IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA

(the "University")

AND:

UNIVERSITY OF BRITISH COLUMBIA FACULTY ASSOCIATION

(the "Association")

(Dr. Carl Johnson Arbitration)

________________________________________

AWARD

________________________________________

Arbitration Board: Joan M. Gordon

For the University: Thomas A. Roper, Q.C.

For the Association: Allan E. Black, Q.C.

Date and Place of Hearing: September 16, 2003,
Vancouver, British Columbia

Date of Award: October 15, 2003
Introduction

This matter involves a grievance by Dr. Carl Johnson against the University’s decision on July 19, 2002 to deny him tenure and promotion to the rank of Associate Professor. Dr. Johnson is an Assistant Professor in the Department of Classical, Near Eastern and Religious Studies.

The jurisdiction of this Board is described in Article 13.07 of the Agreement on Conditions of Appointment for Faculty (the “Agreement”). The relevant provisions of Article 13.07 for the purposes of this award are these:

13.07 Jurisdiction

(a) A decision may be appealed on the ground that it was arrived at through procedural error...

(b) When procedural error is a ground of appeal and a Board decides that there was a procedural error, a Board may:

(ii) if the error may have resulted in a wrong decision:

(A) direct that the matter in question be reconsidered commencing at the level of consideration at which the error occurred. In so ordering the Board shall specifically identify the error, shall give specific directions as to what is to be done on the reconsideration, and shall adjourn the hearing until reconsideration has taken place; or ...

(emphasis added)

The University acknowledges that a “procedural error” may have occurred at the departmental level that “may have resulted in a wrong decision”: Article 13.07(b)(ii). The University further acknowledges that a reconsideration of Dr. Johnson’s candidacy
for promotion and tenure should occur commencing at the departmental level in accordance with Article 13.07(b)(ii)(A) of the Agreement.

The narrow issue at this stage of the proceeding is the scope of the information to be considered by the review committees during the reconsideration process.

The Association’s contention is that given the conceded procedural error, the President’s decision and its evidentiary underpinnings are a nullity, and a fresh consideration of Dr. Johnson’s candidacy for promotion and tenure is required under Article 5 of the Agreement. The Association maintains that Dr. Johnson has the right, under Article 5.03, to supplement his file during the reconsideration process with new, additional information relating to scholarly activity after the President’s decision.

Alternatively, the Association’s position is that if the Agreement creates a seven year period for review of Dr. Johnson’s record, that limitation on evidence relating to scholarly activity does not apply where, as here, the President’s decision is a nullity due to an admitted error in the initial consideration process.

The University’s position is that Articles 5.03 and 13.07 are distinct provisions applying to separate procedures. The University says the reconsideration process must be conducted on the same body of information -- i.e., the original dossier -- which was reviewed prior to the impugned decision. The University contends that as both the consideration and the reconsideration processes for promotion and tenure are based on a candidate’s record of teaching and scholarly achievements during the seven year pre-tenure period, this Board has no jurisdiction to direct the review committees to consider anything other than “evidence” as defined in Article 13.01. That provision limits the evidence on a reconsideration to the candidate’s original dossier.
The parties argued this issue on the basis of the following Agreed Statement of Facts.

Agreed Statement of Facts


2. As part of the Collective Agreement, the University and the Association have entered into an Agreement on Conditions of Appointment for Faculty (the “Agreement”). This Agreement was in effect for all appointments on and after July 1, 1993 and was in place at the time of the consideration of Dr. Johnson's case for tenure and promotion.

3. Article 5 of the Agreement contains procedures for appointment, reappointment, tenure and promotion of faculty members at the University.

4. The previous Agreement on Conditions of Appointment for Faculty in force between May 1980 and July 1, 1993 is attached.

5. The University has published a Guide to Promotion and Tenure Procedures.

6. Dr. Carl Johnson (the “Grievor”) is an Assistant Professor in the University’s Department of Classical, Near Eastern and Religious Studies (the “Department”).

7. The Grievor has been employed by the University since July 1, 1995.

8. The Grievor was first appointed as an Assistant Professor for a term July 1, 1995 to June 30, 1998. He was reappointed for a term July 1, 1998 to June 30, 2001 and was further reappointed for a term July 1, 2001 to June 30, 2003.
9. The Grievor has been on sabbatical from the University for the period July 1, 2002 until June 30, 2003.

10. The Grievor was subject to a review for tenure and a periodic review for promotion to the rank of Associate Professor with the University. The process pertaining to that periodic review commenced in May of 2001 when the Grievor met with the Department Head in accordance with Article 5.02 of the Agreement. That process continued through the Department (Article 5.07), the Dean of the Faculty of Arts (Article 5.11) to the President. On July 19, 2002, the President advised the Grievor, pursuant to Article 5.15(b) of the Agreement, of her recommendation that he not be awarded tenure or be promoted to Associate Professor.

11. On September 4, 2002, the Association filed a grievance on behalf of the Grievor resulting from the decision of the President.

12. For the purposes of this arbitration, the University acknowledges that pursuant to Article 13.07(b)(ii) of the Agreement, a "procedural error", as that term is defined, may have occurred at the departmental level, and that procedural error "may have resulted in a wrong decision". The University acknowledges that a reconsideration of the Grievor's candidacy for tenure and promotion should occur commencing at the departmental level in accordance with Article 13.07(b)(ii)(A) of the Agreement.

**Applicable Provisions of the Agreement, Guide and Leave of Absence Policy**

The following provisions are excerpted from the Agreement and the associated Guide to Promotion and Tenure Procedures at UBC (the "Guide"), and the University’s Leave of Absence Policy. I am referring extensively to the provisions of these documents because an understanding of the overall review regime negotiated by the parties is essential to a proper determination of the issues addressed in this award. The italicized language is particularly relevant to my interpretive conclusions.
Agreement on Conditions of Appointment for Faculty

The University of British Columbia and the Faculty Association of the University of British Columbia have agreed on the following conditions of appointment for faculty members at the University of British Columbia.

1. Interpretation

1.01 For the purpose of this Agreement:

“Periodic review” means a review of the record of a faculty member, undertaken in accordance with the procedures of Section 5, leading to a decision by the President whether or not to recommend to the Board of Governors that the faculty member is promoted;

“Scholarly activity” means research of quality and significance, or, in appropriate fields, distinguished, creative or professional work of a scholarly nature; and the dissemination of the results of that scholarly activity;

2. Types of Appointments

...  

2.03 Term Appointments with Review

(a) Term appointments with review are full-time appointments for a specified term of at least twelve (12) months other than term appointments without review.

(b) For the purpose of calculating years of service, all appointments shall be deemed to have commenced on July 1 of the calendar year in which the appointment began.

(c) These appointments carry no implication of automatic renewal but imply that the appointee will be considered for further appointment. They are to be reviewed before expiration of the specified term in accordance with the criteria and procedures prescribed below.

(d) Subject to Section 2.03(f), any person holding a term appointment with review is eligible for consideration for a tenured appointment.

...
(f) In the case of an Assistant Professor

(1) if at any time before, or if in, the seventh year of service an Assistant Professor is promoted to the rank of Associate Professor, a tenured appointment will also be granted;

(2) if an appointee is not granted a tenured appointment pursuant to (1) above, then in the seventh year of service a recommendation either to grant a tenured appointment at the rank of Assistant Professor or otherwise, or not to renew the appointment, must be made.

(3) during the pre-tenure period an Assistant Professor who has been reviewed for but denied promotion to the rank of Associate Professor has the right of appeal which would normally arise from a decision following a periodic review.

(g) A decision not to grant a tenured appointment on the expiry of the maximum period for a term appointment with review will normally be followed by a one-year terminal appointment. ...

(h) The maximum period of a term appointment with review is:

(1) in cases of Assistant Professor eight (8) years;
...

The ... eighth year, in appropriate cases, shall be the terminal year.

(i) No person will acquire a tenured appointment by reason only of holding a term appointment with review that extends beyond the maximum period of such appointments.

* * *

3. Titles and Ranks

3.05 Assistant Professor
...

(b) Initial appointments at this rank are normally for a term of three years, but in exceptional circumstances may be for a lesser period. Renewal of an individual's appointment is for a term of three years. If an additional renewal is granted, it is for two years.
3.06 Associate Professor

(a) Appointment at or promotion to the rank of Associate Professor normally requires evidence of successful teaching and of scholarly activity beyond that expected of an Assistant Professor. The candidate for appointment or promotion will be judged on teaching as defined in Section 4.02, on sustained and productive scholarly activity, on ability to direct graduate students, and on willingness to participate and participation in the affairs of the Department and the University. ...

* * *

4. Criteria for Appointment, Reappointment, Tenure and Promotion

4.01

(a) Candidates for appointment, reappointment, tenure or promotion, other than those dealt with in paragraph (b), are judged principally on performance in both teaching and in scholarly activity. Service to the academic profession, to the University, and to the community will be taken into account but, while service to the University and the community is important, it cannot compensate for deficiencies in teaching and in scholarly activity. Competence is required both in teaching and in scholarly activity, provided that a candidate who does not meet the criterion of scholarly activity but who is judged to be an excellent teacher may be given a tenured appointment as Senior Instructor when, in the view of the University, its needs will be best served by that appointment. Appointments without term [i.e., tenure] are granted to individuals who have maintained a high standard of performance in meeting the criteria set forth below and show promise of continuing to do so.

...

(c) Judgments of an individual should be made objectively.

...

4.02 Teaching

Teaching includes all presentation whether through lectures, seminars and tutorials, individual and group discussion, supervision of individual students' work, or other means by which students, whether in degree or non-degree programs sponsored by the University, derive educational benefit. An individual's entire teaching contribution shall be assessed.
Evaluation of teaching shall be based on the effectiveness rather than the popularity of the instructor ....

4.03 Scholarly Activity

_Evidence of scholarly activity_ varies among the disciplines. _Published work is_, where appropriate, _the primary evidence_. Such evidence as distinguished architectural, artistic or engineering design, distinguished performance in the arts or professional fields, shall be considered in appropriate cases. ...

* * *

5. Procedures for Appointment, Reappointment, Tenure and Promotion

5.01 General Provisions

(a) Appointments, reappointments, tenure decisions and promotions are made by the Board of Governors upon the recommendation of the President.

(b) The procedures in this section govern ... recommendations for or against the award of tenure and promotions.

...

5.02 Meetings with the Head

(a) _At the beginning of the academic year preceding the year in which a faculty member may be considered for promotion under Section 9 below, ... or for tenure, the Head shall meet with the faculty member_. The purpose of the meeting is to identify any potential difficulties with the candidature and to assist the candidate with any concerns.

(b) When a faculty member is to be considered for promotion under Section 9 ... or for tenure, _the Head shall meet with the candidate before the submission by the candidate of information to be supplied by the candidate_. The purpose of this meeting is:

(i) to advise the candidate that it is the responsibility of the faculty member to provide an _up-to-date curriculum vitae and other relevant_
information to the Head, prior to a date set by the Head, provided that this date is no earlier than September 1; and

(ii) to identify any potential difficulties with the candidature and to assist the candidate with any concerns.

... 

5.03 Recommendations: Supplementing Files

In the case of recommendations on ... promotion or tenure the candidate or the University has the right, up to the stage of the President's decision, to supplement the file by the addition of new, unsolicited information (such as a new set of student evaluations, the publication of an additional book or article, the receipt of a grant, a published review of the candidate's work, etc.) or a response to particular concerns that emerge in the relevant documentation.

5.04 Departmental Consultation: Committees

(a) The Department Head shall consult formally at meetings convened for that purpose with eligible members of the Department in order to ascertain their views and to obtain their recommendation concerning ...

...

(c) Consultation shall be achieved through standing committees. ...

5.05 Departmental Consultation: Letters of Reference

(a) Letters of appraisal from external referees on the quality and significance of the scholarly (including professional, and/or creative) achievements of the candidate shall be obtained ...

...

5.06 Departmental Committee: Meetings

(a) Consultation shall be conducted according to procedures agreed upon between the Head and the eligible members of the Department and approved by the Dean. ...

(b) Consultation shall include consideration of all relevant information, including any information submitted by the candidate as provided for in 5.02(b)(i) or 5.03 above, at formal meetings.

...
(e) Normally, the only material which will be considered is material that has been obtained following required or other recognized procedures. Material which will not normally be considered includes material solicited by the candidate and unsolicited material such as letters from third parties, faculty members who are not official appraisers, or students. If any material that would normally not be taken into account is considered and it is not supportive of the candidate, the contents of the material shall be revealed to the candidate. The candidate shall be given a reasonable opportunity to rebut or explain the contents, and *this rebuttal or explanation shall be added to the file*.

(f) When serious concerns about the candidacy arise in the departmental standing committee, the Head shall inform the candidate of that fact and the reasons therefor with sufficient particularity to enable the candidate to have a meaningful opportunity to respond either orally or in writing at the option of the committee and to *introduce further relevant evidence*. The candidate shall be provided with a summary of the referees' opinions, the summary to be prepared by a member of the departmental committee selected by the committee. The summary shall be prepared in such a way that the identities of the referees are not disclosed.

...  

5.07 Head and the Department Recommendations

(a) When a Department has considered ... a tenure decision, or a promotion resulting from a periodic review under section 9 below, the Head shall forward the following to the Dean:

(i) the Head's recommendation with the basis for it;

(ii) the recommendation, a record of the vote and the full report of the departmental committee;

(iii) letters of appraisal from external referees;

(iv) unsolicited information from faculty members or students that qualifies for consideration under section 5.06(e); and
(v) information submitted by the candidate pursuant to section 5.02(b)(i) or 5.03.

...  

5.08 Notification of Departmental Recommendations to Candidate

(a) In all cases other than an initial appointment, the Head shall, at the time the recommendations are forwarded to the Dean, inform the candidate in writing of the recommendations being forwarded.

(b) If the recommendation of either the Head or the standing committee is negative, the Head shall provide detailed and specific reasons in writing for any negative recommendation including respects in which the candidate is deemed to have failed to satisfy the applicable criteria. Where the Head's recommendation is negative but that of the standing committee is positive the Head shall also provide detailed and specific reasons for the positive recommendation.

...  

(d) The candidate shall be invited to make a timely response, which shall be added to the file pursuant to section 5.03.

...  

5.10 Review by the Dean

(a) The Dean shall review the recommendations received from the Head to ensure that proper procedures have been followed, that all relevant material has been considered, and that recommendations made are consistent with the evidence presented.

(b) In the case of recommendations concerning tenure, promotion ... the Dean shall consult with an advisory committee. In the case of other recommendations the Dean may consult with an advisory committee.

(c) The advisory committee shall be composed of tenured full professors, one-half of whom shall be elected by the faculty, and one-half of whom shall be selected by the Dean. ...

(d) The Dean may request further information from the Head and the departmental standing committee, and may also obtain such further information as is deemed appropriate.
(e) The Dean, after considering the advice of the advisory committee, (i) may refer the case back to the Head and the departmental standing committee for reconsideration; or (ii) make a recommendation to the President pursuant to 5.11.

5.11 Dean: Recommendation to the President

(a) The Dean shall ... forward his or her recommendation to the President together with the recommendations received from the Department.

(b) If the Dean's recommendation is different from either that of the Head or that of the departmental standing committee, the Dean shall inform the President of the reasons for this.

5.12 Dean: Informing the Candidate

(a) In all cases other than initial appointments, the Dean shall, at the time the recommendations are being forwarded to the President, inform the candidate in writing of his or her recommendation.

(b) If the recommendation of the Dean is negative, in opposition to the recommendation of the Head or the departmental standing committee, or for reasons not raised by the Head or the departmental standing committee, the Dean shall provide detailed and specific reasons in writing to the candidate including the respect in which he or she is deemed to have failed to satisfy the applicable criteria.

... 

(d) The candidate shall be asked to make a timely written response, which shall be added to the file pursuant to Section 5.03.

...

5.14 Review by President

(a) All recommendations to the President concerning ... promotions to the rank of Associate Professor or Professor, or concerning tenure decisions, shall be reviewed by the Senior Appointments Committee, which is a standing advisory committee established by and making recommendations to the President. A Dean whose recommendations are being considered by the committee may participate in the deliberations of the committee but shall not vote on the recommendations.
(b) The President may request a further review of a case by the Dean.

5.15 President: Informing the Candidate

(a) ... the President shall, at the time a decision is made on whether or not a recommendation is to be forwarded to the Board of Governors respecting a candidate, inform the candidate in writing of that decision.

(b) If the recommendation of the President is negative, the President shall provide detailed and specific reasons in writing to the candidate including the respects in which he or she is deemed to have failed to satisfy the applicable criteria and send a copy to the Association.

5.16 Arbitration

The President's decision to deny ... tenure, or promotion may be subject to arbitration following the procedures as provided in Section 13 of this agreement.

* * *

9. Periodic Review for Promotion

9.01

... 

(b) A review of the record of each Assistant Professor shall be conducted during the fifth year after appointment at or promotion to that rank, and every second year thereafter.

* * *

13. Appeal of Decisions on Reappointment, Tenure and Promotion

13.01 Interpretation

For the purpose of this Section:

... 

*decision* means a determination made by the President not to recommend ... tenure, or promotion after periodic review.
"evidence" means the information that was, or should have been, considered at each stage of the process leading to a decision.

"procedural error" means a failure or failures to follow required procedures or a failure or failures to consider relevant evidence.

... 13.07 Jurisdiction

(a) A decision may be appealed on the ground that it was arrived at through procedural error or on the ground that it was unreasonable.

(b) When procedural error is a ground of appeal and a Board decides that there was a procedural error, a Board may:

(i) dismiss the appeal if it is satisfied the error has not resulted in a wrong decision;

(ii) if the error may have resulted in a wrong decision:

(A) direct that the matter in question be reconsidered commencing at the level of consideration at which the error occurred. In so ordering the Board shall specifically identify the error, shall give specific directions as to what is to be done on the reconsideration, and shall adjourn the hearing until reconsideration has taken place; or

(B) if it decides that the error was of such a nature that it would not be possible for the matter to be fairly dealt with on a reconsideration, decide the appeal on the substantive merits.

(c) When unreasonableness is a ground of the appeal the Board shall reverse the decision if it finds that on the evidence the decision is unreasonable; otherwise it shall dismiss the appeal.

(d) When procedural error and reasonableness are grounds of appeal a Board may exercise any of the powers conferred by (b) and (c) above.
1.0 Procedures: Department, Faculty, SAC

1.01 GENERAL

These procedures apply to cases that are considered by the Senior Appointments Committee: that is ... promotion to the rank of Associate Professor or Professor, or appointment with tenure.

The recommendation that comes to the President concerning a promotion or the granting of tenure must be supported by documentary evidence.

A dossier should state explicitly how all the requirements of the Agreement on Conditions of Appointment for Faculty concerning consultations with the candidate's senior colleagues have been fulfilled.

SAC should be told explicitly how the requirements of the Agreement on Conditions of Appointment for Faculty about notification of the candidate of concerns (if any) have been satisfied. Copies of correspondence should be included in the file.

Checklist-Guideline: Each file* sent to the SAC should include the following items and whenever practicable, it would be of great assistance if they could be assembled in the following sequence:

1. Covering Page
2. Letter from the Dean
3. Letter from the Department Head
4. Any relevant correspondence between the Dean and the Department Head
5. Candidate's responses, if any
6. CV and Publications Record (updated and properly prepared)
7. Additional information about teaching, if necessary
8. Identification of the background of external referees
9. Head's sample letter requesting the external referees' letters
10. External referees' letters
The following should not normally be included in a file:

1. Letters from individual members of the Departmental Standing Committee. ...
2. Letters of reference which have not been solicited in accordance with the procedures set out in the Agreement ...
3. A statement by the candidate. The Committee wishes to have factual information only from the candidate and factual information is properly incorporated in the candidate’s c.v. and publications record. ...
4. Page by page assessments of manuscripts of a sort more appropriate to the needs of a potential publisher.
5. Samples of the candidate’s publications.
6. The candidate’s full teaching dossier.

*Please note: When a candidate is being considered for both tenure and promotion, both recommendations should be dealt with in a single file but recommendations should be distinct.

1.02 DEPARTMENT

1.02.1 Timing:

Heads should make initial contact with potential external referees as early as possible, and, if feasible, well before the September 1st date stipulated in the Agreement, so that materials can be sent to them soon after that date and Departmental consideration of cases is not unduly delayed. (See “Schedule of SAC meetings,” below.)

1.02.2 External referees:

- See Agreement on Conditions of Appointment for Faculty, Section 5.05 ...
- Although Heads' letters to external referees will vary, they should include the following items:
  - A clear indication of whether or not a tenure case is a seventh-year consideration, and an explanation of the relationship at UBC between promotion to Associate Professor and the granting of tenure, i.e., that someone can be given tenure in the seventh year
without being promoted to Associate Professor, but that no one can be promoted to this rank without being given tenure at the same time. For a pre-7th-year case, the letter should convey the fact that at UBC a negative decision would mean that final consideration of tenure would be postponed until a subsequent year.

- Referees' letters which are two or three years old are not sufficient, and must be up-dated by the same, or supplemented by other referees.

1.02.3 CVs:

- The Curriculum Vitae and Publications Record must be up-to-date versions dated and initialed by the candidate. Updates are permitted but it should be made clear at what level the update was introduced. The effective date of the original curriculum vitae, publications record, and any updates should be clearly indicated.

* * *

1.03 FACULTY

1.03.1 Schedule of SAC meetings

Included in this Guide is a list of SAC's meeting dates for the coming academic year, with dates set aside for particular Faculties and deadlines (16 days before the SAC meeting) for receipt of dossiers by the Faculty Relations Office. It is in everyone's interest for dossiers to reach SAC in a timely way, and not all at once in the spring.

* * *

1.03.4 Seventh Year Tenure Considerations:

1.03.4.1 The file should clearly identify a seventh-year tenure consideration, on the cover sheet and in the letters from the Dean and the Department Head.

* * *
1.04 SAC

1.04.3 Operating Procedures:
...

1.04.3.2 Subcommittee screening:
...

- Subcommittees can return files to the Faculty for further consideration, or ask for additional information.

1.04.3.4 Introduction of new information:
- Whenever possible, new information from the Dean should be circulated in advance through the Faculty Relations Assistant. Such written material should be limited to information that updates the file, or information that has been requested by a SAC subcommittee.
- The Dean may provide new information orally in response to questions (e.g., "Has this paper now been accepted?")
- Members may provide simple, factual information such as, "This journal is peer reviewed." Members should not serve as the primary source of academic judgment expected of disciplinary colleagues or referees.

(emphasis added)

The following is an excerpt from the University’s Leave of Absence Policy:

Any leave granted to a member of faculty on a pre-tenure appointment will not extend beyond the date of termination of his or her appointment.

Except in the case of maternity leave any period of leave taken during a pre-tenure appointment shall be included in the years of service in that pre-tenure appointment.

When a member of the faculty on a pre-tenure appointment is granted maternity leave, the length of the pre-tenure appointment shall be extended by one year, unless the faculty member informs the Head in writing that she does not wish the pre-tenure period extended.

If a faculty member is unable to perform his or her duties because of illness or injury the parties agree to consider whether, in the
circumstances of each case, the period of a pre-tenure appointment should be extended.

(emphasis added)

Analysis

Counsel’s succinct and helpful submissions and all authorities cited in support of the parties’ positions have been considered. In the interest of providing an expeditious decision, as requested, I will not summarize those matters in this award.

The task for this board is to ascertain what the parties mutually intended in the circumstances of this case. Did they intend to permit Dr. Johnson to supplement his file for the purposes of the reconsideration with information relating to scholarly activity subsequent to the President’s decision?

Central to the Association’s position is its contention that, where the University concedes a procedural error has occurred that may have led to a wrong decision, and concedes the matter in question must be reconsidered at the departmental level, the President’s decision and its evidentiary underpinnings no longer exist. The Association says the Article 5 procedures start afresh on the reconsideration such that Dr. Johnson is entitled to supplement his file under Article 5.03 with new information evidencing his scholarly activity since the President’s decision.

The University’s contention is that the President’s decision continues to exist and is simply reconsidered starting at the appropriate review committee level and in accordance with the arbitrator’s directions. The University maintains Article 5.03 applies to the initial consideration process, whereas Article 13 applies to the reconsideration of a decision. A candidate cannot, says the University, supplement his
reconsideration file under Article 5.03 with new information relating to scholarly activity outside the seven year pre-tenure period.

In my view, the language of the Agreement does not support the Association’s contention that the President’s decision is a nullity for the purposes of a reconsideration. The language supports the University’s position on this issue.

The parties used the term “decision” throughout Article 13.07, and the definition of “decision” in Article 13.01 undoubtedly refers to the President’s initial decision in respect of which an appeal has been launched. I find the language of Article 13.07(b)(i) and (c) clarifies the parties’ intention. Article 13.07(b)(i) authorizes an arbitration board to “dismiss the appeal” if it is satisfied the procedural error did not result in a wrong decision. If the appeal is dismissed on this basis, the President’s initial decision stands and governs. Article 13.07(c) authorizes an arbitration board to “reverse the decision”. This language contemplates the continuing existence of the President’s initial decision notwithstanding an appeal. The power to reverse the President’s decision would, I find, be unnecessary if the decision and its evidentiary underpinnings were a “nullity” for the purposes of a reconsideration.

The Association’s position effectively contends for a reconsideration process in the nature of a de novo consideration of a candidate’s record, as opposed to a reconsideration of a decision. There is no express reference in Article 13.07 to a process in the nature of a de novo review, and the negotiated language does not support a finding that such a process was intended by necessary implication. Under Article 13.07 the referral back to the review committees at the level of consideration at which the error occurred flows from an arbitration board’s direction that the matter in question be “reconsidered”, not considered afresh from the date of the direction.
Indeed, the language of the second sentence in Article 13.07(b)(ii)(A) contemplates real specificity in arbitral directions both in terms of the identification of the procedural error, and in respect of the task for the review committees on reconsideration. The fact that the University has conceded the propriety of a reconsideration, rather than awaiting a direction from the arbitration board, does not alter the nature of the task for the review committees. They must conduct a reconsideration of the matter in question, namely, Dr. Johnson's satisfaction of the prescribed standard of achievement for promotion and tenure under the Agreement.

Is it the parties' intention that the reconsideration must be conducted solely on the basis of the information included in Dr. Johnson's original file, or dossier? Or, is it their intention that Dr. Johnson has the right to supplement his file during the reconsideration with new information relating to scholarly activity since the President's decision? The University contends for the former, the Association for the latter.

As noted earlier, the Association relies on Article 5.03 which was added to the Agreement during the 1993 amendments. For ease of reference, it is repeated here:

5.03 Recommendations: Supplementing Files

In the case of recommendations on ... promotion or tenure the candidate or the University has the right, up to the stage of the President's decision, to supplement the file by the addition of new, unsolicited information (such as a new set of student evaluations, the publication of an additional book or article, the receipt of a grant, a published review of the candidate's work, etc.) or a response to particular concerns that emerge in the relevant documentation.

It also appears that the language of Article 13.07 (formerly Article 13.10) was amended in 1993 or sometime thereafter.
These amendments were negotiated against a well-developed jurisprudential backdrop. A number of these interpretive awards were cited in counsel’s submissions. The parties are presumed to have been aware of this interpretive framework when they negotiated amendments and additions to the Agreement.

Additionally, the language of Article 5.03, and the relationship between that new provision and the exercise of arbitral authority under Article 13.07, has been considered by a respected arbitrator in British Columbia, Arbitrator Kelleher (as he then was), in a series of awards relating to Dr. Dodek (the “Dodek Awards”).

Having critically examined all of the above, I am persuaded that the Association’s interpretation does not withstand close scrutiny under the language expressing the parties’ agreement. The Association’s contention is inconsistent with the fundamental concept underlying the review process provided by the Agreement, namely, equality of treatment for all candidates for promotion and tenure.

I am satisfied that the review process contemplated in the Agreement is intended to ensure equality of treatment by providing candidates with the same period of time in which to develop their records in an effort to satisfy the prescribed standard of achievement. In Dr. Johnson’s case, that period of time is his seven year “pre-tenure period”: see Article 2.03, and in particular 2.03(f)(1), (2) and (3), Article 3.05(b) and Article 9.01(b). The eighth year for Dr. Johnson is a one year terminal appointment: see Article 2.03(g) and (h).

The Association’s approach would effectively overturn the prior jurisprudence under the Agreement. It would provide a candidate, through the remedy of
Debbie Boyce

From: ADR Services [adrsvs@telus.net]
Sent: Friday, October 17, 2003 4:03 PM
To: Allan Black; 'Roper, QC, Thomas A'
Cc: sfuller@ogilvyrenault.com; Debbie Boyce
Subject: UBC -and- UBC Faculty Assoc. (Carl Jonson)

3 typos have been corrected in the Award faxed to you yesterday. I am attaching the Award so you can print pages 21 & 22 which include the following changes:

Page 21, first line should read “Article 13.07(b)(ii)(A)

Page 22, 4th para, 3rd line should be “standard” (s removed from original) and last line of same para should be “see” (not See)

If the attached copy is not formatted correctly or you are unable to print pages 21 & 22 let me know and I can mail them to you.

Our apologies for any inconvenience caused.

Deanna Hansen
Assistant to Joan Gordon

10/20/2003
reconsideration, with something more than he or she is entitled to claim in a properly conducted review process. I find that if the parties had intended such a marked departure from the longstanding expectations prior to the current Agreement, they surely would have expressed their intention in clear terms. In my view, nothing in the language of the Agreement, and more specifically Articles 5.03 and 13.07, supports a finding of this nature.

At the same time, I find the University’s interpretation -- i.e., no operative relationship between Articles 5.03 and 13.07 on reconsiderations -- to be inconsistent with the reasoning of Arbitrator Kelleher in the Dodek Awards.

I begin with a further consideration of the above-quoted language of the Agreement, followed by a consideration of the reasoning in several appeal board interpretations of that language.

Under the terms of the Agreement, candidates for promotion and tenure have a specified number of years (for an Assistant Professor, seven years) in which to satisfy the prescribed standard of achievement in terms of their teaching and scholarly activity. This period of time is referred to as the “pre-tenure period”. A candidate’s satisfaction of the standard must be judged objectively; and for this purpose, a candidate must prepare and submit his or her “record” for review and consideration (see Article 2, 3 and 4).

The procedures in Article 5 are intended to ensure that both the review committee process and the decision by the President will occur before the expiry of the pre-tenure period. The review and decision-making process under Article 5 is expressly linked to the specified pre-tenure periods: see, for example, Article 2.03.
The detailed procedures in Article 5 constitute a multi-level, collegial review process leading to a decision by the President. Although precise dates are not set out in Article 5 for the meetings of the various review committees, the overall purpose of the review regime, as elaborated in the associated Guide, is, I find, intended to ensure that each candidate's record will be compiled and processed up the review ladder in a timely manner such that the President will be able to make her decision before the expiry of the pre-tenure period: see, for example, paragraphs 1.02.1 and 1.03.1 of the Guide.

The provisions of Article 5 contemplate a lengthy process that typically commences in early September of the academic year preceding the year in which the candidate may be considered for promotion and tenure, and ends no later than June 30 of the following academic year. Some provision must therefore be made for updating candidates' records to ensure that all "relevant information" is available for consideration prior to the ultimate recommendation and decision by the President. That mechanism is expressly provided for in Article 5.03 which was, as noted earlier, added to Article 5 during the 1993 amendments.

Appeal board decisions interpreting the Agreement prior to the inclusion of Article 5.03 have determined that the parties intended the review process under Article 5 to be conducted in a manner that ensures equality of treatment for all candidates. Equality of treatment requires all candidates to be given the same period of time -- the "pre-tenure period" specified in Article 2 -- in which to meet the required standard for promotion and tenure. These concepts also inform the issue of relevancy in terms of evidence or information relating to a candidate's teaching and scholarly activity.

Given the passage of time inherent in the appeal/reconsideration process under the Agreement, equality of treatment must be protected where an appeal is launched.
Appeal boards have interpreted the provisions of Article 13, and more particularly their remedial jurisdiction, in a manner that is consistent with the goal of equality of treatment. Two consistent findings emerge from appeal board decisions published prior to the 1993 amendments.

Firstly, effect must be given to the ordinary meaning of the words used to define the term “evidence” in Article 13.01: “the information that was, or should have been, considered at each stage of the process leading to the decision [by the President not to recommend promotion or tenure after a periodic review]”. Thus, at appeal board hearings, “relevant” evidence has been determined to be information relating to a candidate’s teaching and scholarly activity prior to the President’s decision -- i.e., during the pre-tenure period. Information relating to a candidate’s teaching or scholarly activity subsequent to the President’s decision has been determined to be irrelevant and therefore inadmissible. Appeal boards have variously characterized this latter type of evidence as “new evidence”, or “evidence not in existence at the time the President’s decision was made”. See Dr. Francis James -and- President David W. Strangway, May 29, 1986 (Dalby, et al.); and, Dr. Sarah Bell -and- President Douglas T. Kenny, February 16, 1982 (Hickling, et al.).

Secondly, on referrals back to the review committees for reconsideration, appeal boards have declined to exercise their remedial jurisdiction in a manner that would create inequality of treatment, or an unfair advantage, for a particular candidate. Recognizing that the review process for promotion and tenure is subject to the rules of natural justice, appeal boards have identified their remedial jurisdiction as that which the parties have contractually agreed to. Appeal boards have refused to direct remedies on reconsideration which would effectively “extend the pre-tenure period”, thereby giving one candidate more time, or “a second chance”, to meet the required standard of
achievement. In some cases, this approach has been expressed, perhaps too simply, as “freezing the record” at the date of the President’s initial decision. See Dr. Eni -and- The President of the University, March 14, 1994 (MacIntyre, et al.); and, Dr. Francis James, supra.

As I have already observed, the parties negotiated the amendment of Article 13.10 (now Article 13.07) and the addition of Article 5.03 against this interpretive backdrop. In my view, the language of Article 13.07(b)(ii)(A) cannot support a finding that the parties intended an arbitration board to give specific directions to the review committees to consider information relating to Dr. Johnson’s teaching or scholarly activity since the date of the President’s decision, i.e., post-tenure period achievements. I find that if the parties had intended to breath life into the fundamental change for which the Association contends here, they surely would have altered the definition of “evidence” for the purposes of Article 13. They did not do so. That definition was a crucial underpinning of appeal board interpretations and rulings relating to the relevancy and admissibility of evidence at appeal board hearings and for the purposes of reconsideration. See, for example, Dr. Francis James, supra. The unaltered definition of evidence in Article 13.01, referring as it does to “information that was, or should have been, considered at each stage in the process leading to a decision”, constitutes a persuasive indicator of the intended scope of an arbitration board’s authority to “give directions as to what is to be done on reconsideration” under Article 13.07(b)(ii)(A). I am satisfied that this language supports a finding that the remedial authority in Article 13.07 should still be exercised in a manner that is consistent with the underlying principle of the review process itself -- equality of treatment for all candidates.
I am further persuaded that if the parties had intended Article 5.03 to open the
door on reconsideration to information relating to post-tenure achievements, they would
have expressed their intention in clear terms in either or both of Articles 5 and 13. No
clear expression of such an intention is found in these provisions. The parties likely
would have clarified such an intention in the Guide as well. The above-quoted excerpts
from the Guide exemplify the detailed and explanatory nature of that document. None
of the provisions of the Guide signal a fundamental shift in approach to file
supplementation on reconsideration.

Moreover, it must be recalled that reconsideration is but one remedy available
under Article 13.07. Pursuant to Article 13.07(c), an arbitration board may “reverse”
the President’s decision or “dismiss the appeal” where unreasonableness is the ground
of appeal. In such circumstances, the arbitration board’s findings and decision must be
made on “evidence” as defined in Article 13.01. The Association’s interpretation
would give rise to real inconsistencies on appeals depending on whether the matter was
referred back to the review committees for reconsideration due to procedural error, or
whether the arbitration board determined the appeal itself due to unreasonableness.
This result, of course, runs counter to the parties’ evident intention in this Agreement
to ensure consistency in the review and decision-making process.

Turning to the University’s position, I cannot entirely uphold its contention that
there is no operative relationship between Articles 5.03 and 13.07. I accept that the
placement of Article 5.03 in the Article 5 review procedures supports a finding that the
parties intended the provision to apply primarily to the initial consideration process.
The parties’ use of the words “up to the stage of the President’s decision” in Article
5.03 ensures consistency with prior jurisprudence limiting “relevant information” to the
pre-tenure period, while at the same time providing a mechanism for updating
candidates’ records as they climb the consideration ladder. At the same time, the remedy of reconsideration potentially triggers many of the provisions in Article 5. Hence, in certain circumstances, Article 5.03 may be involved in a reconsideration process.

The relationship between Articles 5.03 and 13.07 was addressed by Arbitrator Kelleher in the Dodek Awards, the only awards cited to this board in relation to the new language in the Agreement. I am satisfied that the reasoning in the Dodek awards illustrates the way in which file supplementation may arise under Article 5.03 during reconsiderations without any deleterious impact on the fundamental concept of equality of treatment for all candidates.

In the Dodek Awards, the parties agreed, as they have done in the case at hand, that the President’s initial decision would be reconsidered. During the first reconsideration process the department heads sought Dr. Dodek’s clarification of certain letters on his record. Dr. Dodek provided a written response, but his response was not included in the package that was forwarded up the review ladder. In concluding that Dr. Dodek’s rights had been breached such that a second reconsideration was required, Arbitrator Kelleher referred to Article 5.03 and found that Dr. Dodek’s letter was “a response to a particular concern that emerges in the relevant documentation” -- i.e., the documentation in Dr. Dodek’s original dossier relating to the pre-tenure period. Dr. Dodek’s letter was contemplated by Article 5.03, but was not “new” information relating to his teaching or scholarly activity subsequent to the President’s decision. It was simply a clarification of the significance of relevant information on Dr. Dodek’s file when the President reached her initial decision. It would have satisfied the definition of “evidence” in Article 13.01 if it had been tendered at an arbitration hearing.
A similar finding was made in Arbitrator Kelleher’s brief October 1998 award following the second reconsideration of Dr. Dodek’s candidacy. At issue there was whether, on reconsideration, the departmental committee could rely on statistics showing the number of times Dr. Dodek’s papers were cited between 1991 and 1993. Such statistics would have supplemented the original dossier, but the information in the statistics related to Dr. Dodek’s scholarly activity during the pre-tenure period. Arbitrator Kelleher found that the departmental committee could properly consider that information.

These determinations by Arbitrator Kelleher clarify the limited way in which Article 5.03 may relate to a particular reconsideration process. They also clarify the parties’ intention with respect to the remedial jurisdiction of an arbitrator under Article 13.07(b)(ii)(A). I find Arbitrator Kelleher’s interpretation to be consistent with the parties’ ongoing intention to preserve equality of treatment for all candidates for promotion and tenure. And significantly, Arbitrator Kelleher’s determinations address the Association’s contention that a candidate’s natural justice rights must be given effect during the reconsideration process. This approach to Articles 5.03 and 13.07 ensures that on a reconsideration, all of the information that “was or should have been considered” at each stage of the initial review process will be considered, while at the same time preserving equality of treatment for all candidates.

My conclusion is also consistent with the accepted approach to the exercise of remedial jurisdiction in the administrative law arena generally. The remedial jurisdiction of an administrative tribunal is generally to be exercised in a compensatory, non-punitive fashion. There must be a rational connection between the identified errors in the initial decision-making process and the remedial relief granted. The goal of
remedial jurisdiction is to put the aggrieved party in the position she would have occupied but for the breach of her contractual rights. The goal is not to punish the level of the decision-making process where the error occurred, or to place the candidate in a better position than he would have been in had his contractual rights been complied with. The Association's contention would, I find, have the latter effect. It would also undermine the concept of equality of treatment.

Given the University's conceded procedural error, Dr. Johnson is entitled to a remedy that places him in the position he would have occupied but for the conceded procedural error. He is not entitled to be placed in an advantageous position, vis-à-vis other candidates, that would effectively enable him to extend his pre-tenure period, or have a second chance to satisfy the prescribed standard for promotion and tenure.

I find the Association's reliance on several authorities relating to the admissibility of new evidence in arbitration and labour board hearings to be misplaced. In my view, Dr. Johnson's natural justice rights are protected by an interpretation of the Agreement that facilitates his entitlement to what he should have received in the first instance -- an objective assessment of his record of teaching and scholarly activity during the pre-tenure period against the standard in the Agreement.

The exact nature of the information Dr. Johnson wishes to place on his file during the reconsideration process was not clearly identified at the hearing. It appears to relate to scholarly activity, but beyond that, the information was not described with any specificity. To the extent that it is information such as that addressed in the Dodek Awards -- i.e., information relating to scholarly activity during the pre-tenure period that was or should have been considered at each stage of the process leading to the President's decision -- it may be placed on his file. If, however, it is information
relating to scholarly achievement subsequent to the President's decision, it may not be placed on his file. It is in this way that Articles 5.03 and 13.07 are harmonized. See the Dodek Awards.

I retain jurisdiction to assist the parties with issues arising out of the implementation or clarification of this award.

It is so awarded.

DATED this 15th day of October, 2003 at Vancouver, British Columbia.

[Signature]

Joan M. Gordon
Arbitrator