June 20, 2012

Dr. Sue Alexander Greninger  
Secretary of General Faculty and Faculty Council  
WMB 2.102 (F9500)

Dear Sue:

I write concerning the “Proposed Revisions to UT Austin’s HOP 3.16 Threatened Faculty Retrenchment,” Documents of the General Faculty 8936-8939 (enclosed). As you know, President Powers forwarded this proposal to The University of Texas System with his recommendation for approval (cf. his letter of February 22, 2012, to Dr. Pedro Reyes, Executive Vice Chancellor ad interim for Academic Affairs). Having reviewed the proposal on behalf of the System, the Office of General Counsel has returned the proposal with several concerns. These are summarized in the enclosed e-mail message from Mr. Dan Sharphorn, Deputy General Counsel, to Ms. Candice Fischbach, Policy Manager of the University Policy Office. Also enclosed is a copy of the proposal with the passages of concern identified.

The Faculty Council will want to reconsider the proposal in light of Mr. Sharphorn’s comments. If you have any questions, please do not hesitate to contact me.

Sincerely yours,

Charles A. Roeckle  
Deputy to the President

CAR/am

Enclosures

cc: President William Powers, Jr.  
Dr. Steven Leslie, Executive Vice President and Provost  
Mrs. Patti Ohlendorf, Vice President for Legal Affairs  
Dr. Gretchen Ritter, Vice Provost  
Ms. Candice Fischbach, Policy Manager, University Policy Office  
Ms. Debbie Roberts, Executive Assistant, Office of the General Faculty  
Faculty Council Executive Committee
Hello Candice. Below are my comments on the proposed revisions:

Comments on the “Proposed Revisions to UT Austin’s HOP 3.16 Threatened Faculty Retrenchment”

Part II, Abandonment of Academic Programs or Positions for Academic or Budget Reasons, second paragraph, last sentence:

“The Review Committee will be composed of at least half faculty members including, unless otherwise agreed to, the Chair of the Faculty Council.”

It is unclear who would be required to agree to the exception. Recommend the Provost be able to decide.

Part III, Abandonment of Academic Positions or Programs Because of an Institutional Financial Exigency, fifth paragraph, sixth sentence:

“The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.”

This impermissibly exceeds the standards established in Regents’ Rule 31003, Sec. 3.4, i.e.:

“Tenure Preference. If, in the opinion of the committee, two or more faculty members are equally qualified and capable of performing the same teaching, research, and/or clinical role, the faculty member or members having tenure shall be given preference
over nontenured faculty. However, if such faculty members have the same tenure status and equal qualifications, consideration will be given to other documented needs of the institution.”

Part IV, Procedures for Appeal:

The last sentence in the last paragraph of Part II and the first sentence in this part indicate that these procedures are to be used in the case of position elimination due either to financial exigency or for bona fide academic reasons, including those motivated by budget concerns:

“A faculty member whose position has been eliminated due to academic or budgetary reasons or institutional financial exigency is entitled to appeal that decision.”

However, the grounds for appeals cited from Regents' Rule 31003, Sec. 3.8(d) in the next paragraph of Part IV are only applicable to elimination due to financial exigency:

“(1) Financial exigency was not in fact the reason for the initial decision to reduce academic positions; or (2) The decision to terminate the appellant as compared to another individual in the same discipline or teaching specialty was arbitrary and unreasonable based upon the evidence presented.”

The applicable grounds for appeals due to bona fide academic reasons are specified in Regents' Rule 31003, Sec. 2.4(e):

“The burden shall be upon the appellant to show by a preponderance of the credible evidence that the decision to terminate the appellant as compared to another individual in the same discipline or teaching specialty was arbitrary and unreasonable based upon the evidence presented.”

The third paragraph, first sentence, of Part IV states:

“For appeals on grounds other than the reasons listed in the paragraph immediately above, such as, but not limited to, race or gender discrimination or violation of academic freedom, the faculty member shall use the Faculty Grievance Procedure (HOP 3.18).”

Regents' Rule 31003 spells out the grounds available for appeals of decisions to eliminate certain faculty positions due to financial exigency (Sec. 3.8(d)) or for bona fide academic reasons (Sec. 2.4(e)). These are the grounds that must be applied and the grievance procedures cannot be substituted. The existing grounds would include claims of race or gender discrimination or violations of academic freedom as such actions, if proven, would be arbitrary and unreasonable.

Part V, Additional Notes, first paragraph, first sentence:

“If appointments are terminated, the University will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic or clinical program would otherwise result.”

This should read:
"If appointments are terminated, the University will not at the same time make new appointments in the same subject area or specialization except in extraordinary circumstances where a serious distortion of the academic or clinical program would otherwise result."

First paragraph, second sentence:

"Similarly, the appointment or a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic or clinical program would otherwise result.

As noted above in comments on Part III, this impermissibly exceeds the standards established in Regents’ Rule 31003, Sec. 3.4, i.e.:

"Tenure Preference. If, in the opinion of the committee, two or more faculty members are equally qualified and capable of performing the same teaching, research, and/or clinical role, the faculty member or members having tenure shall be given preference over nontenured faculty. However, if such faculty members have the same tenure status and equal qualifications, consideration will be given to other documented needs of the institution."

Dan Sharphorn
Associate Vice Chancellor and
Deputy General Counsel
The University of Texas System
201 West 7th Street
Austin, Texas 78701
512-499-4462
dsharphorn@utsystem.edu

From: Withers, Brandi
Sent: Monday, February 27, 2012 9:27 AM
To: 'cfschbach@austin.utexas.edu'
Cc: Sharphorn, Dan; Revisore, Suzanne
Subject: UTAUS - Threatened Faculty Retrenchment - HOP 3.16

THE UNIVERSITY OF TEXAS SYSTEM
Office of General Counsel
201 WEST SEVENTH STREET AUSTIN, TEXAS 78701-2902
TELEPHONE (512) 499-4462
FAX (512) 499-4523

MEMORANDUM
Date: February 27, 2012
To: Candice Fischbach ([Fischbach@austin.utexas.edu](mailto:Fischbach@austin.utexas.edu))
Re: Threatened Faculty Retrenchment - HOP 3.16
OGC#: 142147 – UTAUS

Your email of February 27, 2012 relating to the captioned subject has been referred to Dan Sharphorn for review. We will provide you with our comments and recommendations as soon as possible. Please feel free to contact Dan should you have further questions or information regarding this matter.

cc: Dan Sharphorn

BRANDI WITHERS
Legal Administrative Assistant
The University of Texas System
Office of General Counsel

201 West 7th Street, Austin, Texas 78701
Ph: (512) 499-4507  Fax: (512) 499-4523
PROPOSED POLICY
CHAPTER 3 - FACULTY AND ACADEMICS

Sec. 3.16. Abandonment of Academic Positions or Programs

I. GENERAL POLICY
Regents Rule 31001, Abandonment of Academic Positions or Programs, calls for development of institutional procedures for an in-depth review to inform and guide decisions on these matters. The following are procedures for The University of Texas at Austin beyond those indicated in Regents Rule 31003.

Regents Rule 31003, abandonment of academic positions or programs, will be interpreted in the light of Rule 40101 which gives faculty a "major role" in regard to "general academic policies and welfare" and related matters and in the light of the further provisions that assign these faculty responsibilities to the faculty governance organization and require that the organization and procedures of the governance organization be set out in the university Handbook of Operating Procedures and subject to governance review and approval.

II. ABANDONMENT OF ACADEMIC PROGRAMS OR POSITIONS FOR ACADEMIC OR BUDGET REASONS
An academic program under consideration for abandonment or an academic position held by a tenured faculty member or a tenure-track or non-tenure track faculty member before the end of a contract that is under consideration for elimination for bona fide academic or budget reasons should be reviewed in depth through a procedure determined by the president in consultation with the Faculty. The president shall consult with the Faculty Council and the affected budgetary units to determine the most appropriate of the possible courses of action to be taken and the means of safeguarding faculty rights and interests, including tenure rights.

Upon determining the existence of the need to reduce academic programs or faculty positions, or both, the president, in consultation with the Faculty Council Executive Committee, shall appoint a Review Committee composed of faculty and administrative personnel to make recommendations to the president as to which academic positions and/or academic programs should be eliminated. The Review Committee will be composed of at least half faculty members including, unless otherwise agreed to, the Chair of the Faculty Council.

Faculty in a program that is under consideration for abandonment or in academic positions that are under consideration for elimination will be notified and afforded an opportunity to contribute to the review process.

Upon completion of the review process, a recommendation with supporting rationale shall be submitted by the Review Committee to the president for review and recommendation. If the president determines that an academic program shall be abandoned, the president will submit

Comment [Jew1]: Per Dan Sharpnac: It is unclear who would be required to agree to the exception. Recommend the Provost be able to decide.
a request for approval with supporting documentation to the appropriate Executive Vice Chancellor.

A faculty member who wishes to appeal for reconsideration of a termination decision shall make this request within 30 days of notification of termination. The hearing process shall proceed as outlined in Section IV of this policy.

III. ABANDONMENT OF ACADEMIC POSITIONS OR PROGRAMS BECAUSE OF AN INSTITUTIONAL FINANCIAL EXIGENCY

Financial exigency is, as defined in the Regents' Rules, "a demonstrably bona fide financial crisis that adversely affects the institution as a whole and that, after considering other cost-reducing measures, including ways to cut faculty costs, requires consideration of terminating appointments held by tenured faculty" (RR 31003, 3). Whenever reason exists to anticipate the University is sufficiently threatened by financial exigency, declines in enrollment, or changes in educational needs to endanger the continuance of the University's obligations to faculty members with tenure or those on regular academic appointments, the president at the earliest date possible shall inform the Faculty Council and all potentially affected budgetary units of the problem.

Procedure for Eliminating Programs or Positions

"Upon determining the existence of a financial exigency and the need to reduce academic positions or academic programs or both, the president . . . shall appoint a committee composed of faculty and administrative personnel . . . . At least one-half of the total committee membership shall be faculty members and at least one-half of the faculty members on the committee shall be appointed from recommendations submitted to the president from the [Faculty Council]" (RR 31003.3.1). The formation of the Exigency Committee shall include the general criteria the committee should apply in making its recommendations.

It is recommended that at least a majority of the faculty appointed will be tenured. Any appointed non-tenured or tenure-track faculty should be senior faculty with substantial experience in the University. The nominations should seek to represent the University as a whole, not just programs initially slated to be reduced or just those not so slated, and at least some of the faculty should have served on faculty governance review committees for recommendations on promotion and tenure for academic personnel. Unless otherwise specified, the committee shall complete its work in a period of time no longer than 60 days from the appointment of the Exigency Committee.

For Regents' Rule Section 3.2, Assessment of Academic Programs, the Exigency Committee will provide a written report of its analysis of programs and recommendations. As stated in the Rule, "The committee will review and assess the academic programs of the institution and identify those academic positions that may be eliminated with minimum effect upon the degree programs that should be continued and upon other critical components of the institution's..."
mission. The review will include, but not be limited to, as relevant: (a) an examination of the course offerings, degree programs, supporting degree programs, teaching specialties, and semester credit hour production; (b) an evaluation of the quality, centrality, and funding of research activities; and/or (c) an assessment of the productivity, community service, and quality of clinical services (in relation to teaching, healthcare delivery, and scholarly activity)."

For Regents’ Rule Sections 3.3, Review Consideration, and 3.4, Tenure Preference, the Exigency Committee should recommend specific positions to be eliminated in its written report. The recommendations should be related to the Exigency Committee’s assessment of programs. If other officers of the University, such as deans or program chairs, are involved in identifying individuals whose appointments are to be terminated, the process for obtaining these recommendations should be described in the report. The Exigency Committee will have available the personnel records of those being considered including current curriculum vitae, recent annual reports, promotion committee reports and recommendations, and results of periodic performance reviews. It will have access to full personnel files. The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result. Faculty whose positions would be jeopardized by the proposed actions will be provided the opportunity to contribute meaningfully to the Committee’s review process, including the ability to respond in writing to the recommendations.

"Upon completion of its review, the committee shall promptly recommend in writing to the president those persons who may be terminated, ranked in order of priority, with the reasons for their selection. The president shall, after consultation with institutional administrative officers as the president may deem appropriate, determine which academic positions are to be terminated because of the financial exigency and shall give the holders of these positions written notice of the decision" (RR 31003, 3.5, "Recommendation").

IV. PROCEDURE FOR APPEAL

A faculty member whose position has been eliminated due to academic or budgetary reasons or institutional financial exigency is entitled to appeal that decision.

For appeals on the grounds that "(1) Financial exigency was not in fact the reason for the initial decision to reduce academic position; or (2) The decision to terminate the appellant as compared to another individual in the same discipline or teaching specialty was arbitrary and unreasonable based upon the evidence presented" [RR 31003, 3.8, (d), (1) and (2)]. the faculty member must use the Hearing process described in Regents’ Rules 31003. The hearing committee will not consider any other issues.

For appeals on grounds other than the reasons listed in the paragraph immediately above, such as, but not limited to, race or gender discrimination or violations of academic freedom, the faculty member shall use the Faculty Grievance Procedure (HOP 3.18). The faculty appellant

Comment [Jsw2]: Per Dan Sharpmon: This impermissibly exceeds the standards established in Regents’ Rule 31003, Sec. 3.4, i.e., "Tenure Preference. If, in the opinion of the committee, two or more faculty members are equally qualified and capable of performing the same teaching, research, and/or clinical role, the faculty member or members having tenure shall be given preference over non tenured faculty. However, if such faculty members have the same tenure status and equal qualifications, consideration will be given to other documented needs of the institution."

Comment [Jsw4]: Per Dan Sharpmon: The last sentence in the last paragraph of Part II and the first sentence in this part indicate that these procedures are to be used in the case of position elimination due either to financial exigency or for bona fide academic reasons, including those motivated by budget concerns:

Comment [Jsw5]: Per Dan Sharpmon: However, the grounds for appeals cited from Regents’ Rule 31003, Sec. 3.8(d) in this next paragraph of Part IV are only applicable to elimination due to financial exigency.

The applicable grounds for appeals due to bona fide academic reasons are specified in Regents’ Rule 31003, Sec. 2.4(e):

"The burden shall be upon the appellant to show by a preponderance of the credible evidence that the decision to terminate the appellant as compared to another individual in the same discipline or teaching specialty was arbitrary and unreasonable based upon the evidence presented."

Comment [Jsw6]: Per Dan Sharpmon: Regents’ Rule 31003 spells out the grounds available for appeals of decisions to eliminate certain faculty position due to financial exigency (Sec. 3.8(d)) and/or bona fide academic reasons (Sec. 2.4(e)). These are the grounds that must be applied and the grievance procedures cannot be substituted. The existing grounds would include claims of race or gender discrimination or violations of academic freedom as such actions, if proven, would be arbitrary and unreasonable.
will follow the standard grievance process as outlined in HOP 3.18 and flowchart 3, beginning at Step 5 with a request for a hearing.

V. ADDITIONAL NOTES

"If appointments are terminated, the University will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic or clinical program would otherwise result. Similarly, the appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic or clinical program would otherwise result" (RR 31003, IV).

A faculty member who is terminated shall be given a reasonable amount of time to close down his or her research and related facilities in a non-destructive way.

During this period of employment and for two additional years, the terminated faculty member shall have right to first consideration for any vacancies occurring in his or her field of teaching (RR 31003, 3.6).

Comment [jsw7]: Per Dan Sharpnorn:
This should read:
"If appointments are terminated, the University will not at the same time make new appointments in the same subject area or specialization except in extraordinary circumstances where a serious distortion of the academic or clinical program would otherwise result."

Comment [jsw8]: Per Dan Sharpnorn:
This last sentence in this paragraph... As noted above in comments on Part III, this impermissibly exceeds the standards established in Regents' Rule 31003, Sec. 3.4, i.e.:
"Tenure Preference. If, in the opinion of the committee, two or more faculty members are equally qualified and capable of performing the same teaching, research, and/or clinical role, the faculty member or members having tenure shall be given preference over non-tenured faculty. However, if such faculty members have the same tenure status and equal qualifications, consideration will be given to other documented needs of the institution."

Comment [dcf9]: Candice noted: Both Dan and I cannot find any correlation to this noted citation to "RR 31003, IV." Clarification is being sought through Debbie Roberts in the Faculty Council Office as to FC's intent.