

# ACADEMIC FREEDOM AND TENURE: THE UNIVERSITY OF TEXAS MEDICAL BRANCH (GALVESTON)<sup>1</sup>

(APRIL 2010)

## I. Introduction

On September 13, 2008, the city of Galveston, Texas, including the University of Texas Medical Branch, suffered devastation as a result of the landfall of Hurricane Ike. On the campus itself, more than 1 million square feet of building space was flooded, including the first floor of the John Sealy Hospital, which as a consequence lost its blood bank, sterile processing unit, pharmacy, and cafeteria. Initial university estimates indicated losses of nearly \$710 million, of which the largest portion, \$276.4 million, represented losses from business interruption. Although medical students were able to return to Galveston approximately five weeks after the hurricane, and the hospital reopened (with diminished capacity) before the end of the year, the University of Texas Board of Regents, estimating that the campus's current rate of expenditures exceeded revenue by almost \$40 million per month, predicted that UTMB would "deplete its financial resources and reserves in approximately three months, leaving the institution in the untenable position of having no funds to continue to operate." As a result, on November 12 the board declared a state of financial exigency. The reasoning behind this decision was later embodied in a formal "Statement of the Basis for the Initial Decision to Reduce Academic Positions," prepared by the UTMB administra-

tion to be distributed to all faculty and staff who wished to contest the financial basis for the termination of their appointments. Because it provides a succinct summary of the arguments that would figure in University of Texas System correspondence with the staff of the American Association of University Professors and in discussions with the undersigned investigating committee, it is quoted here in its entirety:

As of November 12, 2008 it was determined that UTMB suffered capital losses, including losses resulting from damages to buildings and equipment, of approximately \$400 million due to Hurricane Ike. Further, business interruption costs were projected at approximately \$500 million. Projections indicated that John Sealy Hospital operations would not be immediately returned to pre-hurricane levels resulting in a significantly reduced need for health care personnel and services and reduced revenue streams from inpatient and outpatient care. Total projected hurricane related costs were in excess of \$700 million.

Financial analyses also showed that UTMB's rate of expenditures, including the continuation of wages and benefits for faculty and staff, would exceed revenues by approximately \$40 million per month. UTMB cash reserves were insufficient to fund the pre-hurricane level of operations. Financial projections showed that UTMB would deplete its financial resources and reserves by the end of March, 2009.

Other sources of funds, such as the Permanent University Funds, Available University Funds, and monies projected to be provided by the Federal Emergency Management Agency are not authorized to be used for standard ongoing operating expenses or the payment of wages and benefits at UTMB. UT System and institutional endowments are devoted by law to specific uses and cannot be used for wages

---

1. The text of this report was written in the first instance by the members of the investigating committee. In accordance with Association practice, the text was then edited by the Association's staff, and, as revised, with the concurrence of the investigating committee, was submitted to Committee A on Academic Freedom and Tenure. With the approval of Committee A, the report was subsequently sent to representative faculty members involved in the events and to the administrations of the University of Texas Medical Branch and the University of Texas System. In light of the responses received, and with the editorial assistance of the staff, this final report has been prepared for publication.

and benefits at UTMB. Furthermore, state funds are not available for use through [the] UT System; rather, the legislature appropriates funds directly to each individual institution within the System.

The realities of UTMB's economic circumstances created an imminent financial crisis, compelling a reduction in force in order to assure the ongoing fiscal validity of the remainder of UTMB's medical education, research and health care enterprise.

Following its declaration of a state of financial exigency, the board instructed the UTMB administration to implement a reduction in force of approximately 3,800 full-time-equivalent faculty and staff positions, a figure that subsequently fell to slightly under 3,000.<sup>2</sup> On November 17 an e-mail entitled "Special Message from the President" went out from UTMB president David Callender, who wrote, "Tomorrow, we will begin giving notices to approximately 2,000 faculty and staff whose positions are part of the reduction in force authorized by the University of Texas System Board of Regents. We expect to complete the process Monday, November 24." On the latter date, the provost sent letters of termination to affected faculty.

As a consequence of the procedures followed in the implementation of the reduction in force, several faculty members sought the advice and assistance of the American Association of University Professors during the fall and winter, and following staff efforts to resolve the Association's procedural concerns through correspondence with the system and institutional administrations, the Association's general secretary authorized the appointment of this investigating committee to report its findings to Committee A on Academic Freedom and Tenure. Two members of the committee met in early September 2009 in Austin, the headquarters of the University of Texas System, with Chancellor Francisco Cigarroa, Executive Vice Chancellor for Health Affairs Kenneth Shine, and General Counsel Barry Burgdorf.<sup>3</sup> The two members also met separately

---

2. The necessity for such a declaration seems to have been apparent to the board and UTMB administration for several weeks, but at the request of state legislative leaders it was delayed until after the November general election. The administration has stressed to the investigating committee that it actually had about five weeks, rather than a few days, to prepare the initial round of termination recommendations in consultation with the departmental chairs.

3. Dr. Cigarroa was president of the UT Health Center at San Antonio prior to his installation as the new system chancellor early in 2009. Dr. Shine was serving as interim chancellor at the time Hurricane Ike struck, and, after Dr. Cigarroa's appointment, he returned to his former position as executive vice chancellor of health affairs.

with George Reamy, who as a part-time staff member of the Texas Faculty Association (TFA), the statewide higher education arm of the National Education Association, had represented several faculty members at their appeal hearings in his capacity as TFA faculty advocate.

At the beginning of October, all three members of the committee met in Galveston with Garland Anderson, UTMB provost and dean of the School of Medicine, and UTMB counsel Carolee King, as well as with UTMB staff attorney Dan Sharphorn, who was provided as counsel by the system to the faculty panels hearing the appeal cases (see Section III.C below). In addition, the investigating committee met with eleven members of the faculty, one of them representing the committee initially formed to review departmental recommendations (hereafter the review committee) and two of them, along with Mr. Sharphorn, representing the faculty panels that heard individual cases (hereafter the appeal panels). The remaining eight were complainants, one of whom had since resigned and taken another position and with whom the committee spoke by telephone. The committee also met with a faculty member at the MD Anderson Cancer Institute in Houston, who had served as president of the systemwide Faculty Affairs Council. The interviews took place both with faculty members whose services had been terminated as a result of the reduction in force, including two former UTMB Faculty Senate presidents, and with representatives of the faculty bodies involved in the decision-making and appeals processes. The committee was received hospitably by all parties. Following its visit to Galveston the committee held conference calls with President Callender, who had been unavailable at the time of the committee's visit, and with counsel King, to pursue further some of the questions raised during the interviews.

## II. The Institution

The Medical Department of the University of Texas held its first classes in 1891, in one classroom building and one hospital in Galveston, with twenty-three students and thirteen faculty members. Its location had much to do with the fact that at that time Galveston was the largest city in Texas. Renamed in 1918, the University of Texas Medical Branch became the home of the first medical and nursing schools in Texas and eventually expanded to an eighty-five-acre campus on Galveston Island with fifty-four major buildings. Prior to the landfall of Hurricane Ike in September 2008, UTMB enrolled approximately 2,300 students in undergraduate, graduate, and medical degree programs in the Schools of Medicine, Nursing, and Allied Health Professions and the Graduate School of Biomedical Sciences, all of

which are represented on the UTMB Faculty Senate.<sup>4</sup> In addition, UTMB houses two institutes, the Marine Biomedical Institute and the Institute for the Medical Humanities. Before the implementation of the reduction in force in November 2008, UTMB had more than 8,000 non-faculty employees and 1,084 permanent faculty members, including both basic scientists and clinicians. The reduction in force affected only the School of Medicine.

While UTMB was the first medical facility in the University of Texas System, that system now has five other health-related institutions, each with its own administration but all under the oversight of the UT Board of Regents. Individual institutions in the UT System have considerable budgetary autonomy, and the system does not supervise a unified presentation at the time of budgetary hearings, nor do the regents technically have authority to move money from one campus to another. The system and the campuses engage in continuing consultation, however, and the system does advise individual campuses on their budget requests.

Health science centers in the University of Texas System are encouraged to develop specific strengths and missions, and UTMB is no exception. It provides safety-net care for indigent patients from around the state, serving at present patients from more than 150 counties, and it has also been the site of a top-ranked trauma center, whose operations were interrupted by the hurricane. The institution is one of only two health science centers in the system to own their own hospitals; the other is a much smaller operation in Tyler. Other hospitals in the system are operated under other authorities, and hence UTMB, in addition to having substantial Medicaid and indigent-care commitments, accounts for a disproportionate share of health care expenses systemwide. In the health science centers, both basic scientists and clinicians, absent specific stipulations in their contracts to the contrary, are eligible for tenure, albeit by different standards appropriate to the two cohorts. A post-tenure-review system can theoretically lead to dismissal, but no faculty members with whom the investigating committee met recalled any such instance, and several of those notified of termination referred to their positive post-tenure reviews in the years and months leading up to the reduction in force as proof of satisfactory performance.

Like an increasing number of public institutions, UTMB may be more accurately described as “state-

assisted” than “state-supported,” and by the time of the hurricane, state appropriations amounted to about 10 percent of the operating budget. Hospital contracts and physician income provide about 53 percent of the total funding for the School of Medicine, with the balance coming from cost recovery on externally funded grants and from philanthropy, notably financial support provided by the Sealy and Smith Foundation to the hospital that carries the Sealy name. The education and research missions of UTMB are thus effectively supported in large measure by clinical activities, a point that will be of critical importance in assessing the question of financial exigency (see Section IV). Faculty and staff salary and benefits account for about 67 percent of the school’s budget.

Faculty input to the regents is provided by the Faculty Affairs Council, a systemwide faculty body that reports annually to the board and works through its representatives with several board committees. The council has been consulted in the development of institutional policies, such as the question of how to define salary support in medical schools. Both it and the board’s health affairs committee have been involved in changes in the regents’ rules as they affect medical centers. At the time of the events described in this report, the council sent a letter of protest to the board, outlining its own view of one particular policy, Rule 31003 of the system’s Rules and Regulations of the Board of Regents, entitled “Abandonment of Academic Positions and Programs,” and in particular Section 3, “Elimination Due to Financial Exigency,” which is at the center of this report. Under regents’ procedures, a campus president determines the existence of financial exigency, though a formal declaration may, as in this case, come from the board. Rule 31003 nowhere defines financial exigency, however, a point to which the investigating committee returns later.<sup>5</sup>

### III. Events and Actions Subsequent to the Declaration of Financial Exigency

This section presents information, as understood by the investigating committee, on events following and related to the declaration of financial exigency at UTMB.

#### A. THE FACULTY REVIEW COMMITTEE

The UTMB administration took action within days after the board of regents declared a state of financial exigency. The provost met with department chairs in the School of

---

4. Senate representation is as follows, according to senate bylaws: five members from the allied health professions, six from the graduate school, ten from medicine, and five from nursing.

---

5. Information provided by the board historian indicates that after Rule 31003 was first promulgated in 1980, it was reviewed at least twice, in 1992 and 2003–04, both times with input from the Faculty Advisory Council.

Medicine and instructed them to classify their faculty in their respective departments into three categories. The “A” list was to consist of persons whose services were critical to carrying out the academic, clinical, and research missions of the department and could therefore not be spared. The “B” list would include faculty members who were not critical but whose loss would pose a difficulty to the department. The “C” list was to contain the names of faculty members whose services could no longer be justified under the present economic circumstances. Some confusion existed among the faculty as to whether newly appointed faculty were held to be exempt from the process. No such directive appears to have come from the administration, though in one or two instances preferential treatment for new appointees was articulated as a matter of departmental policy. According to the provost, departments were instructed to cut administrative positions and professional staff by 50 percent before any decisions affecting faculty were made. (As a result of this action, according to the administration, the number of department administrators was reduced from twenty-one to twelve.) The chairs were given ten days to make their decisions and report back. When some chairs resisted naming anyone to the “C” category, the provost told them in a second meeting that they could not escape the responsibility for naming faculty or staff for appointment termination. In short, every department chair, whatever the relative importance or centrality of that department to the academic mission or whatever its recent history in terms of additional, flat, or reduced financial support, was held to the same obligation of providing candidates for termination. The chairs were enjoined to secrecy, and apparently in most cases neither their advisory committees nor even their vice chairs were informed.

Following receipt of the final lists from the chairs, the president, on the recommendation of the provost and under the authority granted to him by Rule 31003, appointed a six-member faculty review committee, drawn from lists of senior faculty members recommended by the chairs themselves, to make recommendations “as to which academic positions and/or academic programs should be eliminated.” Section 3.2 of Rule 31003 specifically states that such a committee will review and assess all academic programs as part of the process, identifying “those academic positions that may be eliminated with minimum effect upon the degree programs that should be continued.” The committee is charged with reviewing “course offerings, degree programs, supporting degree programs, teaching specializations, and semester credit hour production.” Section 3.3 stipulates that, once that review is complete, the committee makes

recommendations on the elimination of positions by reviewing the “academic qualifications and talents” of those holding academic positions and the needs of the program. The committee is to weigh the faculty member’s past performance and future potential in deciding on its recommendations.

Even before the review panel issued its report, several members of the UTMB faculty challenged the manner of appointment to the committee and the Rule 31003 procedures themselves. These faculty members pointed out, first, that the chairs, having drawn up their lists of faculty members to be recommended for release, then exercised additional influence by nominating the members of the initial faculty review board. Second, they observed that, rather than undertaking programmatic review, which would have provided data on the role of all faculty in a given program or department, the review committee was confined to vetting the recommendations of the chairs as to who should be placed on the “C” list and thus could not compare the qualifications and merits of those recommended for release with those who were not. They objected further that the faculty senate had been given no role in discussing the constitution of the committee, that the committee’s membership was kept secret, and that the committee kept no records of its proceedings. The provost defended the constitution of the committee, stating that he asked the chairs to name senior tenured faculty who were known for their judgment and their credibility and that he did not know all the members himself. The membership, he said, was kept secret until the release of the committee’s findings because he did not wish its members to be subject to public pressure. The senate was not consulted, the provost further said, because schools other than the School of Medicine were represented on it, though in the event one senator was named to the committee. (Some faculty members complained that this individual was a colleague in the provost’s own department.) Whether the faculty review committee should have kept minutes in the form of a record of discussions seems more debatable, given that discussions in personnel committees of appointment, promotion, and tenure are publicly reported only in the form of the outcome in each case.

The review committee met for two days, scheduling separate interviews with twenty department chairs. According both to the provost and to the faculty representative from the committee with whom the investigating committee met, the review committee was not provided papers on any of the candidates for release in advance of the meeting. As stated earlier, the committee

did not have access, either formally or informally, to the names of other faculty members not included on the “C” list, but the committee’s faculty representative stated that in any case there would have been no time to conduct a more extensive review. Rather, the committee summoned the particular department chair to discuss each case. It then met without the chair’s presence and voted the “C” recommendations up or down, usually up, though the provost recalled at least two occasions on which the graduate dean intervened on behalf of the faculty member because of his or her usefulness to the graduate program. No member of the committee was permitted to be present for the discussion and vote on any case in his or her own department, and indeed in some instances members claimed not to have known who among their colleagues had been notified of layoff until meeting them during the appeals process.

It is clear that, in the time provided, the committee could have applied only minimal standards of proof in reviewing the cases of both tenured faculty members and nontenured faculty members at risk for termination of their existing appointments before their conclusion. In one of the appeals hearings, the provost estimated that approximately one-and-a-half hours was devoted to each department’s “C” list, each of which contained several faculty names.

Under Section 3.4 of Rule 31003, tenure is taken into account in termination decisions resulting from financial exigency only when “two or more faculty members are equally qualified and capable of performing a particular teaching role,” in which case the tenured faculty member is to be given preference. Inasmuch as the review committee was not provided with data on those not on the “C” list and given that its members had no way of evaluating or comparing the nontenured faculty with tenured faculty, except to the extent that such information might have been volunteered orally by the chair, its ability to weigh tenure was of course nugatory. The language of Section 3.4 does not cover the basis for termination in cases in which no person other than a tenured faculty member is performing particular duties, nor does it explain how or on what basis the criterion of “equally qualified and capable” is invoked. In the words of the committee representative who spoke with the investigating committee, “The panel was told that tenure was no longer binding,” except in cases of otherwise approximately equal merit. This representative did, however, believe that the fact of tenure had required a higher standard of proof in committee discussions and that the basis for “breaking” tenure had to consist of more than a couple of years of relatively inactive

research funding (although in some cases precisely that criterion figured in a termination decision). The faculty representative saw the function of the panel as confined to making certain that there was nothing unreasonable or “grossly inappropriate” in the recommendations of the chairs. Such a characterization of the committee’s parameters appears to be a far more restrictive view than is implied in Section 3.3. In addition, Section 3.5 requires that such a committee recommend a priority order of those to be released, with reasons for that prioritization; this does not appear to have occurred, or if it did, it is not a matter of public record.

At the end of the process, the numbers of terminations proposed in each department were as follows:

Anesthesiology	7
Biochemistry and Molecular Biology	5
Community-Based Clinics	2
Family Medicine	3
Internal Medicine	22
Microbiology and Immunology	4
Neurology	3
Neuroscience and Cell Biology	10
Obstetrics and Gynecology	
Outreach	3
UTMB-Based	8
Ophthalmology	2
Orthopedic Surgery	5
Otolaryngology	3
Pathology	12
Pediatrics	4
Pharmacology	2
Preventive Medicine and Community Health	9
Psychiatry	5
Radiology	4
Surgery	18
TOTAL	131

The number of reductions in a given department was not, according to the UTMB administration, based on the relative importance of a department to the overall academic mission of the School of Medicine (though educational and research factors were also weighed) but principally on the impact of the hurricane on the carrying out of clinical functions, that is, patient care. For example, the reduction of the number of available beds in the hospital as a result of hurricane damage diminished the need for faculty in pathology, but obstetrical and gynecological care had to be up and running as soon as possible after the hurricane. Psychiatry also experienced a significant cut in nonclinical faculty, resulting in effect in a

change of departmental mission. That portion of Rule 31003 (Subsection 3.2) requiring an assessment of academic programs does not seem to have been carried out except insofar as the relationship of released faculty members to the teaching function of their particular departments was considered. Nor were departments asked to come up with a specific dollar amount, or percentage of total budget, as a target; rather, they were asked simply to prepare the three lists.

Following his receipt of the recommendations of the review committee, the provost wrote a memorandum to President Callender on November 21 entitled "Faculty Reduction in Force," with a list "formed in accordance with the Texas Board of Regents Series 30000, Rule 31003, Section 3" of faculty positions recommended for termination. One hundred and twenty-seven faculty members in the School of Medicine, more than forty with tenure and approximately fifteen others on the tenure track, received notices of termination that Monday, providing just over six months of notice to non-tenure-track faculty (notice effective May 31, 2009) and just over nine months to those with tenured and tenure-track appointments (effective August 31, 2009). Among those whose services were being terminated were the current and immediate past presidents of the faculty senate, both of whom held tenure, and, according to the November 30 issue of the *Galveston Daily News*, a number of "experts in molecular medicine, researchers on infectious diseases, and well-known surgeons."

The outcome of the panel's deliberations, once they became known, ignited tempers on campus and received considerable attention in the local press. Critics of the reduction in force included those in the community who were primarily concerned with the economic impact of the faculty and staff terminations and with whether the step just taken was the first move toward closing the Galveston medical branch and moving services to the mainland. Criticism also came from the Texas Faculty Association (TFA), the Texas Daily Newspaper Association, and some state legislators with ties to the Galveston area. The board of regents was taken to task for handling in a private meeting what many saw as a matter of public interest regarding the declaration of financial exigency and the very survival of the medical branch.<sup>6</sup> The TFA alleged that the closed-door meeting and reduction in force were meant to facilitate what the system leadership had long hoped to do, namely, move the medical school

in whole or in part to Austin.<sup>7</sup> Dissenting faculty members alleged that the speed of the process evinced an entire lack of real deliberation on questions of educational impact and faculty status. They and some media reporters complained that the board had not consulted with the faculty or its elected senate before declaring a state of financial exigency nor sufficiently considered less drastic means to address financial difficulties. Furthermore, many among the faculty saw the role played by the chairs in the president's naming of the faculty review committee as inherently at odds with the notion of any genuine faculty participation or even consultation with the faculty at large. Critics complained that many members of the review committee also had administrative appointments.

Members of the UTMB Faculty Senate were quick to respond to the reduction-in-force action as well. Even before the outcome of the review committee's deliberations were made public, the senate chair, Professor S. David Hudnall, e-mailed the president on November 14, invoking Rule 31003 and asking if the faculty senate would be given any role in making recommendations regarding academic positions or programs to be eliminated or in hearing possible faculty appeals. On November 26, Professor Hudnall e-mailed his fellow senators to state his "serious concerns regarding the RIF process, the status of tenure, and the ability of the senate to participate effectively in shared governance." Following the receipt of a number of inquiries from faculty colleagues affected by the reduction in force, Professor Hudnall again wrote to the president and to the provost on December 17, arguing the case for transparency in the process and for the role of the senate as "the only democratically elected body on campus." This perceived lack of transparency and the exclusion of the senate from the process would lead to a number of additional faculty allegations that no

---

7. In a written response to a prepublication draft of this report, Executive Vice Chancellor for Health Affairs Kenneth I. Shine and General Counsel Barry D. Burgdorf of the University of Texas System pointed out that Dr. Shine, at an October 12, 2008, town hall meeting on the UTMB campus, had specifically stated that there were no plans to move the institution to Austin, "which remains the case." Although the report of an external consultant may have fueled the concerns of some faculty that all options were on the table, the investigating committee has found no evidence that the administration planned to move UTMB off Galveston Island, whether to Austin or another mainland location. While clinical operations have been expanded off the island, the stated purpose of this expansion has been to improve patient mix and revenue streams.

---

6. On the TFA lawsuit under the Texas Public Information Act, see Section III.D below.

criteria for retention or termination had been put forth other than the general language of Regents' Rule 31003 and that the declaration of financial exigency was not bona fide but rather a cover for the purging of tenured faculty as well as an assault on the principle of tenure itself.<sup>8</sup> Furthermore, a number of faculty members who had received termination notices reported that they were being required by their chairs to abandon laboratory and office space within a matter of weeks, essentially being forced out of the medical center and putting years of research at risk. Such actions seem to have occurred only in certain departments. In these cases the administration, to its credit, rescinded such directives. The administration's view was, and continues to be, that it communicated with the senate at its regular meetings regarding the unfolding state of affairs, but the provost, in his discussion with the investigating committee, indicated some worry over the senate potentially harboring an inappropriate interest in knowing more about specific hearings, which he believed could not be divulged on grounds of confidentiality. This investigating committee has not, however, seen evidence that the senate had any such designs.

#### **B. THE TERMINATION LETTER**

The following is an example of the letter of termination that the provost sent to individual faculty members, this one to a tenured professor with twenty-two years of service:

Dear Dr. \_\_\_\_:

Due to the devastation caused by Hurricane Ike and our state of financial exigency, we regret to inform you that your position has been eliminated. The procedures for elimination of academic positions due to financial exigency are set forth in the Regents' Rules and Regulations, Rule

---

8. In their response to the prepublication draft of this report, Dr. Shine and Mr. Burgdorf stated, "It seems that each allegation raised by a faculty member, critic or newspaper reporter was accepted without rebuttal, regardless of its foundation, including claims that ignored the catastrophe or implied it was a convenience to the administration and said that the declaration of financial exigency was merely an attempt to purge tenured faculty." This investigating committee would respond that this section of its report simply sets forth allegations as allegations; the purpose of this section is to indicate the climate of opinion among some faculty members and other Galveston constituents at the time of the events. One task facing this committee was the assessment of such allegations, which it has set forth primarily in the concluding pages of the report.

31003, sec. 3 (attached for your convenience). Thus, in accordance with the Rules, your position has been identified as one that will be eliminated. Unless your appointment expires earlier, your employment will be terminated effective August 31, 2009.

We will be pleased to notify you, if a vacancy occurs at UTMB in your field of \_\_\_\_, within two academic years following the date of your termination. If you timely apply and are qualified for the position, you will be given priority consideration along with the other qualified applicants whose positions have been eliminated.

You may go on line at [www.utmb.edu/benefits](http://www.utmb.edu/benefits) to obtain information regarding the continuation of medical, vision, dental coverage, conversion of your term life insurance, and retirement options, as applicable. A benefits representative will also be available at the Clear Lake Center, 20728 Gulf Freeway, Webster, Texas. Thank you for your years of service to UTMB, and I wish you the best in all your future endeavors.

The provost's language closely tracks that of Regents' Rule 31003. The second paragraph of the letter is based on Section 3.6, which sets out the provision for notification of openings in the released faculty member's field. (The investigating committee addresses this issue in Sections III.D and IV.C of this report.) Section 3.7 describes the establishment of hearing committees in case of appeals, and Section 3.8 states that a faculty member may pursue an appeals procedure in which the "burden shall be upon the appealing person to show by a preponderance of the credible evidence" that the action taken was not for reason of financial exigency or was otherwise "arbitrary and unreasonable." It will be noted that the provost's letter speaks to the appeals possibility only by indirection, in referring the recipient to the language of Rule 31003. By giving no other reason for the termination than the need for a reduction in force and the fact that the faculty member's position has been identified for elimination, the letter in effect requires the faculty member to go through the appeals process to obtain an account of the reasoning that led to the decision to select him or her for termination.

#### **C. THE FACULTY APPEAL PANELS**

##### **1. The Faculty Appellants**

Approximately thirty faculty members initially chose to appeal their release within the statutory maximum of thirty days from the date of notice of termination. Hard

figures are somewhat elusive in cases of this kind, because some faculty members may have initiated an appeal but later reached a settlement, resigned to take a position elsewhere, or retired. According to the UT System representatives with whom the investigating committee spoke, 124 faculty members were released (three fewer than the original 127 notified) and thirty-one appeals were filed of which twenty-nine were processed. Three of the appellants prevailed as a result of the hearings, and at least two others, though they lost their appeals, were subsequently reinstated. Of the three instances in which the faculty member prevailed, however, one involved a non-tenure-track faculty member who succeeded only in getting his termination date extended from May 31 to August 31, the same effective date accorded to tenured faculty.

George Reamy, the TFA's designated "faculty advocate" who represented many of the appellants in their hearings, obtained copies of the appellate hearing reports in twenty-eight cases under the Texas Public Information Act and made them available to the investigating committee prior to its visit. Of those whose rank and tenure status were identified from the minutes, fourteen held tenured positions at the time of the termination of their appointments, and four were described as nontenure track, while the remainder of the files do not indicate tenure status or length of service. Those identified as tenured ranged in length of service from seventeen to thirty-five years, representing collectively more than three hundred years of service to the institution. Association-supported policy regards both the abrogation of tenure and the abrogation of a term appointment prior to its stated date of expiration as entitling the faculty member to due-process protections, with the burden of proof in tenured and nontenured faculty cases alike resting on the administration.

Eighteen of the released faculty appellants held the PhD degree and ten the MD. As noted earlier, the vast majority of those released did not appeal, whether because of retirement or resignation or for some other reason. In two departments, psychiatry and otolaryngology (and perhaps others that did not come to the attention of the investigating committee), the chairs stated that their selections were made in order to turn the department decisively in a clinical direction to improve its revenue stream, and in these cases there is no doubt that basic scientists were regarded as more dispensable.

By a slight majority, appeals were filed on both grounds laid out in Rule 31003, Section 3.8(d), namely,

that the termination was not based on financial exigency and that the decision to release the particular appellant as opposed to another individual was arbitrary and unreasonable. Nearly half of the appellants based their appeals on the second of these grounds only.

## 2. Panel Procedures

Rule 31003, Section 3.7 states that "a person to be terminated who appeals to the hearing committee shall be given a reasonably adequate written statement of the basis for the initial decision to reduce academic positions and, upon request of the person, shall be given any written data or information relied upon in arriving at such decision." In responding to those seeking a hearing, the administration customarily appended two documents. The first was the four-paragraph statement describing the reasons for declaring the financial exigency, quoted in the first section of this report. The second was an affidavit that required the applicant to subscribe to the statements incorporated in Rule 31003, Section 3.8(d), beginning, "I am aware that the burden of proof in the appeal hearing for recommendation of the termination of my position as provided by Regents Rule 31003 is upon me, as appealing faculty member" and citing the two grounds for appeal: "(1) The decision to terminate me as compared to another individual in the same discipline or teaching specialty was arbitrary and unreasonable" and "(2) Financial exigency was not in fact the reason for the initial decision to reduce academic positions." The appellant could check one or both grounds for appeal.

The appeal panels set up for the hearings of notified faculty members at UTMB consisted of three members each, drawn from a larger panel of nine appointed by the provost and again, as was the case with the initial review body, consisting of persons recommended by department chairs. No faculty member from the department of the released faculty member was permitted to serve on that person's panel. As mentioned in Section I of this report, the University of Texas System appointed a staff attorney, Dan Sharporn, to serve as adviser to the committee on procedural issues but not as an advocate for either side; he did not pose questions to either side during the hearings. On occasion, when he was unavailable, the system provided a substitute attorney. The faculty member making the appeal was permitted to bring an advocate as a counterweight to the administration's counsel; in the minority of cases where this option was not exercised, the administration refrained from providing its own



attorney as well. Hearings were closed to the public unless the appellant requested that the hearing be open.

The hearing of appeals began in March 2009 and continued to the end of May. President Callender's letters, recording his decision in each case after receiving the panels' recommendations, started going to appellants in late April and continued into June. (One late case, delayed, apparently, by miscommunication, was not settled until the end of August, as it happened in the appellant's favor.) The provost met with panels on a few occasions to discuss only the question of the bona fide nature of the financial exigency declaration, but most of the time the UTMB attorney represented the administration.

Two hours were allocated initially for each hearing, but representatives of the appeal panels stated that they complied whenever the appellant requested additional time. The appellant could challenge a particular member of the panel on the basis of conflict of interest, as did happen in one case, but under the rule a panelist sat in judgment on his or her own fitness to serve. In one case the professor claimed that the administration introduced two witnesses of whom she had not been previously informed. Like the initial panel recommending faculty members for release, the appeal bodies received no documentation in advance of the hearings. Although the policy was debated, the view that prevailed was that individual members of any panel could not all be assumed to have read to the same point in the material prior to convening and that it was better to begin from a common point and review the written material later. No restrictions were placed on the amount of material submitted, and in some cases the faculty member submitted extensive documentation in support of his or her position, including, for example, outcomes of previous promotion and tenure reviews or letters from colleagues and external referees. According to representatives of the panels, the notified faculty member and his or her department head typically would highlight key exhibits in their presentations and in many cases walk the hearing panel through the relevant documents in the course of the proceeding. Panel members might review these documents during the presentations and, if necessary, continue the review after the hearing closed. Some cases required extensive reading after the hearing, some did not, and the results were reflected in the varying length of time that elapsed between the hearing and the report to the president. It was difficult for the investigating committee to establish, however, whether in every case the appeal panel was able to absorb this material or take it into consideration, especially since in some cases the panel's report is dated the same day that the hearing

itself was held.<sup>9</sup> Panels were allowed up to thirty days to file a report, but scheduling pressures doubtless made for quicker disposition in many of the cases.

The written reports of the appeal panels vary considerably in detail. At one extreme, only the briefest summary of the case, with no flavor of the committee's reasoning, was deemed sufficient; in other instances, the give-and-take of the proceedings was described in considerable detail. At the first extreme, a panel may have felt that the supporting exhibits, which went to the president along with the report, spoke for themselves. Most of the reports are unanimous, though there is occasionally a dissenting view from one of the three panelists, usually disagreeing with the administration's position on the necessity of declaring a financial exigency.

More than half of those who lost their appeals were recommended by their respective panels for consideration for reinstatement should financial circumstances warrant. The language of such reports is both glowing and regretful. The term of art in such cases was that the faculty member was "valuable but not essential," and the chair not infrequently described the decision as difficult. This consideration doubtless weighed with the provost when he told the investigating committee that there were no dismissals for cause. Nonetheless, the Association's recommended policy is clear: if a faculty member's appointment is terminated implicitly or explicitly on the grounds of relative merit, however merit is measured, his or her release is in effect a dismissal for cause, requiring a full due-process hearing in which the burden of proof is to be borne by the administration. That burden-of-proof obligation, as has been seen, is not recognized in Rule 31003, and the panels, like the appellants themselves, were specifically instructed that the burden rested on the appellant. Favorable comments on past performance may have been intended to fulfill the letter of Rule 31003, Section 3.3, but their effect, especially when followed by the formula of "valuable but not essential," suggests at best a cursory review and an attempt to soften the inevitable blow.

---

9. This point is important in one of the two cases discussed in this section. Going only by the dating of the reports, the investigating committee noted eight cases in which the hearing committee dated its report on the same day as the hearing, two in which the committee dated its report the next day. This is not to say, without access to the exhibits themselves (submitted to the investigating committee only in those cases in which the faculty member had approached the Association for assistance), that all such cases were equally complex.

The reports of the hearing panels were sent to President Callender as soon as they were finished. As previously indicated, the president had access to all the exhibits as well as the panel's report in each case, and he told the investigating committee that for this reason he was not troubled by the variation in specificity in the reports, inasmuch as he could always check the findings against the evidence. He did not believe it was necessary to remand any of the reports for further consideration but supported the recommendations of the particular hearing panel in all cases, including the three in which the panel upheld the appellant against the department chair.

The procedures employed in two cases to implement the statutory language are of particular interest. In the first of these, a tenured professor, who had been at UTMB for seventeen years, submitted no fewer than eighty-six exhibits prior to his hearing, including a forty-eight-page statement of grounds for his appeal, taking issue with the decision to release him on the grounds both of absence of a bona fide financial exigency and of arbitrary and unreasonable treatment. The bridge between his argument on financial exigency and his claim to be the victim of an arbitrary and unreasonable decision involved allegations, among others, that the real reason for his release and others reflected conditions that had existed before Hurricane Ike and that, by delegating decisions to the chairs, the provost had effectively removed financial exigency as a rationale, since such a condition implied a campuswide, not a departmental, approach to the problem. It is impossible to know whether the hearing panel took account of these arguments in its own discussion, but the record of the hearing, and the committee's recommendations, do not reflect any discussion testing their rebuttability. Since the professor's exhibits (in accordance with hearing panel practice) could have been reviewed by the panel only on the day of the hearing or thereafter, not even the lengthy appeal statement could have played much of a role in the hearing panel's decision, since the professor appeared before the panel on March 31 and the panel report is dated April 1.

In connection with this first case, the investigating committee observes more broadly that Section 3.8(d)(1) of Rule 31003 is notable for confining the discussion of financial exigency to whether it was the reason for the termination of academic positions, for one can hardly imagine how the faculty member could be expected to rebut the claims in the administration's four-paragraph November 2008 declaration. If such a rebuttal of the facts were possible, it would presumably nullify all findings to the contrary in other cases. A more appropriate

standard would seem to have been whether financial exigency was the real reason for the decision to terminate the appointment of the person who is specifically lodging the appeal, or whether, conceding the reality of the financial crisis, that crisis was of such magnitude as to justify the draconian measures employed instead of allowing for a review of cuts through other means—again an argument that it is difficult for an appellant to mount, though several tried. As has previously been stated, an occasional panelist dissented from the administration's description of UTMB's financial circumstances, but the majority of panelists (at least two in each hearing) seem to have regarded the four-paragraph declaration as presumptively valid and that declaration is not couched in any terms that invite faculty dissent, absent an examination of the books that was hardly practicable under the circumstances of the appeals.

In the other case, a tenured faculty member of twenty-three years' service wrote to the president on December 15, requesting a hearing. As part of that request, she asked for "the specific criteria used by university and School of Medicine management" in recommending certain terminations and not others, as well as "all relevant information and documentation (e.g., external funding, evaluations, etc.) used to assess my performance and that of my colleagues against these criteria" and "any correspondence or other records (e.g., e-mails, letters, memoranda, or notes) from or to my department chair that discuss either the possibility of terminating me or my actual termination." The provost, who responded to all such appeals on behalf of the president, wrote to the faculty member quoting the language of Rule 3.7 ("upon the request of the person, [that person] shall be given any written data or information relied upon in arriving at such decision [to reduce academic positions]") and responded, "In your initial appeal letter, you have requested a number of categories of documents that touch on the decision to terminate your particular position, as opposed to the general decision to reduce academic positions. For that reason, we do not consider your request for documents to encompass a request for the information provided in Section 3.7 of Rule 31003." Nonetheless, he went on to add that there might be documents responsive to the request and that his office was in the process of gathering them.

However much the provost may have intended to mitigate its effect, the language of Rule 31003 puts the appellant at an inherent disadvantage in the process. Read literally, it makes it impossible for him or her to present evidence of impermissible consideration (other than arbitrary and unreasonable treatment vis-à-vis

another person or persons in the department), yet the information requested by the appellant in this case was precisely of the sort that one would expect to be forthcoming when a tenured faculty member is being dismissed while others, tenured or nontenured, are being retained. To repeat: A judgment on the relative merits of faculty members under these conditions constitutes a dismissal for cause, because it undoes a previous decision to confer tenure based on merit. The professor's information request, properly, would have placed the burden of proof on the administration, not the faculty member, in coming before a hearing body. While the investigating committee notes that the administration, as well as the hearing panels, interpreted the language of the rule liberally, and that the hearing panels seem not to have excluded any material that the appellant wished to bring forward, the rule lent itself to restricting narrowly the ability of faculty members to defend themselves.

### 3. Assessing Criteria

To recapitulate some important facts: According to Rule 31003, Section 3.3, decisions affecting the continuance of a faculty member under conditions of financial exigency should begin with a review of "the academic qualifications and talents of holders of all academic positions in those degree programs or teaching specialties, the needs of the program they serve, past academic performance, and the potential for future contributions to the development of the institution." Tenure status is to be considered only pursuant to Section 3.4, when, as has been stated, two or more faculty members are equally qualified and capable of performing a particular teaching role, in which case the faculty member or members having tenure are to be given preference over nontenured faculty. If the issue is between two nontenured or two tenured faculty members, on the other hand, "consideration will be given to other documented needs of the institution."

The language of Rule 31003, applicable as it is to all institutions in the University of Texas System and not confined to medical schools, tracks a fairly traditional view of the role of a teacher-scholar-citizen in a comprehensive university. In medical schools, where some faculty members may have virtually no teaching responsibilities, or may be involved almost exclusively in research and graduate education or in patient care, the distinction among the traditional roles is not always evident. Teaching itself may take a number of forms, for example, taking residents on the rounds at the hospital. Both clinicians and basic scientists, however, at UTMB as well as at many other medical schools, are expected

to recover a significant portion of their salary either through external funding or through patient income. Under such conditions, a faculty member's "potential for future contributions to the development of the institution" is in danger of being defined entirely by the financial bottom line. Yet most of the appeals reviewed by the investigating committee were based precisely on the faculty member's contribution to many aspects of teaching, research, and, where applicable, clinical duties, as perceived by both the faculty member and his or her colleagues (frequently in allied departments), thus being fully in line with the traditional formula of teaching, research, and (to a lesser degree) service. This line of argument suggests that a termination of appointment driven by financial considerations alone could not only harm the affected faculty member but also deprive the institution of needed and useful services. The investigating committee heard several complaints that ongoing academic programs had been compromised, if not jeopardized, by a particular termination, and the hearing records show some attention to the question. The investigating committee cannot evaluate the effects of various faculty layoffs on the curriculum or its centrality, a matter more suitable for inquiry by an accrediting body, but the point to be made is that the allegations, though often noted by the appeal panels, seldom seem to have weighed much in a final determination of the appellant's case.

On the basis of the appeals the investigating committee surveyed, the termination of faculty appointments, accompanied with however profuse a show of gratitude for past performance and regret at the necessity of termination, seems in most instances to have been driven by bottom-line considerations. Certainly much of the language in the reports of the appeal panels indicates very little basis for the terminations other than a purely economic calculus, namely, to what extent the faculty member was recovering his or her stipulated salary through external grants, along with a nonspecific reference to departmental needs. "External funding, along with acknowledgment by awards for other contributions to the university" figure as criteria in one fairly typical case. In another instance, involving a tenured faculty member, "the department only considered current funding, and not historical funding for all faculty," which appears to violate section 3.3 of Rule 31003 calling for a consideration of "past academic performance." In yet another case, according to the appeal panel's characterization of the state of affairs, "the department decided to . . . categorize faculty as A, B, or C based on the percentage of salary support from

extramural funding” alone. When this formula was applied to one tenured faculty member of seventeen years’ standing, the salary was supported at an estimated 15–18 percent level at the time of the decision to release him, but the department chair claimed that the administration did not permit him to change the recommendation when the faculty member, receiving a new three-year grant after the hurricane, raised the level of salary support to an estimated 34.75 percent, slightly above the departmentally prescribed minimum. In the two cited departments where the ax fell heavily on the basic scientists, the rationale was the necessity to shift to a primarily clinical orientation in order to improve revenue streams, although there is no record of any prior departmental faculty discussion, either before or after the hurricane, of such a significant shift in programmatic emphasis. On the clinical side, other constraints obtained: thus, of one professor of eighteen years’ experience, it was written that “the collections were below what it cost the department for her services.”

While some chairs rested their cases on bottom-line considerations, some did adduce other factors, though these carried varying degrees of conviction and may at most have been makeweights in the final decision. A tenured professor was released because of “low percentage support from extramural funding. In addition, he was not picked by other students as mentor.” Another tenured faculty member complained that, as a result of a record of whistle-blowing some years before, he had become a target of convenience and that false and inaccurate information had become part of his personnel file. Therefore, by referring simply to financially driven criteria, the chair was effectively insulated from any charge of unreasonable or arbitrary behavior. Yet another tenured faculty member was retained over a second tenured faculty member in the same department allegedly because of his “stronger leadership roles in the department” and the fact that he had had eight best all-around teacher awards compared to the dismissed faculty member’s one award. The reference to a “leadership role in the department” may have been a tacit response to the fact that the dismissed faculty member’s service to the institution took the form of leadership in the faculty senate. The department chair, having given fundamentally generic reasons for the termination, launched into a series of attacks at the hearing, for example, that the faculty member “usually arrives late for work and is not a strategic division leader” unlike the senior colleague to whom he was compared. The chair alleged that the faculty member in question “procrastinates, delegates, and seldom meets deadlines.” The appeal panel, under the

governing rules, had no playbook with which to handle this kind of outburst, unheralded, according to the faculty member, in any of his annual evaluations, and no way of recommending, even had it so desired, that the case be reheard as a dismissal for cause. The incident illustrates the danger that, under the proceedings following the declaration of financial exigency, it was all too possible for that declaration to serve as a cloak for a chair who wished to settle old scores.<sup>10</sup>

In fairness to the appeal panels, it should be said that they were as constrained by the narrow grounds on which they could hear cases as were the appellants who were bringing them. An appeals body is as dependent on the administration’s disclosure of sometimes complex, diffuse, and abstruse documentation as is the faculty member attempting to make the case. It is also true that in all cases the panels took evidence of the appellant’s overall record of service to the institution, but what they do not appear to have done, on the whole, was to press the department chair to furnish evidence that she or he had weighed all relevant factors for faculty evaluation as required by Rule 31003, with an eye to considering in particular whether that total performance might outweigh a sometimes momentary hiatus in external funding. One particular metric might have been employed by a department chair in a given case and stood unchallenged as sufficient reason for dismissing an entire record of service, however valuable (and perhaps in sum even essential) it might have been to the institution. And the outcome of some of the hearings, and the bases on which hearing panels made decisions, are at best puzzling.

For example, in two cases where the reports of the review body are unusually full, the panels reached conclusions at odds with the record established in the hearing. An associate professor in his sixth year of service, whose tenure status is not identified in the report, was placed on the “B” list because of “past performance and lack of sustained success in obtaining extramural research support,” although throughout most of his

---

10. In their response to the prepublication draft of this report, Dr. Shine and Mr. Burgdorf stated, “The appeal panel was not limited in what it could recommend. Had the evidence warranted it, the panel could have recommended that the faculty member be rehired, or that the appeal hearing be retained, that the matter be reviewed, or that the appeal hearing be re-heard.” The investigating committee discerns no evidence that the panels were instructed to reach any determination other than support or disapproval of the original termination decision. If such advice was ever offered orally by counsel, the written records do not show it.

career the professor had achieved a level of funding at approximately 50–55 percent of his salary prior to Hurricane Ike and had published twelve papers the previous year. The chair also stated that, after arriving to head the department the previous year, he had developed a scale involving several areas that “served as a metric for future productivity and benchmark comparisons” including “an emphasis on discovery and translational research in addition to teaching and UTMB leadership and citizenship duties” and that the faculty member had been considered according to these standards. The panel, however, responded that “the details of any implementation of these goals by the department or realignment of an individual’s performance expectations to meet these points are not evident in the review. Moreover, based on comments made by [the appellant], it is uncertain of his level of awareness of this document or the potential for it to be utilized in the evaluation of his performance.” When the chair stated that the appellant “did not contribute substantially to any of the five focal point goals for the department,” the panel responded, “However, only five months had elapsed between the establishment of the five focal points and Hurricane Ike. It is unclear if a faculty member’s career may be redirected to advance these points to facilitate departmental growth and realignment in that time-frame or if [the professor] received counseling specific to deficits in this new process.” The chair then compared the appellant to several other retained faculty in terms of teaching skills and contribution to the department’s teaching goals. Thus, in the course of the hearing, the stated reasons seem to have gravitated from a one-year hiatus in external support to a failure to meet departmental goals (by standards only recently articulated) and especially to teaching considerations. The panel again disagreed, stating that the faculty member’s research, translational interactions, outreach, and teaching, contrary to the chair’s testimony, did “meet several of the focal points.” Despite these warning signs, however, and its own (repeatedly stated) divergences from the chair, the panel felt that the decision to terminate this faculty member’s appointment was “reasonable and not arbitrary given these financial constraints and the immediate needs of the department under the new circumstances.”

Another example of an apparent disconnection between the nature of a panel’s reasoning and the disposition of a case involved a previously mentioned professor of more than twenty years’ service with a sustained record of contributions to the teaching of required courses and programmatic development. Almost uniquely among

these reports, the sources and level of her research funding did not figure at all, though it was undoubtedly relevant that she had no recent federal funding. Her situation was complicated by long-standing difficulties with her department chair, who had attempted to remove her from her laboratory following the hurricane and on four previous occasions for lack of research productivity. The stated criteria for retention of a faculty member advanced by this chair were “level of external peer-reviewed federal funding; retention of ‘super-teachers’ where possible, and retention of others who were deemed critical to the mission of the university or department.” As it developed in this case and several others from the same department, this last category was deemed to include new nontenured appointees, who in this department were sheltered from the reduction-in-force directive. Although there is no definition of “new,” elsewhere in the panel report it seems most likely to refer to those with an agreed-upon period of startup funding, not necessarily a person in his or her very first year of service.

As we have seen, Regents’ Rule 31003, Section 3.4 says that when tenured and nontenured faculty are under consideration for termination, tenured faculty should be retained in preference over nontenured faculty, including new appointments, only in circumstances in which the qualifications of two individuals, one from each group, are more or less comparable. This *de minimis* view of the protection of tenure would therefore indicate that no such determination is required when nontenured faculty members are brought in for teaching and research specialties not currently represented by other faculty. Nothing in the rule speaks to the blanket assumption that all new appointees must be protected from a reduction in force, and the hearing panel was clearly troubled by this. “The committee recognizes the importance of a university standing behind its commitments to new recruits, but even more importantly, the university must keep its commitments to tenured faculty.” Yet in spite of this apparently unanimous statement, only one of the three panelists believed that the termination decision was arbitrary, because it required the application of a formula not in conformity with the regents’ rule. (AAUP-recommended standards to be applied in such a case are considered in Section IV.A below.)

This faculty member set forth several other defenses of her case, pointing to her breadth of teaching abilities, objecting that despite the department’s centrality to the teaching mission at UTMB it had sustained a disproportionate share of cuts in academic positions, and asserting that she had not been fairly evaluated under the multiform standard of Rule 31003. Here the panel

reiterated a pattern noticeable in many other such cases: praise of the appellant's multiple contributions, acceptance (by a 2–1 vote) of the chair's basis for termination, and a concluding suggestion that the university review her role in teaching and the effect of her departure on one curriculum in particular to "determine if there is a mechanism for her retention."

One report did indeed find that a senior professor of seventeen years' standing had been wrongly notified of termination because two nontenured assistant professors with no record of funding, productivity, or "educational or service commitment" were retained in his stead. The appeal panel found for the professor, and the president upheld the panel and reinstated him.

Overall, the pattern that the hearings indicate is that many of the affected faculty members who were praised for their services to UTMB were nonetheless released on the grounds that either their external research funding or their clinical revenue stream did not meet the university's needs in the wake of the hurricane. This action does not constitute a full review or adequate cause under even the impoverished standards of Rule 31003. The problem may perhaps be most clearly dramatized by comparing this rapid-fire release of tenured faculty with the extended care and documentation that normally go into the decision of whether or not to grant tenure to a faculty member in the first place. Adherence to a single standard as "adequate cause" seems to have been premised, in all too many cases, on an avoidance of any meaningful assessment of the sort that would determine whether other considerations might be sufficient to outweigh that single economically based metric.<sup>11</sup>

#### **D. THE TFA LAWSUIT AND POTENTIAL REINSTATEMENTS**

In a November 19, 2008, letter to the chair of the UT

---

11. In their response to a prepublication draft of this report, Dr. Shine and Mr. Burgdorf stated the following: [M]any of the decisions to eliminate programs and positions were based on concerns about the ability of UTMB to continue to deliver high quality health care to its patients, which is a mandate from the people of Texas and our faculty's ethical obligation. There was no "single economically based metric" as the report charges. Patient care was a critical part of the metric. But it is indeed true that economics played a significant role in dealing with the "financial exigency." It would not be a "financial" exigency if economics were not part of the problem. And it is further true that academic health centers, in particular UTMB, are dependent on "clinical revenue to support the rest of its missions." Indeed, over 60% of UTMB income

System Board of Regents, Texas Daily Newspaper Association president Gary Borders argued that the board had improperly discussed and authorized the reduction in force at UTMB in closed executive session, in violation of the Texas Open Meetings Act. He and other critics charged that the public had a right to know what alternatives to appointment terminations were considered and why emergency funding for faculty was not available from UT System and legislative sources. On December 2, as faculty members were preparing to appeal their appointment terminations to President Callender, the TFA and three individuals filed suit against the board, charging violation of the Open Meetings Act and seeking the reinstatement of all those laid off as part of the reduction in force.

The lawsuit was settled out of court five months later, in April 2009. Under its terms, all affected faculty members were to remain on an official "Re-Employment List" for thirty-six months from the date of termination. As positions were restored, they would be advertised on UTMB's Web site, and released faculty on the list would have up to twenty business days from the date of the job posting to express an interest and to be interviewed. The former faculty member would be appointed if qualified and if there was not another person better qualified. Being deemed qualified, according to the TFA news release, was based on such factors as experience and

---

arose from the clinical programs and Hurricane Ike forced the closing of the hospital until January of 2009, and it was reopened at less than one-half of the original capacity. . . .

The AAUP's rules are designed to protect against the "serious distortion" of academic programs, but this alone is not possible for an academic health institution. These are hybrid organizations that must not only be concerned with the "serious distortion" of academic programs, they must also be concerned with the quality of patient care. Indeed, when it comes to patient care, their responsibility is not just to avoid a "serious distortion," their responsibility to their patients is to avoid providing anything but the very highest health care possible. Thus, while the AAUP may want an academic institution to favor a tenured faculty member unless to do otherwise would be a "serious distortion" of the academic program, that cannot be the standard by which an academic health institution makes decisions about patient care. To do anything but keep the most competent doctor in terms of patient care would be a "serious distortion" of their healthcare mission and their duty to their patients. And, yes, it is true that a health care institution, at least one like UTMB, must be able to deliver that health care in a "cost-effective" manner if it is to survive.

education, and UTMB was barred from using the comparative cost of the appointment of a former faculty member, as over and against a newer faculty member, as a reason for denying such appointment. Any released person not reinstated under these terms could request and receive binding arbitration under an independent retired judge in Houston. The burden of proof for showing an inadequate basis for continued denial of employment would continue to rest on the complainant. American Arbitration Association rules would apply, and the decision of the arbitrator would be final. The settlement did not require a general reassessment of the reduction in force, nor did it reinstate any faculty members to their previous positions.

#### IV. Issues

Summarized here are what appear to the investigating committee to be the central issues of concern raised by the actions taken by the administration to effect the reduction in force at UTMB.

##### A. THE BASIS FOR A DECLARATION OF FINANCIAL EXIGENCY

Association-supported policy in cases of financial exigency derives from the rather spare observation in the 1940 *Statement of Principles on Academic Freedom and Tenure*: “Termination of a continuous [tenured] appointment because of financial exigency should be demonstrably bona fide.” The statement is amplified in the Association’s *Recommended Institutional Regulations on Academic Freedom and Tenure (RIR)*, first formulated in 1957 and subsequently revised on several occasions. Regulation 4c(1) of the *RIR* states that such terminations may occur “under extraordinary circumstances because of a demonstrably bona fide financial exigency, i.e., an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means.”

Regents’ Rule 31003 does not provide any definition of financial exigency, although a definition does come in Rule 30601, pertaining to staff, in which it is described as “a state in which financial demands call for budget cuts.” This falls far short of the Association’s standard of institutional survival. Budget cuts do not a financial exigency make; if they did, hardly any institution of higher education in the country aside from a few exceptionally well-endowed colleges and universities could claim to be exempt from a condition of financial exigency. UTMB administrators with whom the investigating committee met stated that, in the wake of Hurricane Ike, the School of Medicine seemed to be facing a crisis of such magnitude that indeed its survival was at stake.

Calculations were that it would be unable to meet its payroll by March 2009; when the board declared financial exigency it was not known, they stated, that the state would advance money sufficient to meet that cost, and the provost said that at the time he issued the notices of termination for May and August respectively, he was not certain that the affected faculty members would receive their salary for the entire time. Under these conditions, the administration believed, the viability if not survivability of UTMB was at issue in the very near term.

Of course, it was not the institution as a whole but a particular (albeit surely the central) part of it in which viability was in question, and no steps were taken to ascertain whether losses in the medical school might be met at least in part by cuts in other programs. The provost indicated to the investigating committee that the nursing program could not be cut, and very few savings were available through reduction in other colleges. There seems to be no question that the administration and many members of the faculty, even a few of the faculty who themselves received notice of termination during this period, believed that the lack of hospital and clinical services meant that the entire institution was at a very high risk of bankruptcy and full closure if radical steps were not taken. But even faculty members sympathetic to the administration’s case did not agree on how budget cuts should be made or that the way chosen was the best way.

Questions about whether the crisis was demonstrably bona fide had been raised both inside and outside UTMB early on. Critics made much of the fact that a “Special Comment” issued by Moody’s Investors Service in October 2008 on the post-Ike situation found that events at Galveston did not have a serious effect on the overall University of Texas System of which UTMB was only a small part: “Moody’s believes the costs to repair UTMB can be absorbed by the System at its current ratings levels given its total financial resources. The System will, however, need to tap into its operating reserves to manage the cash flow timing of clean-up efforts and reimbursements from external sources.” Again, critics expressed puzzlement at the apparent reluctance of the administration and system in the fall and early winter to pursue emergency state support more vigorously, and they argued that this showed reluctance to maintain a Galveston presence at pre-hurricane levels and a desire to transfer many of UTMB’s functions to a mainland location. It was also pointed out that UTMB had recently purchased land on the mainland for expansion.

In response, system spokespersons, both in their correspondence with the Association’s staff and in

subsequent discussions with the Association's investigating committee, argued that under existing regulations funds cannot be transferred within the system and that each campus in that system rests on its own bottom. These spokespersons reiterated that FEMA and insurance funds could not be drawn upon to maintain faculty strength and that it was not the policy of the Sealy and Smith Foundation, which for years had been a generous benefactor of the hospital, to support personnel costs. Two funds often cited by faculty and the TFA, the Permanent University Fund and the Available University Funds, had already been cited in the financial-exigency declaration as not being available for operations except in specifically authorized cases, and only the University of Texas at Austin could tap these funds for that purpose. System representatives also vigorously disputed allegations that they and the UTMB administration had been hesitant, remiss, or laggard in pressing for additional state funding. They stressed that the Texas legislature meets only every other year and was not in session in fall 2008, during which elections were held for the session to begin in January 2009. They characterized the outgoing speaker of the House as generally unresponsive to UTMB concerns and the incoming speaker as one who would be more sympathetic when he took the leadership reins.

Much of the controversy over the intentions of the UTMB administration and the UT System at the time of the hurricane, or even over events antedating the hurricane, by now involves dead issues, and the investigating committee finds no reason to question the very real financial difficulties that UTMB faced in the wake of Hurricane Ike. It does question the speed of the process, one that might be described as "fire in haste and rehire at leisure." The investigating committee believes that, had the administration reached out more actively to engage the faculty at the very outset and had the reduction in force (if a proven necessity) been carried out with more transparency and under appropriate due-process protections, at least some of the criticism might have been muted early on. As it was, much of the criticism was reignited by the posting of new positions within a matter of a few months, which for some faculty members called into question the bona fides of the original declaration of financial exigency.

#### **B. THE ROLE OF THE FACULTY**

The Association's view of the role of faculty governance in colleges and universities derives from the 1966 *Statement on Government of Colleges and Universities*, jointly formulated by the AAUP, the American Council

on Education, and the Association of Governing Boards of Universities and Colleges.<sup>12</sup> Under this document, faculty are said to have "primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty." Even after, in the event of an adverse decision, the faculty should have the right to request further consideration and to transmit its views to the administration and governing board. The *Statement on Government* also acknowledges that "budgets, personnel limitations, the time element, and policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice."

With respect to matters of faculty status, such as appointment, reappointment or nonreappointment, promotion, the award of tenure, and dismissal, the *Statement on Government* further argues:

The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments. Likewise there is the more general competence of experienced faculty personnel committees having a broader charge. Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.

In his discussion with the investigating committee, the provost asked if the Association did not believe, in effect, that in circumstances like those surrounding Hurricane Ike, a reduction in force should be "faculty driven." The question is a fair one, and requires a

---

12. The AAUP adopted the 1966 *Statement* as its official policy, and the other two organizations commended it to the attention of their respective memberships.



nuanced answer. The *Statement on Government* stresses the idea of shared governance, in which faculty, president (understood to include the administrative officers who report to him or her), and governing board all participate according to their particular areas of expertise and responsibility. “Primary responsibility” in this context does not refer to unbridled power, whether exerted by faculty or administration, but to a deference to primary competencies as appropriate to the particular area of responsibility in question. To be sure, a faculty body that simply refuses to do its duty in responding to a financial crisis requiring a reduction in force, or which dodges hard questions, has no claim to deference if it abdicates the field it ought properly to occupy. But by every means the investigating committee could determine, there appears to have been a signal willingness of the faculty as a whole, and particularly an appropriate body such as the faculty senate, which could have constituted an independent committee not appointed by the administration, to offer advice prior to the implementation of a reduction in force and thus share in a difficult process.

Of course, in one sense it could be argued that what happened at UTMB had all the appearance, and much of the reality, of a “faculty-driven” process, beginning with department chairs in their status as faculty colleagues, continuing with the faculty review committee, and concluding with the faculty appeal panels; furthermore, as has been said, President Callender was deferential to such faculty advice in all cases. But the legitimacy of the process was undercut by the perception that chairs owe their primary allegiance to the administration. Thus, in being chair driven, appointments to the initial review committee and the hearing panels were all made upon the recommendation of the chairs whose very termination recommendations were to be under review; the process in this sense was far from “faculty driven.”<sup>13</sup> The point is particularly important because what is called a “chair” at Galveston more nearly resembles what would be called a “head” at many, if not most, medical schools. Chairs often draw higher salaries than the dean; they may double as heads of the related

hospital departments. Certainly the process employed at UTMB allowed for the overruling of chairs’ recommendations. One system spokesperson pointed to the relative number of appeals compared to the number of terminations, and the disposition of those appeals, as evidence that “the system worked.” A more skeptical observer might respond that the system worked as it was intended to work—within the confines of a process in which the same officers intimately involved in the reduction of force also took a significant role in shaping the review process, and under a policy that severely narrowed the scope of appeals and displaced the burden of proof in all cases to the faculty member proposed for termination of appointment, whether tenured or nontenured.

After defining financial exigency, *RIR* 4c(1) continues with three paragraphs describing the appropriate role of the faculty of the institution. These follow in order, with comments on each:

As a first step, there should be a faculty body that participates in the decision that a condition of financial exigency exists or is imminent, and that all feasible alternatives to termination of appointments have been pursued.

Initial discussions between the board of regents and the administration of UTMB, with the ensuing decision to issue a declaration of financial exigency, took place with no faculty involvement. While system representatives have indicated that such options as early retirement were also considered, the investigating committee has no way of evaluating to what extent these options figured in discussions that, by their nature, are private and confidential. The administration noted that furloughs are forbidden under Texas law, and the idea of an across-the-board salary reduction was rejected on the grounds that UTMB would have been likely to lose some of its best professors. Faculty members who spoke to the investigating committee argued that, as it was, some of the institution’s best faculty left anyway, while the then chair of the senate reported that a number of professors who were retained expressed to him their willingness to share the pain in the form of a salary cut. Department chairs with high salaries and no current research income seem not to have volunteered, or to have been asked, to return a portion of their stipends. The investigating committee does not here insist that the outcome would have necessarily been different if such measures had been taken; it merely registers the fact that the door was not held open to the faculty, which, through public communications and in the forum provided by the faculty senate, was presented with a *fait accompli*.

---

13. Moreover, the initial review panel included a number of persons whose role at UTMB was seen as primarily administrative. These distinctions are sometimes hard to make in a medical school, where there may be considerable fluidity in the nature of duties assigned to particular appointments, and the investigating committee has insufficient data to conclude on what side of the line any particular such individuals might be said finally to fall.

*RIR* 4c(1) continues:

Judgments determining where within the overall academic program termination of appointments may occur involve considerations of educational policy, including affirmative action, as well as of faculty status, and should therefore be the primary responsibility of the faculty or of an appropriate faculty body. The faculty or an appropriate faculty body should also exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated. These criteria may appropriately include considerations of length of service.

The responsibility for identifying individuals whose appointments are to be terminated should be committed to a person or group designated or approved by the faculty. The allocation of this responsibility may vary according to the size and character of the institution, the extent of the terminations to be made, or other considerations of fairness in judgment.

A striking factor of the termination process at the UTMB School of Medicine was that, while the hearing panels received testimony on the value of particular appellants to one or more academic programs within the individual's own or "adjacent" departments, the future of academic programs as a matter of educational policy seems to have been an afterthought rather than an initiating principle in terminations. No faculty body responsible to the institution as a whole was asked to consider academic policy in advance of the terminations, which could then be carried out with an eye toward compliance with whatever shifts in programmatic emphasis might have been determined to be necessary under impending fiscal constraints. This meant that department chairs had virtual autonomy in their decisions, checked only by the initial review committee named by the administration in consultation with those chairs and ultimately, of course, by the appeal panels themselves.

### C. CONSIDERATIONS OF ACADEMIC DUE PROCESS

The investigating committee here addresses those issues specifically related to the affordance of academic due process.

#### 1. The Hearings

*RIR* 4c(2) stipulates that, if the administration has issued notice of termination of appointment to a faculty member on grounds of financial exigency, the faculty member has the right to a full hearing before a faculty

committee. "The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5 [governing dismissals for cause], but the essentials of an on-the-record adjudicative hearing will be observed." The investigating committee believes that, setting aside the question of how the hearing panels were formed, the UTMB appeals process did offer such essentials in the case of some appeals, while in others it did not.

This same Association-recommended regulation continues by referring to several issues that the hearing may address:

- (i) The existence and extent of the condition of financial exigency. The burden of proof will rest on the administration to prove the existence and extent of the condition. The findings of a faculty committee in a previous proceeding involving the same issue may be introduced.
- (ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered presumptively valid.
- (iii) Whether the criteria are being properly applied in the individual case.

In the absence of input from faculty peers, the hearing panels apparently considered the administration's declaration of financial exigency to be presumptively valid, the burden of proof being on the faculty member to overturn it. With respect to (ii), a hearing panel, confronted with this language, could presumably have argued that it was proceeding on the grounds that the recommendations of the initial review committee were likewise presumptively valid. The third question is repeatedly argued in the hearing panel reports, with the panel findings generally being on the side of the department chair.

#### 2. Post-Hearing Considerations

##### *a. The Criterion of "Serious Distortion"*

Subsections 3 through 6 of *RIR* 4c speak to the obligations of an institution to faculty members whose appointments are terminated in circumstances of financial exigency. Subsection 3 stipulates that an administration "will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic program would otherwise result" and that the appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure except under the same circumstances—when a

“serious distortion” in the program would occur otherwise. By contrast, Rule 31003, as we have seen, essentially puts tenured and nontenured faculty on an equal footing except as regards a position for which both of them are “equally qualified and capable,” in which case the palm goes to the tenured faculty member. The governing criterion of the *RIR*, “a serious distortion of the academic program,” does not figure in Rule 31003. The rule rather obviously does not bar the appointment of new untenured faculty members if they are in a developing field of interest or emphasis not previously represented by the existing (and immediately pre-existing) faculty. That move itself, however, may be said to constitute a change of programmatic emphasis, or the addition of a new subfield, requiring an anterior judgment of programmatic development that should be made by the department corporately and clearly demarcated for planning purposes. Otherwise, the release of tenured professors and recruitment of new faculty members becomes a back-door attempt to reconfigure a department more in line with someone else’s idea of how it should look. By contrast, a “serious distortion” results from a large vacuum in an existing program that would result if a particular nontenured faculty member, the only one in an important specialty, were to be released. If any department at UTMB’s School of Medicine, so far as this committee knows, attempted to make that case, the committee has no evidence of it. Surely the burden-of-proof standard, in the first step of the process, ought to rest on a department chair who alleges that a serious distortion of the academic program will result if a nontenured faculty member is not retained, even though a tenured faculty member in the same department is released.

#### *b. Alternative Placement*

Regulation 4c(4) of the *RIR* stipulates that, before terminating an appointment because of financial exigency, “the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution.” The investigating committee is unaware of any attempt to relocate an affected faculty member in the School of Medicine elsewhere in the school or in another UTMB component. The committee was informed that the University of Texas System had offered assistance in placement of affected faculty members elsewhere in the system but that faculty members had not wanted their situation to be publicized in that way. The executive vice chancellor for

health affairs described this arrangement as a special policy carved out as an exception to a UT System policy, which frowns on intercampus “raiding” of faculty.

#### *c. Notice or Severance Salary*

*RIR* 4c(5) refers to standards of notice or severance salary set forth in Regulation 8 of the *RIR*, which incorporates the Association’s *Standards for Notice of Nonreappointment*. The minimum time is one year in the case of decisions reached after eighteen months of service on a renewable term appointment or if the faculty member is tenured. As we have seen, nontenure-track faculty received notice of just over six months, and tenured faculty, together with probationers in their third year of service or beyond, received notice to take effect on August 31, approximately two-and-a-half months short of one year, based on the date of the provost’s letter. In the case of these persons, therefore, notice fell short of Association-supported standards.

It should be observed here that rather than a deliberative process that might have allowed the affected faculty member to present his or her case prior to the issuance of a notice of termination, those notices preceded the hearing that a faculty member could request after receiving the notice. The fact of a prior decision on termination, coupled with the placing of the burden of proof on the faculty member making the appeal, is almost inevitably to tilt the scales against the affected individual even before the hearing begins. The administration (and, equally, the system) took the position that the decision had to be made, that it did not want to prolong the uncertainty that the faculty member would otherwise feel (of the sort sometimes associated with furloughs, had they been permissible), and that it did not want either to lull the faculty member with false anticipations or to fail to make it clear that he or she was free to accept another position elsewhere even before the expiration of his or her appointment at UTMB.

#### *d. Recall*

The sixth and last section of *RIR* 4c states, “In all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and a reasonable time in which to accept or decline it.” The investigating committee has already discussed this issue in connection with the TFA lawsuit. The lawsuit, as has been

noted, resulted in a one-year extension of Rule 31003's standard of two years to reapply, but neither that lawsuit nor the rule affirmed the presumptive claim of the released faculty member to be offered reinstatement without being put in the position of having to apply for an opening in competition with others who might be interested, and the settlement reached as a result of the TFA lawsuit did not affirm even the right of such a faculty member to be notified of the opening.

The foregoing remarks require a note of caution. The investigating committee has not been presented with a list of newly appointed faculty members and their specialties, and it does not take on itself the function of determining how closely the credentials of a released faculty member might match those of an incoming nontenured faculty member. Some vacancies may have resulted from the voluntary departure of clinical faculty members who had to be replaced in order to maintain or replenish critical revenue streams and maintain appropriate levels of patient care. The larger problem, which the committee addresses in the concluding pages of this report, derives from UTMB's heavy dependence on clinical revenue to support the rest of its mission. But again, here as elsewhere, the problem is one of faculty perceptions, and perceptions under the highly charged circumstances of a massive reduction in force have a reality of their own. More transparency, not only at the time of the crisis but in the succeeding months, would have been a boon to this troubled campus.

In January 2010, UTMB legal counsel Carolee King forwarded to the investigating committee an enumeration (without names) of released faculty members who had been reinstated as a consequence of fiscal developments since the previous spring. Thirty-two faculty members had been recalled, of whom nine had filed appeals and twenty had not. An additional three had appealed but their appeals had been withdrawn, whether or not because of their reinstatement was not indicated. These developments are to be welcomed, and the investigating committee hopes that additional offers of reinstatement can be made in the near future.

## V. The Status of Tenure in the University of Texas System

In the words of the 1940 *Statement of Principles on Academic Freedom and Tenure*, "Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and

economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society."

In the course of communications both with the Association's staff and with the investigating committee during its visit to Galveston, it was evident that some faculty members saw events at UTMB as reflecting a broader assault on the principle of tenure itself. These suspicions antedated Hurricane Ike. In August 2006, the Texas Faculty Association posted on its Web site an e-mail dated June 22 of that year from the then dean of the medical school to the then president, copied to a UTMB attorney, regarding reduction of tenured faculty. The attorney, the dean said, "has been working hard but has not really identified any appropriate strategy for us to reduce tenured faculty except for reducing salary. We do not have early retirement option . . . or a mandatory reduction to part-time. This will be a significant issue in keeping us from our \$31m goal." When asked about this memorandum, the provost stated that he had not been serving in an administrative capacity when it was written and that, although he could not speak for a predecessor, neither he nor anyone else was attempting to "bust" tenure. System representatives have been equally adamant on this point. The problem lies with Rule 31003 in that the rule allows for the dismissal of tenured faculty, as well as probationary faculty prior to the expiration of a term appointment, and places the burden of proof for retention upon the faculty member to show why he or she should not be dismissed. Thus Rule 31003 undermines the principle of tenure.

If one of the purposes of tenure is, as the 1940 *Statement* declares, the provision of a certain amount of financial security to men and women in the profession to make that profession attractive to them, then it seems obvious that if a tenured faculty member is placed at risk when he or she is unable to secure salary recovery through external funding, or clinical revenue at a level deemed requisite to preserve his or her position, tenure itself has become hostage to forces beyond his or her control, or indeed the control of the institution. More subtly, it may also undercut the principle of academic freedom, for if, as was evident in one case, a scientist is heavily invested in "edgy" (that is, "cutting-edge") research, and if the often fickle strategies of federal funding agencies tend to favor high-demand or trendy or "safe" projects, then the message is unmistakable: If you want to preserve your job, go where the funding is. When, by contrast with their peers in the liberal arts and sciences, basic scientists in a medical school are thus placed at risk—and UTMB is by no

means alone in what appears to be a growing trend in medical schools—the risk is not only to freedom of research and tenured status but ultimately also to the quality, if not the viability, of the academic program. The loss is measured not merely in its cost to the individual whose appointment has been terminated; it is measured also in its adverse impact on the students (as was evident in a number of the appeals where students came forward in support of the faculty member), on the institution, and indeed on the very future of the medical profession.

It should be noted that the University of Texas System rules governing dismissal for cause, set forth in Rule 31008, share some of the weaknesses of Rule 31003. Although Rule 31008 does assert, importantly, the principle that the burden of proof rests on the institution to show cause why a tenured faculty member, or a non-tenured faculty member before the expiration of a term appointment, should be dismissed, it also preserves some of the features of concern evident in the events examined here: presidential appointment of a hearing tribunal “from a standing panel (pool) of members of the faculty,” though at least 50 percent of the names chosen for service are to be selected by a procedure established by the appropriate faculty governance body. As with Rule 31003, the faculty member whose case is being heard may challenge one or another name, but the person challenged is the sole arbiter as to whether he or she can serve.

System representatives informed the investigating committee at the time of its September 2009 visit to Austin that they were establishing a committee to review Rule 31003 and that they would welcome AAUP input. The evidence suggests that a review of other regulations affecting faculty status would be in order and that the reason for such a review goes far beyond what the system representatives seemed to think was the main problem with Rule 31003, namely, that it addressed termination of specific programs rather than institution-wide (or in this case schoolwide) financial exigency. The problem, as this investigating committee has seen, goes deeper and involves a fundamental misperception of the nature of tenure in higher education. The underlying assumptions behind Rule 31003 are such as to vitiate basic principles on which tenure is established. That the system’s Faculty Advisory Council in the past had been involved in the review process on previous occasions (see note 5 above) does not mitigate the Association’s concern over the inadequacy of Rule 31003.

Whether the applicability of Rule 31003 to the University of Texas as a whole means that tenure is potentially at risk throughout the entire system cannot be answered

simply.<sup>14</sup> System representatives did not seem to dispute that, subject to board oversight, a particular campus could impose a higher standard for proceedings governing faculty status. Much, too, depends on local campus climate. Just as good regulations do not always ensure good practice, so poor regulations are not always a signal of bad practices; in its polity, its everyday working life, an institution with the right mix of leadership and commitment can always rise above its own rules. But doing so depends on an atmosphere of trust between administration and faculty and a stronger tradition of faculty participation in governance than is evident at UTMB. If programmatic and personnel decisions are driven by a heavy reliance on clinical income, an institution has come very close to the boundary that separates an academic enterprise from a cost-effective business, in which tenure ceases to mean much more than “as long as you pay your way, you stay.” What is required at UTMB is more than a rewriting of a regents’ rule. It is a shared understanding among faculty, administration, and board of where an appropriate boundary line can be drawn to ensure academic quality.

## VI. Conclusions

1. By proceeding under the provisions of Rule 31003, the administration of the University of Texas Medical Branch at Galveston acted to terminate the appointments of tenured and nontenured faculty through a process seriously deficient by the standards laid out in the Association’s *Recommended Institutional Regulations on Academic Freedom and Tenure*. In particular, the shortcomings in academic due process included, in disregard of the provisions in the 1940 *Statement of Principles on Academic Freedom and Tenure* that terminations of tenured appointments for reason of financial

---

14. In their response to a prepublication draft of this report, Dr. Shine and Mr. Burgdorf stated the following: UTS [the University of Texas System] has been and remains firmly committed to the principles of tenure. . . . UTS is a System of 15 institutions with over 18,000 faculty of whom 6,841 are tenured and 3,229 are on tenure-track. Tenure is carefully granted, after full and proper peer review, and in accord with accepted principles of academic freedom and faculty governance. And once earned, it is cherished by the holder and respected by UTS. The academic freedom and employment security of tenured faculty members are fully protected, and tenured faculty, appropriately, play a vital role in the governance of UTS and its institutions.

exigency be demonstrably bona fide, the placing of the burden of proof on the faculty member to demonstrate that the exigency was not bona fide or that the action taken to terminate his or her appointment was arbitrary or unreasonable.

2. The faculty role in determining the existence and magnitude of financial exigency in November 2008 and in assessing the impact of a declaration of financial exigency on academic programs and faculty status was, for all practical purposes, nonexistent.
3. In restricting the scope of review of a termination, Rule 31003 severely inhibits both the due assertion of individual faculty rights and the ability of a hearing panel to reach findings adverse to administrative interests. In addition, there is room for doubt as to whether in all instances, such as in the overall assessment of the academic program in advance of identifying appointments for termination, the review procedures employed comported with applicable provisions of Rule 31003 itself.
4. The manner of selection of the faculty bodies involved in the reduction-in-force process was deficient by the standards of the 1966 *Statement on College and University Government* and raised questions about the extent of their independence of administrative authority. Neither Rule 31003 nor Rule 31008 ensures the independence of a faculty body, chosen or approved by faculty action, a course of proceeding that would not in any way undercut the ultimate authority of the president and governing board in the final disposition of cases but that would allow for an appropriate exercise of independent judgment on the part of the faculty commensurate with its primary responsibility in matters affecting faculty status.
5. Affordance of notice or severance salary to the released faculty members was inadequate when measured against Regulation 8 of the *Recommended Institutional Regulations*.
6. By resting the responsibility largely on the released faculty member to find out if a position had opened suitable to his or her interests and competency and by requiring the faculty member to compete for any such opening, the administration failed to observe the requirements of Regulation 4c(6).
7. In the absence of evidence indicating that new appointments were required to address directly the problem of UTMB income, the administra-

tion has failed to demonstrate that many of the notifications of termination could not have been rescinded when funds for recruitment were expended during spring 2009. ■

LAWRENCE S. POSTON (English)  
University of Illinois at Chicago, *chair*

RONALD M. ATLAS (Biology)  
University of Louisville

GLORIA GIARRATANO (Nursing)  
Louisiana State University Health Sciences Center

#### *Investigating Committee*

Committee A on Academic Freedom and Tenure has by vote authorized publication of this report on the AAUP Web site and in the *Bulletin of the American Association of University Professors*.

Chair: DAVID M. RABBAN (Law), University of Texas at Austin<sup>15</sup>

Members: RONALD M. ATLAS (Biology), University of Louisville<sup>16</sup>; MICHAEL F. BÉRUBÉ (English), Pennsylvania State University; SHELDON KRIMSKY (Biomedical Ethics and Science Policy), Tufts University; DAVID MONTGOMERY (History), Yale University; ADOLPH L. REED JR. (Political Science), University of Pennsylvania; ANDREW T. ROSS (American Studies), New York University; ELLEN W. SCHRECKER (History), Yeshiva University; CARY R. NELSON (English), University of Illinois at Urbana-Champaign, ex officio; GARY RHOADES (Higher Education), AAUP Washington Office, ex officio; MARTHA S. WEST (Law), University of California, Davis, ex officio; ERNST BENJAMIN (Political Science), Silver Spring, Md., consultant; JOAN E. BERTIN (Public Health), Columbia University, consultant; MATTHEW W. FINKIN (Law), University of Illinois at Urbana-Champaign, consultant; ROBERT A. GORMAN (Law), University of Pennsylvania, consultant; JEFFREY R. HALPERN (Anthropology), Rider University, consultant; ROBERT C. POST (Law), Yale University, consultant; JEFFREY KRAUS (Government and Politics), Wagner College, liaison from Assembly of State Conferences.

---

15. Did not participate in any vote or discussion concerning committee action in this case.

16. Did not participate in any vote concerning committee action in this case.