



THE UNIVERSITY OF TEXAS SYSTEM

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April 21, 2009

Eric Combest
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Washington, D.C. 20036-3655

Dear Mr. Combest:

On behalf of Chancellor Cigarroa, President Callender, The University of Texas System (UT System) and The University of Texas Medical Branch at Galveston (UTMB), we write to respond to the concerns raised by the American Association of University Professors (AAUP) in a letter dated January 30, 2009, (and subsequent letters raising related concerns) regarding the UTMB reduction in force. We have spent the last two months working with UTMB on restoration efforts and collecting information necessary to fully respond. Also, due to the complexity of the situation and the extent of the damage at UTMB from Hurricane Ike, multiple parties have had to review and contribute to this response over the last several weeks. It will be useful to start with background information on the structure of UT System and the relationship between the State of Texas, UT System, and UTMB; a structure and relationship that is not always well understood in the general public.

UT System and UTMB – Structure, Relationship and Funding

In 1881, the Texas Legislature authorized the creation of UTMB as the Medical Department of the University of Texas. By a vote of the citizens of the State of Texas, the Medical Department was located in Galveston, then the leading commercial center in Texas. In 1890, Galveston's John Sealy Hospital was built as a clinical teaching facility for UTMB. The first classes were held in 1891, with 23 students and 13 faculty. In 1919, the Medical Department became the Medical Branch ushering a modern era of advancement in medical education for Texas. UTMB is home to the first medical and nursing schools in the State of Texas, and also home to many other "firsts" in Texas, including the first X-ray machine. Today, UTMB occupies 85 acres and 54 major buildings on its main campus on Galveston Island, and has numerous community-based sites on and off the Island. Pre-Hurricane Ike, UTMB had over 8,000 non-faculty employees, 1,084 permanent faculty, and 2,300 students.

UTMB is an institution within UT System. UT System is a federation of 15 campuses (nine academic and six health institutions) governed by one Board of Regents appointed by the Governor of the State of Texas. Individual campuses have substantial freedom to operate within policy set by the Board of Regents. As such, UTMB's President reports to the Executive Vice Chancellor for Health Affairs, who reports to the Chancellor. All are subject to the ultimate governing authority of the UT System Board of Regents and a host of state constitutional and statutory mandates.

Like most public institutions of higher education, UTMB is funded by a variety of sources, including student tuition, public and private endowments, philanthropy, research direct and indirect cost recovery, hospital contracts, physician income, and state appropriations. Each of these funding sources represents constituencies that must be served when making significant decisions regarding the future of the institution.

Hospital contracts and physician income provide approximately 53% of the total funding for the UTMB School of Medicine, and salary and benefits are about 67% of the School of Medicine budget. The education and research missions of the UTMB School of Medicine are supported by clinical activities. In addition, a robust patient volume and mix in those clinical operations are required to provide the necessary training for doctors, and are an essential part of the important clinical research activities being performed by UTMB faculty in efforts to make lives healthier. Most of the patient care UTMB School of Medicine students and residents are involved in takes place in the hospitals on the UTMB campus, including John Sealy, Children's and the Texas Department of Criminal Justice (TDCJ).

One point of frequent confusion regarding UTMB (and indeed funding for all UT System institutions) is the availability of the Permanent University Fund (PUF) for operations. The PUF is a constitutionally set-aside endowment for the benefit of certain institutions of higher education in Texas. UT System is without power to spend the PUF or earnings from the PUF—the Available University Fund (AUF)—except as specifically authorized. In general, the PUF serves as debt capacity for capital expenditures and the only campus within UT System that may use the AUF for operations is The University of Texas at Austin. Therefore, by law neither the PUF nor the AUF may be spent for operations at UTMB.

The Effect of Hurricane Ike

On September 13, 2008, Hurricane Ike struck the Southeast Texas coast making a direct hit on Galveston Island and the City of Galveston. The eye of the storm was at least 40 miles wide just prior to landfall. While Hurricane Ike was officially listed as a Category 2 storm, due to its tremendous size (at one point its breadth occupied almost the entire Gulf of Mexico) and an estimated 15-foot storm surge, experts consider it more appropriately a Category 4+ storm with an accompanying capacity for damage.

Therefore, it is no surprise that Hurricane Ike damaged approximately 75% of the housing in Galveston. The effect on the Island's economy was equally devastating. Post-storm estimates show that the population on the Island has decreased from approximately 58,000 to 45,000. Needless to say, UTMB itself sustained massive damage, which immediately and profoundly impacted UTMB's ability to maintain all of its operations.

The UTMB campus consists of approximately 5,000,000 square feet. Close to 725,000 square feet of UTMB buildings were flooded by several inches to up to 10 feet of water. Unfortunately, most of the hospital support services, including the blood bank, sterile processing unit, pharmacy and cafeteria, were located on the first floor of John Sealy Hospital and were destroyed in the flooding. Elevators throughout the hospital and across campus were also severely damaged, as were phone lines and UTMB's electrical substation.

Before Hurricane Ike, UTMB hospitals, including TDCJ, had an average daily census of 530 beds for the fiscal year ending August 31, 2008. Beginning January 5, 2009, post-Ike, UTMB has had an average daily census of 200 beds with 30 of those beds reserved for TDCJ patients. Efforts are being made to increase the number of beds, but there is no question that the number of available patient beds will remain far below the pre-Ike high census, at least for the foreseeable future.

Given the extensive damage UTMB sustained and the financial challenges posed by Hurricane Ike, President Callender made a very difficult but necessary decision to implement a reduction in force to support the hospital configuration of 200 beds and to preserve and protect UTMB's core missions.

The Financial Situation Post-Ike

In the aftermath of Ike, UTMB, with assistance from UT System, conducted extensive analyses of the financial situation. The immediate analyses predicted that UTMB would lose \$139.9 million in the months of September, October, and November of 2008 and would likely run out of money in March 2009 if a reduction in force were not implemented. In fact, UTMB lost \$138.7 million dollars during that period.

Consultants, insurance adjustors, UT System and UTMB personnel estimated that the cost of capital damages at UTMB attributable to Hurricane Ike was at least \$667 million. This figure does not include \$106 million spent by UTMB on direct cleanup costs. In addition, UTMB incurred business interruption losses of at least \$169 million due to the inability to treat patients in UTMB hospitals and clinics on the Island. This staggering figure of almost \$1 billion dealt UTMB a near mortal blow.

As these figures show, the UTMB health care delivery enterprise confronted an immediate financial crisis that clearly threatened the survival of the institution as a whole. In late 2008, the Texas Legislature was not in session and no special appropriations for UTMB were forthcoming. Even today, almost four months into the 2009 Legislative Session, UTMB

has not yet received a special appropriation, although the request is moving forward with strong support from UT System and UTMB. In time, FEMA will assist in funding for capital costs but provides no monies for operations and cannot fund, by law, business interruption losses.

As previously discussed, there was and is no special funding available from UT System to assist UTMB with its ongoing operations. Accordingly, UTMB reserve balances were, absent immediate and dramatic actions, insufficient to sustain ongoing operations across all areas—education, research, and clinic enterprises. In short, UTMB was facing insolvency with no prospect of a government bailout. To take no action would have been unconscionable.

Even if UTMB had received emergency funding from some source or receives such funding in the future, there was and is no prospect of a patient population or ongoing clinical revenue that could provide adequate funding going forward to justify trying to finance the continuance of all pre-Ike UTMB programs and activities. Indeed, in the fiscal year prior to Hurricane Ike, UTMB lost \$51 million. In fiscal years 1998 through 2006, it lost an average of \$28 million per year. Therefore, Hurricane Ike severely exacerbated an already deteriorating financial situation at UTMB.

Like most modern academic medical centers today, UTMB is a complex, interrelated mix of education, research, patient care, community involvement, and health care business. What Hurricane Ike did was knock out the financial underpinnings of the institution. With substantially reduced patient care revenue, there simply was not the continuing ability to pay staff that was no longer supported by that revenue. To keep payroll at the same levels with no supporting revenue would have put UTMB in a death spiral bringing down not just its clinical enterprise but also its education and research missions. Moreover, as stated earlier, because revenue from clinical operations provides vital support to educational and research activities, loss of clinical revenue necessitated scaling back programs that were not purely clinical in nature.

Therefore, UTMB could only survive on the whole if it reduced the clinics, services, and the number of hospital beds it attempted to operate. The reduction in force was a health care enterprise decision, not an educational decision. No doubt, it had serious consequences for UTMB's educational and research activities, but it was not a decision about educational policy or faculty status.

In your January 30, 2009, letter, you express concerns that faculty terminations only occur upon a "demonstrably bona fide financial exigency" which constitutes "an imminent financial crisis that threatens the survival of the institution as a whole." Continuing losses of almost \$40 million per month that would have bankrupted the institution entirely within four months does, in our opinion, amount to a financial exigency.

You also state that a reduction in force including faculty should never occur unless the financial situation "cannot be alleviated by less drastic means." As stated earlier, 67% of the budget of the School of Medicine is made up of personnel costs. Therefore, it is simply

impossible to make any meaningful impact on expenditures much less narrow a \$40 million per month loss without reducing employee headcount.

Finally, you also state that the AAUP “hoped that the institution, in efforts to renew full operations, would be able to minimize the costs to its educational programs and faculty.” UTMB did minimize these costs. Based on initial financial projections, President Callender recommended a reduction in force of up to 4,200. By the time the UT System Board of Regents endorsed the need for a reduction in force, the number was 3,800. As UTMB implemented the reduction in force, the number was reduced further and, in the end, less than 2,500 FTE positions were laid off. As the number of layoffs necessary to save UTMB was reduced, the number of faculty involved was also kept to a minimum. 124 of 1,084 faculty were laid off, or 11.4% of faculty. Approximately 29% of non-faculty employees were laid off. Of the 124 faculty, 42 were tenured and 16 were tenure track. So, in the end less than 2% of those terminated were tenured faculty. As these numbers indicate, every effort has been made to keep termination of tenured faculty to a minimum. Moreover, UTMB still projects losses of \$146.5 million for this fiscal year and only \$77.8 million of that projected loss is due to depreciation. Clearly, UTMB could have gone further to salvage its precarious financial position.

The Process Used for the Reduction in Force

The decision to downsize the health care enterprise was implemented by President Callender, in consultation with the UT System Interim Chancellor, Dr. Kenneth Shine, and with the endorsement of the UT System Board of Regents, in accordance with a process-laden action plan under Regents’ Rule 31003.

Once UTMB decided to reduce health care services to save UTMB as a whole, it followed that some of the health care professionals affected would be members of the faculty. However, classified and administrative, and professional employees were laid off before considering any reductions to faculty. In your January 30, 2009, letter, you state that AAUP standards “require that the services of a professor with tenure not be terminated in favor of retaining a professor without tenure, except in extraordinary circumstances.” Because tenured faculty were given a preference and that preference was only overcome in the rarest of circumstances, we can say without equivocation that this standard was fully honored with regard to UTMB’s reduction in force.

The Executive Vice President and Provost (Provost), along with the Chief Financial and Administrative Officer (CFO/CFA), met with each Chair and or Center and Institute Director individually to explain that the 26 School of Medicine Department and Center and Institute administrators were going to be reduced to no more than 10 administrators. Each department, center and institute was assigned to a cluster, and one of each of the 10 administrators was assigned to a cluster. In addition, each Chair and/or Center and Institute Director was told that it would need to cut costs and reduce their staff.

UTMB administration instructed each Chair and/or Center and Institute Director to apply the following criteria in evaluating faculty members:

- Educational Mission
- Departmental and Institutional citizenship
- Research Funding
- Clinical Revenue
- Productivity
- Future Clinical Services and Programs offered by UTMB

Again protecting tenure, in cases where two equal faculty members were being considered for the reduction in force, the Chair and/or Center and Institute Director was asked to recommend the non-tenured faculty member for the reduction versus the tenured faculty member. Faculty members being considered for the reduction were categorized—A, B, or C. The A Category consisted of faculty necessary for each department's core mission of research, patient care, and education. Faculty assigned to the C category were those where loss would not materially impact core missions and the B Category were those faculty considered in between Categories A and C. Explanations for each faculty member on recommended lists were written and then the list was sent to the Provost for review. Each list was thoroughly reviewed by the Provost and in some cases, the Provost called and questioned Chairs and Center and Institute Directors to understand why some faculty members had or had not been placed on the list.

Throughout your letter, you express various concerns regarding faculty involvement. As shown below, faculty was intimately involved in the reduction in force process. In accordance with Section 3.1 of Regents' Rule 31003, a Faculty Review Panel was appointed by President Callender, upon recommendation by the Executive Vice President and Provost. The Review Panel consisted of six senior, tenured faculty members from across the School of Medicine. One was a member of the UTMB Faculty Senate, two were women and two were minorities. Five were M.D.s and one was a Ph.D.

Separate hearings were held in front of the Faculty Review Panel with each department chair. In each hearing, the chair presented the rationale for each faculty member recommended for termination to the Faculty Panel, the Provost, the department administrator and the CFO/CFA. The panel was told whether each faculty member was tenured or non-tenured. After the presentation, the Faculty Panel asked questions, then deliberated without the administrators in the room, i.e., without the Provost, the department chair and administrator and the CFO/CFA. The administrators were occasionally called back into the room to answer additional questions and/or provide information. This process was repeated individually for each department.

Following this procedure, the School of Medicine reduction process took a total of five weeks. The Faculty Review Panel process covered two full days of meetings. At the conclusion, 124 faculty members were confirmed for the reduction in force. Of those, 42 were tenured, 16 were tenure track, and 66 were non-tenure track. In sum, the process was laden from beginning to end with faculty involvement.

Post-Termination Treatment of Employees

UTMB went above what was necessary to treat terminated faculty with respect and provide assistance. Within the confines of state law, which limits UTMB's ability to provide termination benefits, tenured and tenure-track faculty will be paid through August 31, 2009, and non-tenure track faculty will be paid through May 31, 2009. In addition, all faculty were allowed to decide if they wanted to continue to work, or to start looking for employment. All employees were allowed to keep their offices and labs. Therefore, your statement that you have heard "reports that some faculty members [have received orders] to vacate their offices and laboratories" is unfounded and simply untrue. The clinical faculty were given information on job availability and, in two cases, were offered other positions that came available on campus. In addition, under pre-existing UT System policy, faculty will be given first consideration as positions for which they are qualified become available, and will be notified during the next three years if a similar position opens. Therefore, your statement that it is unclear "what if any effort has been made to relocate affected tenured professors into other suitable positions" has now been addressed.

Appeals Process

Of the 124 faculty members identified for reduction, 36 filed appeals in accordance with Sections 3.7-3.8 of Regents' Rule 31003. Of those, six withdrew their appeals. A panel of nine faculty members was appointed by the Provost, upon delegation from the President, to hear the appeals in committees of three members. All the panel members were tenured and were selected based on their experience, membership on various committees, and institutional citizenship. Appealing faculty members are being given due process rights beyond any legal requirement, including the right to challenge members of the appeal committee, to be represented by an attorney, to request documentation and information, to call and question witnesses, to present documents and to see all documents presented to the appeal committee. In appealing, Section 3.8(d) of Regents' Rule 31003 applies:

- (d) The burden shall be upon the appealing person to show by a preponderance of the credible evidence that:
 - (1) Financial exigency was not in fact the reason for the initial decision to reduce academic positions; or
 - (2) The decision to terminate the appealing person as compared to another individual in the same discipline or teaching specialty was arbitrary and unreasonable.

Therefore, the terminated faculty benefit from a robust appeals process, chock full of due process. Without apology, UT System policy places the burden on faculty taking benefit of the appeals process. This procedure is consistent with well-established employment law that requires those alleging a wrong to prove it. Moreover, faculty are once again at the center of the appeals process and those appealing have a panel of their peers to plead their case before.

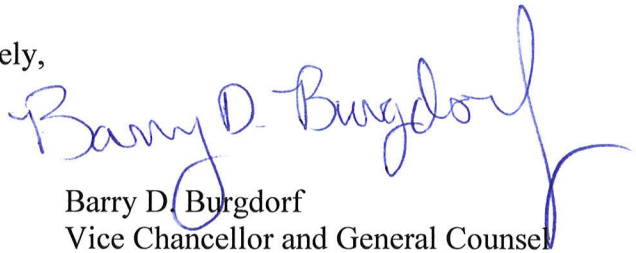
Finally, each and every faculty member has notice of this extensive process when hired and accepted tenure with these provisions in place.

It is never an easy decision to reduce force and, of course, an institution of higher education would never willingly choose it. However, if there was ever a case where a reduction in force was necessary to save an institution such was the case of UTMB after Hurricane Ike. To adhere to an absolute non-termination policy, in the face of certain insolvency that threatened to bring down a historic institution in a mere four months, would not be a responsible course of action. Such an inflexible policy would also adversely impact the hiring in the first instance of tenured faculty necessary to achieve the larger missions of the institution.



Kenneth I. Shine, M.D.
Executive Vice Chancellor for Health Affairs

Sincerely,



Barry D. Burgdorf
Vice Chancellor and General Counsel

- c: Board of Regents, The University of Texas System
Francisco G. Cigarroa, M.D., Chancellor
David L. Callender, M.D., President, UTMB
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