross examination. However, an identical examination procedure shall be utilized for all witnesses testifying during the same hearing.

F. Inapplicability of Strict Evidentiary Rules

Strict legal evidentiary rules shall not apply during the hearing. The Chief Panel Member shall rule on the admissibility of disputed evidence with primary consideration given to the relevance, reliability, and probative value of proffered evidence.

8.5.10 Post-Hearing Procedures

A. Recommendation of the Hearing Panel

After the conclusion of the hearing, the hearing panel shall confer among themselves and vote upon a recommended course of action.

The panel members holding a majority point of view shall designate a member of their group to write a recommendation reflecting their opinion. A panel member holding a minority point of view may issue a dissenting recommendation.

B. Contents of Recommendation

The recommendation of the hearing panel shall include the following components:

1. **Statement Regarding Burden of Proof:** A statement regarding whether or not the hearing panel believes that the burden of proof borne by the Candidate has been sustained.
2. **Findings of Fact:** A list of the relevant facts found by the hearing panel upon which the recommendation is based;
3. **Conclusions:** A list of the conclusions of the hearing panel upon which the recommendation is based; and
4. **Recommended Course of Action:** A statement of the course of action recommended by the hearing panel. With respect to either promotion or tenure decision appeals, the panel may recommend that the Provost's decision be upheld. If the panel finds the Candidate's appeal meritorious, it may recommend that the Candidate be given an opportunity to have his or her case reconsidered through the university's promotion and tenure review process.

The panel does not have authority to grant either promotion or tenure. However, in the case of tenure decision appeals, the panel may recommend that the Candidate be offered an extension of his or her contractual tenure-track appointment period to allow the Candidate the opportunity to be reconsidered through the university's prescribed process for tenure review.

C. Issuance of Recommendation

The recommendation of the hearing panel shall be issued to the parties and delivered to the President of Mines along with the panel's case file within ten business days after the conclusion of the hearing.

D. Issuance of Presidential Decision

The President shall examine the case file, consider the recommendation of the hearing panel, and issue a final written decision in the matter. The President shall possess the authority to affirm, reverse, or modify the recommendation of the hearing panel or to remand the matter to the panel for further proceedings or consideration. The decision of the President shall be delivered to the

parties and the hearing panel within ten business days from the date of the President's receipt of the recommendation and case file from the hearing panel, unless the President is unavailable for a significant amount of time during this period.

E. Presidential Unavailability

The term "unavailable," as utilized in this subparagraph and subparagraph D immediately above, shall be defined to mean out of the office on vacation or sick leave, out of town for Mines business, or otherwise engaged in important Mines business matters to the extent that sufficient time cannot be devoted to decision making hereunder. If the President is unavailable for a significant period of time during the decision-making period, a letter shall be sent to the parties advising them of that fact as well as the anticipated date of presidential availability. In such event, the decision shall be due ten business days from the date upon which the President becomes available. The President shall be the sole judge of all issues related to unavailability hereunder.

F. Appeal of Final Decision of Mines

The decision issued by the President shall constitute the final decision of Mines regarding the matter being appealed. There shall be no further appeal from the final decision of Mines. If the Candidate is aggrieved by the final decision of Mines, he or she may pursue other available legal remedies.