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Chair of the Assembly of the Academic Senate
Faculty Representative to the Regents
University of California
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200

April 23, 2021

MICHAEL DRAKE, PRESIDENT
UNIVERSITY OF CALIFORNIA

Re: Presidential Authority to Enact Salary Curtailments/Cuts

Dear President Drake,

On November 3, 2020, I sent you a letter on behalf of the Academic Council that described the Senate review of the proposed campus curtailment plan. That letter, along with comments on the plan from the ten divisions and five systemwide committees, can be found on the Senate website¹.

The Council did not endorse the curtailment plan for several reasons, as described in the letter and the accompanying documents. There was one issue that required further study, specifically the legal basis of the proposed curtailment, which the Council viewed as tantamount to a furlough but without the necessary Regental declaration of an Extreme Financial Emergency (Regents Standing Order 100.4 (*qq*)).

In the Council's efforts to probe this issue further, it sought formal guidance from the UC Office of General Counsel ("UC Legal"). In a February 9 letter to Council, Deputy General Counsel Woodall noted that the Regents Standing Orders give campus Chancellors and the UC President broad powers over workforce actions, and that no declaration of financial emergency is required prior to a furlough, curtailment, or salary reduction. UC Legal views the emergency authority in 100.4 (*qq*) as additive to the President's existing authority to undertake furloughs, curtailments, or salary reductions.

The University Committee on Faculty Welfare (UCFW) then sought an independent legal analysis from a member of its Task Force on Investment and Retirement (TFIR). This analysis, conducted by UC Berkeley Law Professor Mark Gergen, is in the attached letter from David Brownstone, Chair of TFIR, along with a cover letter from UCFW. This analysis maintains that UCOP and the Chancellors have limited authority over salary reductions, at least as they pertain to Senate faculty.

¹ https://senate.universityofcalifornia.edu/_files/reports/mg-md-campus-curtailment-proposal.pdf

The Academic Council reviewed the UCFW-TFIR letter containing Professor Gergen's analysis at its March 2021 meeting. We found the arguments persuasive and agree that the UC Legal memo overstates UCOP's authority regarding faculty salary reductions. Council members expressed particular concern about UC Legal's claim that UCOP could transfer that authority to individual Chancellors, who might in turn exert their perceived authority without Senate consultation. This idea is alarming not only because it affects shared governance on the campuses, but also because it potentially erodes the sense of the UC as a system of ten campuses.

Although discussion of this particular curtailment plan is now moot, we write to document the Senate's views in case a similar situation arises in the future that prompts a discussion of possible salary actions. In that event, we would request full Senate consultation and expect this letter and the accompanying materials to be part of the discussions.

Please do not hesitate to contact me if you have additional questions.

Sincerely,



Mary Gauvain, Chair
Academic Council

Cc: General Counsel Robinson
Deputy Director Woodall
Academic Council
UCFW
TFIR
Chief of Staff Kao
Senate Directors
Senate Executive Director Baxter

Encl.



UNIVERSITY COMMITTEE ON FACULTY WELFARE (UCFW)
Shelley Halpain, Chair
Shalpain@ucsd.edu

Assembly of the Academic Senate
1111 Franklin Street, 12th
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March 24, 2021

**MARY GAUVAIN, CHAIR
ACADEMIC COUNCIL**

RE: Presidential Authority to Enact Salary Curtailments/Cuts

Dear Mary,

The University Committee on Faculty Welfare (UCFW) has continued to discuss the process by which possible (faculty) salary curtailments or cuts could be enacted, following the OGC's comments and resulting discussion during the 27 January, 2021, Academic Council meeting. Contingency planning for COVID-related financial duress salary actions led UC Legal and the General Counsel to suggest that the president has unilateral, unquestioned authority to propose and enact such changes, leaving shared governance and perhaps Regents policy behind (enclosed). UCFW asked its Task Force on Investment and Retirement (TFIR) to assess the UC Legal position as that group has both legal expertise and institutional memory regarding previous salary curtailments and cuts at UC. TFIR's analysis (enclosed) was led by former member and current faculty advisor to TFIR, Mark Gergen¹ from UC Berkeley.

UCFW finds the arguments presented by TFIR to be compelling. We agree that the OGC memo greatly overstates UCOP's authority in the domain of salary reductions, at least as it pertains to Senate faculty. Members expressed concern that authority on salary reductions could be asserted by UCOP without the expectations of involvement of the Senate. UCFW was particularly concerned about the notion that salary reduction authority could be transferred by UCOP to individual UC Chancellors, who in turn might exert their perceived authority without Senate consultation. This latter idea is alarming not only for how it affects the exercise of shared governance on the campuses, but also because it potentially erodes the 'systemness' of the UC.

UCFW believes the Senate should speak forcefully on this issue, but with due consideration toward timing and diplomacy, recognizing our interest in promoting strong relationships with the UC Office of the President while still asserting the Senate's legitimate concerns.

¹ Robert and Joann Burch D.P. Professor of Tax Law and Policy and Associate Dean for Faculty Development and Research (2016 to present). Mark Gergen joined the Berkeley faculty in 2008 after teaching at the University of Texas School of Law for over two decades. His principal teaching interests are in Contracts, Torts, Federal Income Tax, and Partnership Tax. He has also taught a wide range of other subjects, including, since joining the Berkeley faculty, Property, Remedies, Corporate Tax, and Taxation of Financial Products and Institutions. Gergen's current scholarly interests include both private law and tax. <https://www.law.berkeley.edu/our-faculty/faculty-profiles/mark-gergen/>

Sincerely,

Shelley Halpain, UCFW Chair

Encls.

Copy: UCFW
Hilary Baxter, Executive Director, Academic Senate
Robert Horwitz, Academic Council Vice Chair

March 8, 2021

To: University Committee on Faculty Welfare|

From: Task Force on Investment and Retirement (David Brownstone, Chair)

Re: President's Power to Implement Furloughs and Salary Reductions Without Complying With Standing Order 100.4(qq)

We were asked to evaluate the opinion expressed by the Office of the General Counsel in a Feb. 9, 2021, letter to the Chair and Vice Chair of the Academic Senate (the "OGC Letter") that the President has the authority to implement a furlough or salary reductions without complying with Regent's Standing Order 100.4(qq). We believe this position is plainly wrong under the Regents' By-Laws and Standing Orders or under the Academic Personnel Manual ("APM").

As the OGC Letter acknowledges, "Standing Order 100.4(qq) provides that only the Regents may declare an 'Extreme Financial Emergency on the President's recommendation,'" and that the Standing Order "contains consultation requirements." These include a requirement that the President consult with representatives of the Academic Senate and other stakeholders prior to submitting a recommendation. Standing Order 100.4(qq)(4) imposes other safeguards and restrictions on the emergency powers it provides. These include a requirement that the recommendation be in writing and that it:

must generally describe the emergency conditions underlying the Declaration, the current or future effects of such conditions on campus or University operations, the expected duration of the Declaration if known (which in no event may extend beyond one year), a summary of the plan for implementing the proposed furloughs and/or salary reductions, and the expected outcome of the proposed plan. Standing Order 100.4(qq)(3).

The standing order also defines what constitutes an Extreme Financial Emergency: "Extreme Financial Emergency" for purposes of this Standing Order shall mean any event(s) or occurrence(s) creating an imminent and substantial deficiency in available University financial resources which could reasonably be expected to jeopardize the ability of the University, campus, or multiple campuses, to sustain its current or future operations in a manner which would allow it to fulfill its tripartite mission consistent with past practices. Standing Order 100.4(qq)(1).

The position taken in the OGC Letter rests on the remarkable proposition that "As long as the President is not acting on a matter specifically reserved to the Board, he has broad authority to take actions related to the operations of the University." The OGC Letter also relies on Paragraph 5 of Standing Order 100.4(qq), which provides:

The authority provided under this Standing Order is in addition to any authority otherwise provided University officials under other Regental or University policies and, except as provided herein, nothing in this Standing Order shall limit such other authority.

We can put Paragraph 5 to the side quickly for it adds nothing. Paragraph 5 only preserves "authority otherwise provided University officials under other Regental or University policies." It is not a grant of additional authority.

The OGC Letter cites Regent Bylaw 22.1 as support for its claim of implied authority without pointing to any supporting language in the Bylaw. There is no support there. Bylaw 22.1 provides:

The Regents hereby delegate authority to the President of the University to oversee the operation of the University, in accordance with policies and directives adopted by the Board, and as further specified in Bylaw 30 (President of the University). This delegation is subject to the powers specifically reserved to the Regents in Bylaw 22.2 below (Reserved Powers), in Committee Charters, and in Regents Policies requiring that matters be approved or otherwise acted on by the Board.

The first sentence delegates to the President the power “to oversee the operation of University.” (emphasis supplied) It does not delegate to the President the power to “take actions related to the operations of the University.” The first sentence of Bylaw 22.1 further provides this oversight power must be exercised “in accordance with policies and directives of the Board, and as further specified in Bylaw 30.” The second sentence, which retains certain reserved powers, only qualifies powers delegated in the first sentence. The second sentence is not an independent and broader delegation of power with respect to any matters not specifically reserved to the Regents.

The OGC Letter also cites Bylaw 30 as support for its claim of implied authority. Bylaw 30 defines the position of the President. It provides the President “exercises authority delegated by the Board pursuant to Bylaw 22.1.” As we have shown, Bylaw 22.1 only delegates authority “to oversee the operation of the University.”

Bylaw 30 goes on to define the administrative and budgetary role of the President in terms that are consistent with an oversight role, and are far less grand than asserted by the OGC Letter: The President is the executive head of the University and facilitates the development by the Board of the University’s direction, goals and strategy. The President implements the policies and objectives of the Board, and keeps the Board informed of all significant developments affecting the University. The President administers the day to day central and/or system-wide functions of the University, except those activities within the responsibility of the Principal Officers. The President develops, and on the approval of the Board, manages the University budget.

The OGC Letter argues the authority conferred to “manage the University budget” includes the authority to implement furloughs and salary reductions. These actions are budgetary modifications and are not managing the budget approved by the Board.

The conflation by the OGC Letter of budget making and budget managing could strip the Regents and the Senate of prerogatives they have under the Bylaws. With respect to the Regents, Bylaw 21.9 is quite clear that “It is the responsibility of the Board to set policy and the responsibility of the University administration to implement and carry out policy, which includes responsibility for the day-to-day operations of the University.” Bylaw 22.2(c) specifically reserves to the Regents “approving the University budget.” And, of course, Bylaw 30 merely delegates to the President the authority to manage the budget approved by the Regents. It provides “[t]he President develops, and on the approval of the Board, manages the University budget.”

The Regents’ rules give the Academic Senate a role in the budget making process. Bylaw 40.1 gives the Senate authority to “select committees to advise the President and Chancellors on

campus and University budgets.” Standing Order 105.2(d) authorizes the Academic Senate “to select a committee or committees to advise a Chancellor concerning a campus budget and to select a committee or committees to advise the President concerning the University budget.” These provisions mean that neither the President nor a chancellor can make such decisions without broad consultation. Moreover, Regents Bylaw 40.1 also states that “The Academic Senate.... may address the Board on any matter pertaining to the conduct and welfare of the University.” The OGC interpretation would render such an opportunity to address the Board meaningless.

The OGC Letter cites Standing Order 100.4(c) as a basis for the President’s authority to implement furloughs and salary reductions without complying with Standard Order 100.4(qq). Thus, the OGC Letter states “Standing Order 100.4(c) broadly grants the President the authority to determine compensation, except as otherwise provided in the Bylaws and Standing Orders.”

Sections (a) through (rr) of Standing Order 100.4 include many grants of authority to the President on specific items. The specificity of many of these grants of authority belies the claim paragraph (c) is a broad grant of authority. For example, Standing Order 100.4(r) authorizes the President “to modify budget estimates of income of wholly or partially self-supporting activities, and in connection therewith to increase or decrease appropriations accordingly.” This is an explicit grant of authority to the President to modify the budget approved by the Regents to appropriate less than the amount budgeted, which is the broad power claim in the letter. But this grant of authority is limited to “self-supporting activities.”

Section 100.4(c) provides in full:

(c)The President of the University, in accordance with such regulations as the President may establish, is authorized to appoint, determine compensation, promote, demote, and dismiss University employees, except as otherwise provided in the Bylaws and Standing Orders and except those employees under the jurisdiction of the Secretary and Chief of Staff, Chief Investment Officer, and General Counsel of The Regents. Before recommending or taking action that would affect personnel under the administrative jurisdiction of Chancellors, Executive Vice Presidents, Senior Vice Presidents, other Vice Presidents, or the Director of the Ernest Orlando Lawrence Berkeley National Laboratory, the President shall consult with or consider recommendations of the appropriate Officer. When such action relates to a Professor, Associate Professor, or an equivalent position; Assistant Professor; a Professor in Residence, an Associate Professor in Residence, or an Assistant Professor in Residence; a Professor of Clinical (e.g., Medicine), an Associate Professor of Clinical (e.g., Medicine) or an Assistant Professor of clinical (e.g., Medicine); a Senior Lecturer with Security of Employment, or a Lecturer with Security of Employment, the Chancellor shall consult with a properly constituted advisory committee of the Academic Senate.

The OGC opinion argues the power to “determine compensation” includes the power to implement furloughs or salary reductions. But this is inconsistent with how compensation is determined under the APM. We will focus on APM provisions governing how faculty compensation is determined, which is a matter the APM addresses at length. Base compensation is determined by a faculty member’s step on the relevant salary scale. Some faculty members are paid an off-scale amount above the base amount. APM 620 speaks to this. Eligibility and the amount of off-scale salary is determined by a Memorandum of Understanding when such exists, APM 620-14, or by local procedures, APM 620-80. Finally, some faculty members receive additional compensation for specific activities. APM 600 and 633 et seq. speak to this. APM 610 concerns how a faculty member receives a salary increase.

Drilling down, the President's authority "to determine compensation" is for most faculty a function of the President's authority to set salary scales. As APM 600-0 explains, "Responsibility for issuing academic salary scales rests with the President or the President's designee after consultation with the Academic Council and the Chancellors. Compensation of individual academic appointees is under the jurisdiction of the Chancellor . . ." A Chancellor determines the compensation of individuals because a Chancellor has final authority on merit and promotion increases, which determine compensation paid under the scales set by the President. APM 610-24(b). Of course, the Chancellor does not make merit and promotion decisions unilaterally. Standing Order 100-4(c) provides that in making these decisions "the Chancellor shall consult with a properly constituted advisory committee of the Academic Senate."

The OGC Letter intimates the President could implement a salary reduction by reducing scale salaries. This is debatable. APM 610 provides a change in salary scales is a basis for a salary increase. There is no suggestion that a downward change could result in a salary decrease. But this is besides the point. To use this mechanism the President must reduce scale salaries. The President's possible authority to reduce scale salaries does not give the President the authority to withhold or suspend compensation. And this mechanism cannot be used at the campus level. It can only be used by the President.

The OGC Letter asserts "the Academic Personnel Manual (APM) and Personnel Policies for Staff Members (PPSM) have mechanisms in place for furlough-type actions, including reductions in time for staff and non-faculty academic appointees, as well as curtailment." There are no mechanisms like furloughs or salary reductions in the APM. With respect to Senate faculty, the APM provides for a reduction in salary only as a disciplinary sanction for misconduct and subject to disciplinary procedures. APM-016, Section II. Perhaps the OGC Letter is referring to APM-145, which provides for layoffs and involuntary reduction in time for "academic appointees of the University who are not members of the Academic Senate or equivalent ranks . . ." APM 145-14(a). These actions can be based on "budgetary reasons," in addition to "lack of work, or programmatic needs." APM-145-0. But layoffs and involuntary reductions in time are quite different from furloughs and salary reductions. They are not across the board and people do not continue to work.

Finally, the OGC concludes with the observation that the President delegated the power to implement furloughs and salary reductions to the Chancellors, subject to his approval. Such a delegation of power to the Chancellors would radically alter budgetary decision-making in the UC system. Bylaw 31 provides in pertinent part:

The Chancellors are responsible for the organization, internal administration, operation, financial management, and discipline of their campuses within the budget and policies approved by the Board and/or the President of the University. They oversee all faculty personnel and other staff at their locations, and appoint all members of the instructional staff, and may fix their remuneration in accordance with the provisions of the budget established by the Board and the salary scales of the University.

The Chancellors work within "the budget . . . approved by the Board." And they fix "remuneration in accordance with the provisions of the budget established by the Board and the salary scales of the University."

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
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February 9, 2021

ACADEMIC SENATE CHAIR MARY GAUVAIN
ACADEMIC SENATE VICE CHAIR ROBERT HORWITZ

Dear Chair Gauvain and Vice Chair Horwitz:

You asked for guidance for the Academic Council about the President's and Chancellors' authority to adopt curtailments or salary reductions without declaring an "Extreme Financial Emergency" as described in Regents Standing Order 100.4(qq).

Standing Order 100.4(qq) provides that only the Regents may declare an "Extreme Financial Emergency," upon recommendation of the President. An Extreme Financial Emergency is defined as an "imminent and substantial deficiency in available University financial resources" that jeopardizes operations and the ability to fulfill the University's tripartite mission. The Standing Order contains consultation requirements regarding a declaration of Extreme Financial Emergency, and provides that the President may implement furloughs or salary reductions, and may suspend the operation of University and Regents policies contrary to or inconsistent with the terms of the furlough or salary reduction plan. Finally, the Standing Order at paragraph 5 states that:

The authority provided under this Standing Order is in addition to any authority otherwise provided University officials under other Regental or University policies and, except as provided herein, nothing in this Standing Order shall limit such other authority.

Thus, the Standing Order's statement that the President shall have the authority to implement furloughs and salary reductions upon a Declaration of Extreme Financial Emergency should not be read as a limitation on the President's authority if such authority otherwise exists. It is additive rather than restrictive in nature.

The President has authority independent of Standing Order 100.4(qq) to undertake furloughs, curtailments, or salary reductions. The Bylaws, Standing Orders, and Regents policies grant the President broad authority to run the operations of the University, ensure it has adequate financial resources, and develop and manage the budget. (The budget itself is subject to Regents approval.) As long as the President is not acting on a matter specifically reserved to the Board, he has broad authority to take actions related to the operations of the University.

For example, Bylaw 22.1 delegates to the President authority to oversee the operations of the University, subject to the powers specifically reserved to the Regents in the Bylaws, Regents Policies, and Committee Charters. Bylaw 30 provides that the President administers University operations, develops the budget for Regents' approval, and manages the budget after approval has been secured. Standing Order 100.4(a) provides the President with the authority and full responsibility over the administration of all affairs and operations of the University. Standing Order 100.4(c) broadly grants the President the authority to determine compensation, except as otherwise provided in the Bylaws and Standing Orders. (See also Regents Policy 1500: *Statement of Expectations of the President of the University.*)

The Regents have reserved to themselves only a narrow scope of compensation actions. Bylaw 22.2(e) reserves to the Regents the authority over compensation matters as specified in Regents Policy and Committee Charters. Regents policies require Board approval only for compensation for certain Senior Management Group (SMG) members and other highly compensated individuals, such as certain athletic coach compensation.

Moreover, University policies reflect the President's exercise of these authorities in different respects. For example, the Academic Personnel Manual (APM) and Personnel Policies for Staff Members (PPSM) have mechanisms in place for furlough-type actions, including reductions in time for staff and non-faculty academic appointees, as well as curtailment. These provisions exist in collective bargaining agreements as well. In addition, the PPSM and APM recognize the President's and the Chancellors' authority to set compensation, and to adopt salary scales – which may increase or decrease. Specifically, PPSM 30 (for non-represented staff) and APM 600, 610, and 620 (for non-represented academic appointees) recognize the President's authority to decide on systemwide salary programs and adjustments to the academic salary scales.

Staff and academic policies generally are silent about salary reductions, although the PPSM and SMG policies both contain references to reductions in compensation. The APM does not explicitly address salary reductions. The absence of policy on salary reductions, however, does not mean that such matters are reserved to the Regents only, nor does it constrain the President from acting within his authority on compensation matters where he determines salary reductions may be appropriate.

Academic Senate Chair Gauvain
Academic Senate Vice Chair Horwitz
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As a response to the financial challenges presented by the COVID-19 pandemic, the President has empowered each campus to determine whether particular workforce actions such as salary reductions or curtailments/furloughs are needed. The Regents approved at the September 2020 and November 2020 meetings certain retirement system protections for COVID-related workforce actions as designated by the President. The campuses thus must obtain the President's approval to designate an action as COVID-related.

I hope this provides useful information to you and members of the Academic Council. If you have additional questions on these issues, please do not hesitate to let me know.

Sincerely,

Allison Woodall

Allison Woodall
Deputy General Counsel, Education Affairs,
Employment & Governance

cc: President Michael V. Drake, MD
Provost and Executive Vice President Michael Brown
General Counsel and Vice President Charles Robinson