

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE
LABOUR RELATIONS CODE, R.S.B.C. 1996, c. 244**

BETWEEN:

SIMON FRASER UNIVERSITY

(the "Employer")

AND:

SIMON FRASER UNIVERSITY FACULTY ASSOCIATION

(the "Association")

(Teaching Faculty Restrictions Grievance)

ARBITRATOR: Gabriel Somjen, KC

COUNSEL: Jennifer S. Russell, for the Employer
Stephanie T. Mayor and Alex Bondy, for the Union

HEARING: Written Submissions

DATE OF AWARD: August 1, 2023

1. This case arises from a grievance by the Association that the Employer has breached the Collective Agreement by restricting teaching faculty from appointments as Chair or Director of Departments or Faculties.

2. The Parties agreed to a Partial Agreed Statement of Facts and provided extensive written submissions. Based on those very helpful submissions I reached the following conclusions.

I

3. A background to this dispute is set out in the Partial Agreed Statement of Facts, parts of which I reproduce for ease of reference (with a few deletions for context).

BACKGROUND

2. Simon Fraser University (the “University”) is a university pursuant to the University Act with campuses in Burnaby, Surrey, and Vancouver.

3. The Simon Fraser University Faculty Association (the “Faculty Association”) is the sole bargaining agent for all members of the bargaining unit as defined by the Certification issued May 16, 2014, including lecturers, professors, term faculty, librarians, and laboratory instructors.

4. The University and the Faculty Association are parties to a collective agreement with a term of July 1, 2019 to June 30, 2022 (the “Collective Agreement”).

5. The Parties are currently bargaining a new collective agreement.

6. The Faculty Association has existed as an association since 1965 when the University was established. Prior to being certified as a trade union in May 2014, the Faculty Association and the University operated under a basic agreement and various university policies.

7. The Parties’ first collective agreement (ratified in 2016) was modelled on these existing university policies and the basic agreement.

FACULTY CATEGORIES

8. The Collective Agreement provides for several categories of faculty members:

- (a) tenure track faculty, also referred to as “research faculty”, which refers to Instructors, Assistant Professors, Associate Professors, and Professors;
- (b) teaching faculty, which refers to Laboratory Instructors, Lecturers, Senior Lecturers, and University Lecturers;
- (c) library and archivist faculty, which refers to Librarians, Archivists 1-4, and Division Heads; and
- (d) “other association appointments”, which include practitioner faculty, term research faculty, and post-retirement appointments.

9. "Lecture faculty" refers to Lecturers, Senior Lecturers, and University Lecturers (all teaching faculty except for Laboratory Instructors).

10. According to the Faculty Association's dues list, as of May of 2023 there are approximately 1,217 faculty members at the University with a total of 851 Research Faculty members. There are 27 Practitioner Faculty and 65 Librarian/Archivist Faculty. There are 269 Teaching Faculty members, which is approximately 20% of all faculty members in the Faculty Association's bargaining unit. These numbers represent the faculty contingent at a single point in time and include both continuing and non-continuing faculty members.

UNIVERSITY GOVERNANCE STRUCTURE

11. Under the University Act, the University is divided into eight "faculties" which are academic administrative divisions that focus on teaching and research in specific subject areas.

12. Five of the faculties are "departmentalized", which means they are further subdivided into departments or schools (referred to collectively as "Departments"), each of which will have a Chair. In total, there are 38 Departments across the University.

13. Three of the faculties are non-departmentalized (i.e. "NDFs"): Beedie School of Business, the Faculty of Education, and the Faculty of Health Sciences.

14. The head of a Department is the chair or director (referred to collectively as "Chairs").

15. Chairs fulfill various roles in their respective Departments, which may include:

- (a) Chairing the tenure and promotion committee ("TPC");
- (b) Chairing search committees;
- (c) Fulfilling responsibilities related to workload allocation for faculty members in accordance with Articles 27.17 – 27.21 and 35.69 – 35.79 of the Collective Agreement;
- (d) Budget allocation, in consultation with the Unit and the Dean;
- (e) Overseeing undergraduate and graduate programs;
- (f) Running department meetings and working with other faculty members to build the governance structure for the Department;
- (g) Acting as a conduit between the Dean and the Department;
- (h) Leading strategic academic planning for the unit, including annual requests for continuing faculty renewal, senate-driven unit-level academic plans (5-year cycle), and senate-driven quality assurance processes (7-year cycle with midcycle review);
- (i) Reviewing research proposals including signing off on equipment use and space allocation;
- (j) Allocating space and equipment in consultation with the Dean;
- (k) Forwarding study leave and research grant applications, along with their recommendation, to the Dean for adjudication;
- (l) Fundraising, in consultation with the Dean and other offices;

- (m) Managing accreditation processes, where applicable and in consultation with the Dean;
- (n) Managing external stakeholders; and
- (o) Reviewing student grade appeals.

POLICIES

16. Article 51 of the Collective Agreement was first negotiated in the 2014 – 2016 round of bargaining and existed in its current form in the Parties' first collective agreement.

17. Prior to the negotiation of the first collective agreement, the University had implemented a series of policies related to academic administrator appointments including the following, ... :

- (a) Terms of Appointment for Academic Administrators Policy AC 44 (1980);
- (b) Appointment of Department Chairs and Directors of Schools Policy AC 57 (1991);
- (c) Appointment of Department Chairs and Directors of Schools Policy A 13.02 (1992);
- (d) Appointment of Associate Deans, Associate Chairs/Directors, Program Directors and Program Coordinators Policy A.10.03 (1992).

18. The current policy related to academic administrative appointments is titled "Policy A13.04 - Terms of Appointment for Departmental Chairs/Directors of Schools and other Academic Administrators". ...

EXAMPLE OF TEACHING FACULTY SERVING AS CHAIR

19. In 2019, the School of Sustainable Energy Engineering ("SSEE") was approved by the University Senate and introduced as a new school. ...

20. Dr. Kevin Oldknow had served as program director for the SSEE program. He also served as the inaugural Director of the School of Sustainable Energy Engineering from June 1, 2019 – December 31, 2019, and then again from September 1, 2020 – July 15, 2022.

21. Dr. Oldknow's appointment letter from the President and Vice-Chancellor Dr. Andrew Petter for the position of Director of SSEE for a term of June 1, 2019 to August 31, 2024. ...

22. For the period from February 1, 2020 – August 31, 2020, Dr. Oldknow was on an administrative leave. During this time, Dr. Joseph Peters, who is Research Faculty, served as Acting Director of SSEE. ...

23. On November 23, 2020, Dr. Oldknow was offered an appointment as Associate Professor with tenure in SSEE effective May 1, 2021. Attached as Exhibit 7 is a Memo from E Fiume to the Vice President Academic in this regard. Prior to that appointment, Dr. Oldknow held a position as a Senior Lecturer.

...

25. Dr. Oldknow assumed his current position as Senior Advisor to the Provost in the Office of the Vice-President, Academic and Provost effective July 14, 2022.

EXAMPLES OF TEACHING FACULTY SERVING AS ACTING CHAIRS

26. Dr. Michael Sjoerdsma has served as the Acting Director of the School of Engineering Science for a series of consecutive terms:

- (a) Nov 20, 2021 – Dec 31, 2021
- (b) Jan 1, 2022 – April 30, 2022
- (c) May 1, 2022 – Dec 31, 2022
- (d) Jan 1, 2023 – Jun 30, 2023

...

28. Dr. Sjoerdsma is a Senior Lecturer.

29. Dr. Mehran Ahmadi has served as the Acting Director of the School of Sustainable Energy Engineering since July 15, 2022. His term is set to expire on August 31, 2023.

30. Dr. Ahmadi is a Lecturer.

OTHER ACADEMIC ADMINISTRATIVE APPOINTMENTS

31. As a part of the University's internal governance structure, the University appoints faculty members to various other academic-administrative appointments ("OAAs"). These OAAs are normally term appointments and individuals holding them must have an underlying faculty appointment within the bargaining unit.

32. Faculty members can hold administrative appointments to positions within the bargaining unit (e.g. Program Directors) or outside the bargaining unit (e.g. Associate Deans).

33. For clarity, at the University the term "director" can be used to refer to both Directors of Schools (who are equivalent to Department Chairs), and Program Directors. Program Directors are not equivalent to Chairs. For instance, they do not chair TPCs.

COMMUNICATIONS

34. Dr. Jane Pulkingham is a Senior Advisor (Academic Affairs) in the Office of the Provost and Vice-President, Academic. She was the Dean of the Faculty of Arts and Social Sciences between approximately 2016- 2021. ...

35. On November 8, 2019, Dr. Pulkingham responded to an email inquiry from Dr. Mary Ellen Kelm, Graduate Program Chair, about whether Dr. Sarah Walshaw, a teaching faculty member, could serve as Chair of the History Department. ...

36. On June 29, 2020, Dr. Pulkingham emailed Dr. Melek Ortabasi regarding the search for a Chair in the Department of World Languages and Literatures. ...

These e mail exchanges indicated that teaching faculty were not eligible for Chair positions.

37. In June, 2022, SFUFA raised concerns about the Faculty Relations website which had been amended to include the following statement: "Note: Teaching faculty and non-continuing faculty members normally are not eligible candidates for Chair/Director positions". On October 30, 2019, August 2, 2020, August 12, 2020 and April 4, 2023, the Faculty Relations website did not display this statement.

38. On June 15, 2022, Dr. Sean Zwagerman, Associate Dean of the Faculty of Arts and Social Sciences ("FASS"), sent out an email to all faculty members clarifying a job advertisement that was posted online for the Director of Criminology position. ...

This indicates that teaching faculty were eligible and welcome to apply for a Director's position.

39. Dr. Catherine Dauvergne was the Vice-President Academic and Provost between November 28, 2020 and June 30, 2022.

40. On June 20, 2022, Dr. Dauvergne responded to an inquiry from Dr. Kumari Beck, Associate Professor, Faculty of Education, and President of the Association about whether Teaching Faculty were eligible to serve as Chairs. ...

She indicated that teaching faculty are eligible to serve as Chairs

41. Between October 7 and October 25, 2022, the Acting Dean of the Faculty of Arts and Social Sciences, Dr. Lara Campbell and Dr. Evan Tiffany, Associate Professor and Chair of the Department of Philosophy exchanged emails regarding whether Teaching Faculty could be appointed as Chairs. ...

She stated that teaching faculty cannot serve as Department Chairs.

GRIEVANCE

42. On October 28, 2022, the Faculty Association filed a policy grievance alleging that the University breached the Collective Agreement and applicable law, including but not limited to Articles 35.66 and 51.5 of the Collective Agreement. ...

II

4. The Collective Agreement between these Parties was first signed in 2016. Prior to that there was a basic agreement between the Parties that was not a collective agreement. Many of the policies that existed before 2016 were partially incorporated into the Collective Agreement including policies regarding Chairs of Departments and Directors of Schools.

5. There have recently been conflicting statements by senior leaders of the Employer as to the eligibility of teaching staff to be considered for Chair/Director positions. The confusion and disagreement over that issue has led to this policy grievance.

6. Each Party states the issue differently.

7. The Association states it as:

This dispute concerns the University's recent and unilateral decision to impose a blanket policy and/or practice that teaching faculty ("Teaching Faculty") members cannot be Chairs/Directors in departmentalized faculties. Of note, the University has not applied such a policy and/or practice to Associate Chairs/Directors, Acting Chairs/Directors, any Directors in non-departmentalized faculties ("NDFs"), as well as any other academic administrative appointment at the University.

8. The Employer states it as:

The University says that the issues correctly stated are as follows:

(a) Does the language of the Collective Agreement grant teaching faculty members the right to serve as Chairs of departmentalized faculties or is that role limited to research faculty members? More specifically:

(i) Does the language of the Collective Agreement reflect a mutual intent to limit the role of Chair to research faculty?

(ii) If not, is it a violation of the Collective Agreement for the University to exercise its discretion to appoint Chairs in accordance with a general requirement that Chairs be research faculty members (absent exceptional circumstances)?

(b) In the alternative, if the Collective Agreement does limit the role of Chair to research faculty members, is the University estopped from relying on this language?

9. In this decision I will review the arguments of the Parties, the history of this issue and the Collective Agreement. I will provide answers to the issues raised. I note that the Parties are currently in collective bargaining. I have considered all the arguments made although I will not restate them all.

10. I am grateful to both Parties for their excellent written submissions and Partial Agreed Statement of Facts which have streamlined this process and allowed me to understand the dispute and the Parties' underlying concerns.

11. Directors and Department Chairs are important positions as internal leadership roles. They also sometimes represent the University to outward facing persons and institutions.

12. A Chair is a recognized leader in their Department or Faculty. They receive a stipend in addition to their regular compensation and are allowed relaxation of their teaching and research duties as well as other benefits. The position carries prestige and authority.
13. Therefore, it is not surprising that the Employer wishes to have the best possible candidates for these positions and the Association wants teaching faculty to have the opportunity to achieve these roles where appropriate.
14. The Collective Agreement sets out some of the functions of a Chair or Director.

Article 51: Academic-Administrative Appointments within the Bargaining Unit

A. General

51.1 The parties recognize the central role of faculty members in the administration of the University, and are committed to the fostering of collegial governance.

51.2 Academic-administrative appointments within the bargaining unit will be treated in accordance with this Agreement except as specifically modified.

51.3 Academic-administrative appointments are secondary and distinct appointments. Appointees must have an academic appointment within the bargaining unit.

B. Departmentalized Faculties

51.4 "Chairs" will refer to the following academic-administrative appointments within the bargaining unit:

Chairs

51.4.1 Department Chairs

51.4.2 School Directors

Responsibilities

51.5 The Chair will be a faculty member who has the respect and confidence of the members of the department and the skill and initiative to guide and manage the Department. During the period of appointment, Chairs will make the interests of the Department their paramount concern, and will ensure that the decision-making process includes full discussion with interested persons and seeks to reconcile differing viewpoints.

51.6 The Chair has overall responsibility for ensuring that Departmental policies are formulated and followed, that University and Faculty policies and procedures are followed, and that individual members of the Department fulfill their assigned duties.

51.7 The Chair is the administrator of the Department and has the responsibility to implement University, Faculty, and Departmental decisions.

51.8 Policy decisions that affect the Department as a whole should, in general, be determined at Department meetings or by committees designated by the Department for making such decisions. On occasions when the Chair is required to make decisions affecting the Department as a whole before these can be considered at a Department meeting, the Chair will report decisions taken to the Department members.

51.9 While the Chair is the administrator of the Department, other members of the Department may share in administrative responsibilities. The operating procedures of the Department will be made known to all members of the Department.

51.10 The Chair will act as spokesperson in reporting decisions of the Department to senior University administrators and other sections of the Faculty, and as the channel for communicating to the Department decisions made by the Dean, the Vice-Presidents, the President, Senate, and the Board.

51.11 The Chair must report to the Dean disagreement within the Department regarding the Chair's leadership or significant dissent from Departmental decisions, including the Chair's own reservations, if any.

51.12 The Chair will report failure on the part of members of the Department to fulfill University, Faculty, or Department responsibilities, and to suggest ways of preventing such failures.

51.13 The Chair will maintain confidentiality in personnel matters except as required for the exercise of their duties.

Procedures for Appointment

51.14 The term of appointment for a Chair will normally be either three or five years.

51.15 Search processes for Chairs are advisory to the Vice-President, Academic.

51.16 There are three possible processes for selecting a Chair:

51.16.1 Full search (internal and external candidates): requires a Search Committee

51.16.1.1 If a department wishes to include external candidates in the search there must be a further consultation in the Department involving the Dean and the Vice-President, Academic. The Vice-President, Academic makes the final decision.

51.16.1.2 The Search Committee will prepare a description of the position and the position will be posted and filled according to Article 23: Continuing Academic Appointments

51.16.1.3 Faculty members, professional and support staff and students in the Department will be formally consulted regarding qualities and attributes needed for the leadership of the Department and invited to submit nominations.

51.16.2 Internal search: may require a Search Committee

51.16.2.1 In a search that is not to include external candidates, a candidate for ratification from within the Department will be identified through one of the following procedures, in order of preference:

51.16.2.1.1 An election supervised by the Dean

51.16.2.1.2 Another procedure suggested by the Department and approved by the Dean

51.16.2.1.3 A search using a search committee as described in Article 51.16.1, Full Search above

51.16.3 Renewal of the current Chair: requires a ratification vote

51.16.3.1 A Chair may stand as a candidate for a subsequent term. If a Chair agrees to go forward for renewal, there will be a ratification vote as outlined below.

51.16.3.2 Detailed procedures for appointment of Chairs are contained in University Policy A13.02, Appointment of Department Chairs and Directors of Schools.

51.17 If a Search Committee is required, faculty members will make up the majority of the committee. The Dean of the Faculty will chair the search committee. As with all search committees, gender diversity must be demonstrated.

Ratification Votes

51.18 In all cases a ratification vote of the recommended candidate will be held.

51.19 The vote will be organized by the Dean's office and the vote will be counted in the presence of a faculty scrutineer.

51.20 A positive ratification is one where a majority of those voting support the recommended candidate.

51.21 The Dean will forward a recommendation concerning the appointment to the Vice President, Academic.

Acting Chair

51.22 Appointment of an Acting Chair for a period of four months or less can be approved by the Dean and does not require ratification by the Department. An appointment of an Acting Chair for more than four months must be ratified by the Department and must be approved by the Vice-President, Academic on the recommendation of the Dean.

Request for Reconsideration

51.23 A formal request for the reconsideration of the suitability of a Chair may be made by the faculty members of a Department to the Dean. Normally, such a request cannot be made during the first year of the appointment of a Chair. The formal request must be in writing, setting out the particulars of the grounds for reconsideration of the Chair's appointment, and must be signed by at least one-half of the faculty members eligible to vote in the election or ratification of a Chair.

51.24 Upon receipt of a formal reconsideration request, the Dean will provide a copy to the Chair and give them an opportunity to respond to it. If the issue(s) cannot be resolved at this stage, the Dean must institute a conflict resolution process, which may involve the appointment of a mediator, with the aim of resolving the issue to the mutual satisfaction of the parties involved. The Dean should communicate in writing with all faculty members of the Department as to the process to be used and the timelines to be followed. Satisfactory resolution of the matter at this stage will be evidenced by a written agreement of the parties or a vote at a departmental meeting.

51.25 Where no satisfactory resolution of the issues giving rise to the request for consideration is achieved through the process outlined above, the Dean will put the issue of the reconsideration of the Chair to a vote no later than 30 working days after the end of the conflict resolution stage. The vote will be by secret ballot conducted by the Dean's Office. The results of the ballot will be made public within 24 hours of the results being tallied.

51.26 If the motion to reconsider the suitability of the Chair does not receive the support of at least 60% of the voting faculty members, no further reconsideration will take place for at least one year.

Rescinding a Chair's Appointment

51.27 If the motion to reconsider has the support of at least 60% of the voting faculty members, the Dean will consider whether the Chair's appointment should be rescinded. The Dean will make a written recommendation to the Vice-President, Academic. The Chair will be entitled to make a written response.

51.28 After considering the Dean's recommendation and the Chair's response, the Vice President, Academic will make a recommendation to the Board of Governors.

51.29 The appointment of a Chair may be rescinded by the Board of Governors for just cause. Reasons for rescinding a Chair's appointment may include non-performance of duties, non-compliance with University policy or with the constitution of the Department, or for other serious acts or omissions related to their responsibilities as Chair.

Remuneration

51.30 Chairs will be remunerated as per Policy A 13.04 until otherwise agreed by the Parties.

Teaching Reduction

51.31 Department Chairs and School Directors will receive a one-half reduction in the normal annual teaching assignment. Other academic administrative appointments may receive reduction in their teaching assignment depending on the administrative complexity of the unit as determined by the Dean.

Research Grants

51.32 Chairs will be eligible to apply for internal research grant support. Grants may be made after careful review of the research program by the appropriate Dean. Support will be at a level appropriate to the discipline.

Research Leave

51.33 Department Chairs and School Directors will be granted research leave at full academic salary for two semesters after a three-year term and three semesters after a five-year term. Other academic-administrative appointments may receive research leave depending on the administrative complexity of the unit as determined by the Dean.

Study Leave

51.34 Chairs who are given teaching reduction will accrue eligibility for study leave at half the normal rate.

Associate Chairs/Directors

Appointment

51.35 The Chair will consult with the Members of the Department on the nomination of an Associate Chair/Director.

51.36 There will be a ratification vote and a recommendation may proceed to conclusion when a nominee has been approved by more than 50% of those voting.

51.37 The term of appointment will be determined by the Dean and will not exceed three years.

Responsibilities

51.38 The Chair will determine the duties of the Associate Chair in consultation with the Dean.

Remuneration

51.39 Associate Chairs will be remunerated as per Policy A 13.04 until otherwise agreed by the Parties.

51.40 Associate Chairs/Directors may receive reduction in their teaching assignment, internal research grants, and/or research leave depending on the administrative complexity of the unit as determined by the Dean. These terms will be included in the letter of appointment to the administrative position.

Appointment of Acting Associate Chair

51.41 The appointment of an Acting Associate Chair will follow the same rules as appointment of Acting Chairs above.

C. Non-Departmentalized Faculties

51.42 In this section, "Director" will refer to academic-administrative appointments who will function as equivalent to Chairs in the non-departmentalized faculties. A list of these will be provided by the Dean to the University and the Association annually by September 1st.

Responsibilities of Directors

51.43 The Director will be a faculty member who has the respect and confidence of the members of the faculty and the skill and initiative to guide and manage the program. During the period of appointment, the Director will make the interests of the program their paramount concern, and will ensure that the decision-making process includes full discussion with interested persons and seeks to reconcile differing viewpoints.

51.44 The Director has overall responsibility for ensuring that program policies are formulated and followed, that University and faculty policies and procedures are followed, and that individual members of the faculty fulfill their assigned duties.

51.45 Policy decisions that affect the program as a whole should, in general, be determined at program area meetings or by committees designated by the faculty for

making such decisions. On occasions when the Director is required to make decisions affecting the program as a whole before these can be considered at a program area meeting, the Director will report decisions taken to the faculty members.

51.46 While the Director is the administrator of the program, other members of the Department may share in administrative responsibilities. The operating procedures of the program will be made known to all members of the faculty.

51.47 The Director will act as spokesperson in reporting decisions of the program to senior faculty and University administrators and other sections of the faculty, and as the channel for communicating to the faculty decisions made by the Dean, the Vice-Presidents, the President, Senate, and the Board.

51.48 The Director must report to the Dean, or the designated Associate Dean, disagreement within the faculty regarding the Director's leadership or significant dissent from program area decisions, including the Director's own reservations, if any.

51.49 The Director will report failure on the part of members of the faculty to fulfill University, faculty, program, or area responsibilities, and to suggest ways of preventing such failures.

51.50 The Director will maintain confidentiality in personnel matters except as required for the exercise of their duties.

Other Articles Applicable

51.51 Other Articles applicable to Chairs are applicable to Directors.

D. Other Academic-Administrative Appointments

51.52 In both departmentalized and non-departmentalized faculties, Deans may appoint other academic administrators. These include, but are not limited to, Directors of Programs or Centers and Course/Area Coordinators, and will be collectively referred to as Other Academic Administrative (OAA) Appointments, regardless of the position title.

51.53 The terms of OAA appointments, including remuneration, will vary with the scope and administrative complexity of the duties assigned, and will be decided by the Dean. OAA appointments may receive reduction in their teaching assignment, internal research grants, and/or research leave. All terms will be clearly outlined in the letter of appointment to the administrative position.

51.54 *NOTE: Insofar as policies governing academic-administrative appointments outside the bargaining unit contain provisions relating to the duties, responsibilities, or privileges of Members of the bargaining unit, those provisions will not be changed without consultation as per Article 8.2: Joint Meetings.

15. This language largely tracks the policies in effect prior to the first Collective Agreement.

16. The Association emphasizes the role of collegial governance in the University and the principle that faculty members have a central role in the administration of the University. That theme is set out in Article 51.1. It also appears elsewhere in the Collective Agreement. For example, Article 28.17 states:

28.17 It is expected that each faculty member will be an active participant in the collegial governance of the University. The faculty member's contributions to all levels of the administration of the University should be considered. Account should also be taken of the faculty member's contributions in initiating and participating in seminars, public lectures or similar activities on campus, and of the stimulation and help they may afford to other faculty members of the University. Included in this category are the public service contributions which faculty members may make. It is recognized that certain faculty members or groups of faculty members may have exceptional service duties or expectations due to their membership in a particular group. These contributions should be taken into account in the context of the faculty member's overall contribution encompassing teaching, scholarly activity, and service. There should, however, be a strong focus on the academic content of the contribution by the faculty member in this category.

and Article 28.1 states:

28.1 Faculty members in accepting appointment undertake to uphold and promote the aims of the University in the creation, dissemination, and application of knowledge. A faculty member's professional efforts should be directed primarily to teaching, research, and service to the University and the community. As teachers, they should be effective in transmitting knowledge of and interest in their fields and should keep abreast of knowledge in their fields. Their research should be of such calibre as to contribute to the advancement of their fields. Faculty members should expect to carry their share of service work. Career advancement will be based upon the extent to which these obligations are fulfilled.

These references support the Association's argument that this grievance is not just about candidates being considered for these leadership roles but their ability to participate in the governance of the University to the extent of their ability. The theme of collegial governance and faculty service runs throughout the Collective Agreement and is an important consideration in this case.

III

17. The Collective Agreement and especially Article 51.5, does not explicitly state that Chairs must be research faculty, nor does it prohibit teaching faculty from eligibility for Chair (or Director) positions. Therefore, it is necessary to review the language in the context of the whole agreement and the institution of the University. These principles are

set out in cases such as: *University of Northern British Columbia v. University of Northern British Columbia Faculty Assn. (Fellers Grievance)*, [2017] B.C.C.A.A.A. No. 65 and *Re Times-Colonist and C.W.A., Local 14003* (1997), 67 L.A.C. (4th) 340.

18. Article 51 does not state that a Chair must be a research faculty although some other aspects of the Collective Agreement stipulate that condition. For example, Article 29 is relevant and speaks of the Tenure and Promotion Committee.

29.1 Annually each department, school, or non-departmentalized faculty will establish a committee to consider renewal, tenure and promotion cases. Each committee will be known as the Tenure and Promotion Committee (the TPC). The TPC will assist Chairs in developing recommendations regarding reappointment, tenure, promotion, and salary review.

29.2 The term of the TPC is April 15th to April 14th of the following year.

TPC Chairs

29.3 In a departmentalized faculty, the Chair of the TPC is the Departmental Chair or equivalent.

29.4 In a non-departmentalized faculty:

29.4.1 The TPC Chair must be either a tenured Associate Professor or tenured Professor who has been a faculty member at Simon Fraser University at least five years. They will normally be appointed for a three-year term.

29.4.2 Candidates for Chair of the TPC may be nominated by another tenure track faculty member or be self-nominated. Five other tenure track faculty members in the faculty must sign the nomination form.

29.4.3 The Office of the Dean will conduct a ratification vote if there is only one nominee and an election if there is more than one nominee. All continuing faculty members are eligible to vote. To be appointed Chair of a TPC, a nominee must receive a majority of the votes cast, whether the vote is a ratification or an election.

This committee is important because it deals with the significant issues of tenure (only available to research faculty) and promotion.

19. Article 29.3 states that the Chair of a TPC is the Departmental Chair or equivalent. Article 29.4 requires that in a non-departmentalized faculty the TPC chair must be tenured; no such requirement is set out in Article 29.3 which deals with departmentalized faculties. The Employer argues that by implication, the TPC chair of a departmentalized faculty must also be research or tenured faculty. That interpretation is possible, but it

leaves unanswered the question of why did the parties not simply apply the tenure requirement to both Articles 29.3 and 29.4?

20. The difference between Articles 29.3 and 29.4 tends to support the Association's argument that being a tenured or research faculty is not a precondition to being TPC Chair in a departmentalized faculty. The University places much emphasis on the requirement that a TPC chair of a departmentalized faculty is the Department Chair to support its argument that the Department Chair must be a research faculty to perform the task of TPC Chair which includes overseeing and managing the tenure and promotion of research faculty. This is a valid consideration in the ultimate decision of who will be Chair but does not necessarily preclude teaching faculty from performing the roles of Chair or TPC Chair.

21. Before a candidate is considered by the VP Academic, who has the ultimate authority to confirm a recommended candidate, that person must first meet the two criteria in Article 51.5: they must have the respect and confidence of the members of the Department, demonstrated by a vote and they must have the skill and initiative to guide and manage the Department. It is likely that research faculty will be able to meet these requirements more easily because of their experience and acceptability within the Department but a teaching faculty who meets those initial requirements could also be considered. Although the title above Article 51.5 is "Responsibilities", these two criteria are clearly qualifications for eligibility to be considered for the position.

22. Because Chairs are generally appointed for 3-5 year terms (See Article 51.14), only continuing faculty can reasonably be considered. Also, the issue raised regarding lab instructors is not germane: there is only one lab instructor in the University and in any event lab instructors are precluded by Article 35.65 from being on a TPC which would disqualify them from the Chair position. In practical terms the issue before me relates to continuing teaching faculty, excluding lab instructors.

23. That conclusion results from a reading of the Collective Agreement language. I also asked the parties to advise me how the TPC chair appointments are made in practice. In answer to this the employer says:

Although there is some variation in practice as to how votes are conducted and whether TPC Chairs are included on the slate for the approval of the Dean, the various deans make it clear that the practice is as asserted by the University, and that the Chair serves as TPC Chair for the duration of their appointment by virtue of the fact that those two positions are linked.

24. The Association says:

The Faculty Association concedes that normally the Department Chair is the TPC Chair. That is not in issue. However, the Faculty Association's point has always been that that is not "always" the case. A Department may choose a candidate for

Department Chair that may be unable to fulfil the TPC Chair role (although we have emphasized that Teaching Faculty are more than capable of doing so and are demonstrating this in various acting positions) or, for other reasons, a Department Chair may not be able to serve as TPC Chair. That is why in the alternative the Faculty Association argued that even if Teaching Faculty cannot operate as a TPC Chair (which we deny), the TPC Chair is not necessarily and in every single case the Department Chair.

25. These submissions do not indicate an invariable practice. It appears that generally, TPC chairs are appointed for 3-5 years which is consistent with my conclusion that only continuing teaching faculty should be considered.

26. If a teaching faculty can meet these criteria, they may be able to be Chair, including Chair of the TPC. They may have experience with research even though they do not have a research appointment and their individual experience may be sufficient to qualify them for Chair, as was the case of Dr. Oldknow and a few Acting Chair appointees. The Association concedes that the ultimate decision is that of the Vice President Academic. Its complaint is that the University has stated a policy that teaching faculty will not be considered for these positions even if they meet these initial criteria.

27. The Association argues that the word “is” in Article 29.3 is discretionary and not mandatory. I agree with the University on this point. The word “is” is definitive, not discretionary. It is clear the Parties intended that the Chair of the TPC be the Departmental Chair, which supports the University’s argument that to be a Department Chair a candidate must also be able to be TPC Chair. In many cases a research faculty would be preferred to qualify for both roles. However, there may be cases where a teaching faculty would be suitable for both roles, as was the case with Dr. Oldknow.

28. There is no allowance in the Collective Agreement for one person to be TPC Chair but a different person to be the Department Chair which the Association suggests would cure the problem of a teaching faculty Chair who cannot perform the role of TPC Chair. The same person must be able to do both roles. In practice, this means the Chair will often be a research faculty but there is nothing in the Collective Agreement prohibiting a qualified teaching faculty from doing both.

29. The University argues that other articles of the Collective Agreement refer to research in the context of Chairs and by implication only research faculty can be Chairs. Some examples are 51.32 Research Grants and 51.33 Research Leave. I agree that these examples show in most cases the Chair will be a research faculty, but they do not necessarily preclude teaching faculty. The Association points out that in some cases teaching faculty may perform more research than some research faculty.

30. Considering the relevant portions of the Collective Agreement, in context, I agree with the University that they reflect an understanding that Chairs will, in general, be research faculty, but they do not reflect a mutual intention to preclude teaching faculty.

31. What of the practice of the parties, their bargaining history and the statements of the University on this topic, especially in recent years?

32. The bargaining relationship is relatively recent. Until the last few years the question of teaching faculty being considered for Chair/Director positions has not been an issue. The incorporation of some of the previous policies into the Collective Agreement did not address this issue. The bargaining history does not substantially inform the outcome here.

33. The practice of the parties on this issue has been inconsistent. Chairs have generally been research faculty, but not always. The Association did not raise any issue about that until recently.

34. From time-to-time Chairs, Associate Chairs or Acting Chairs have been teaching faculty. Dr. Oldknow is a recent example. Some of the Acting appointments have lasted for considerable periods. For example, Dr. Sjoerdsma has been Acting Director of the School of Engineering Science for 19 consecutive months.

35. While these examples are not numerous, they demonstrate a willingness in the University to fill a Chair or Acting Chair position with a teaching faculty if the circumstances warrant and the candidate has the ability to perform the role.

Conclusion

36. All these factors lead to this conclusion.

37. Research faculty have generally been chosen for Chair roles but teaching faculty have sometimes filled the role. A strict prohibition on teaching faculty being Chair is not supported by the language of the Collective Agreement, the bargaining history or the conduct of the University. To the extent that the University seeks to maintain a policy of not allowing continuing teaching faculty to be eligible for consideration, such a policy is contrary to the Collective Agreement.

38. Because the University has the discretion to decide whether a candidate who has met the criteria in Article 51 should be awarded a Chair position, it can prefer candidates who are research faculty, provided a candidate recommended by a unit is considered on the merits of their case. A continuing teaching faculty who meets the initial criteria in Article 51 is eligible for consideration but not necessarily entitled to the appointment.

39. The Association argued that if I agreed with the University's initial argument, I should find an estoppel against the University. I do not need to address that argument but find in any event that no estoppel arises here. The University's practice and statements about the issue of eligibility for Chair positions have not been consistent enough that I could find an unequivocal representation to the Association. Because of this grievance and, as the parties are currently bargaining, any estoppel would now have ended in any event.

Dated at Vancouver, BC, this 1st day of August 2023.

“Gabriel Somjen”

Gabriel Somjen, KC
Arbitrator