



Committee on Rules and Jurisdiction
John Imboden, MD, Chair

ANNUAL REPORT 2008-2009

Primary Focus Points for the Year:

- Revision to Request for Legislative Ruling from UCRJ; Receipt of Legislative Ruling

Task Forces, Special Committees, and Sub-Committees:

- None.

Issues for Next Year (2009-2010)

- None.

2007-2008 Members

Theodora Mauro, Chair
John Imboden, Vice Chair

James Brenner
Orlo Clark
Heide Kirsch
Anne Slavotinek
Anita Stewart

Ex-Officio Members

Jean Olson, Parliamentarian
Doug Carlson, Registrar

Permanent Guests

Merlin Larson, Clinical Rep
Joanna Weinberg, Adjunct Rep

Number of Meetings: 1, September 15, 2008; electronic discussion as needed

Senate Analyst: Wilson Hardcastle

2008-2009 Members

John Imboden, MS, Chair
Anne Slavotinek, MD, Vice Chair

Orlo Clark, MD
Marcus Ferrone, PharmD, BCNSP
Heidi Kirsch, MD
Meg Wallhagen, RN, PhD, GNP

Ex Officio:

Doug Carlson, JD, Registrar
Jean Olson, MD, Parliamentarian

Clinical Representative:

Merlin Larson, MD

Systemwide Business

The Academic Senate Committee on Rules and Jurisdiction took up no Systemwide issues this year:

Divisional Business

This year, the Academic Senate Committee on Academic Planning and Budget took up the following issues related to the San Francisco Division:

Jurisdictional Ruling on the Grievance Before the Committee on Privilege and Tenure

At its September 15, 2008 meeting, the Committee reviewed a request from the UCSF Academic Senate Committee on Rules and Jurisdiction to modify its request for a legislative ruling from UCRJ/University Committee on Rules and Jurisdiction ([Appendix 1](#)).

The Committee approved this request and amended their request for UCRJ Legislative Ruling ([Appendix 2](#)).

The Committee received a ruling from UCRJ via e-mail on October 27, 2008 ([Appendix 3](#)). The Committee reviewed and accepted this ruling, and communicated it to the divisional Committee on Privilege and Tenure.

Task Forces and Other Committee Service

This year, members of the Academic Senate Committee on Rules and Jurisdiction served no Academic Senate task forces or other campus committees.

Going Forward

There are no pending issues for the Committee to carry forward into 2009-2010.

Appendices

- [Appendix 1](#): Communication from the Committee on Privilege and Tenure requesting modification to the request for Legislative Ruling, dated September 11, 2008.
- [Appendix 2](#): Communication from the Committee on Rules and Jurisdiction (September 15, 2008) to the University Committee on Rules and Jurisdiction modifying its request for a Legislative Ruling.
- [Appendix 3](#): E-mail dated October 27, 2009 from UCRJ Chair communicating the Committee's Legislative Ruling.

Senate Staff:
Wilson Hardcastle, Senior Analyst
wilson.hardcastle@ucsf.edu; 415/476-4245



Academic Senate
senate.ucsf.edu

Communication from the Committee on Privilege and Tenure Girish Vyas, PhD, Chair

September 11, 2008

John Imboden, MD
Chair, Committee on Rules and Jurisdiction
500 Parnassus Avenue, Box 0868

Dear Dr. Imboden,

We are writing to request modification of the Committee on Rules and Jurisdiction's (R&J) request for a Legislative Ruling made to the University Committee on Rules and Jurisdiction (UCRJ), and also to clarify the deliberations of the Committee on Privilege and Tenure (P&T) concerning the grievance filed by Dr. David Kessler.

Our committee appreciates R&J's thoughtful response to the jurisdictional issues which have been raised. We agree that a Legislative Ruling from the University Committee on Rules and Jurisdiction (UCRJ) would more clearly define the appropriate jurisdiction for grievances of this sort. However, we believe it would be best to ask UCRJ to address the issue slightly differently.

The critical issue which P&T addressed in deciding whether it had jurisdiction concerning retaliation for whistleblower activities is whether an Academic Senate member has a choice of procedure for filing retaliation complaints (according to APM 190 Appendix A-2). Two grievances were filed by Dr. Kessler: 1) claiming retaliation for his asserted whistle-blower activities, and (2) claiming that his faculty rights were violated by his dismissal from his position as Dean of the School of Medicine. The P&T Committee decided that there was a prima facie case for Grievance 1, but not for Grievance 2.

- a. The Committee concluded that the allegations as stated in the written grievance, if true, would constitute a violation of the grievant's rights and privileges as an Academic Senate member (according to APM 190-Appendix A2 – the Whistleblower Protection Policy). We decided that the allegations, if true, would provide a preponderance of the evidence that the Grievant engaged in activity protected by the Whistleblower Policy (alleging improper government activity, etc.), and that he was the subject of personnel decisions that, if the allegations are true, could be considered retaliatory in nature (at least in part).
- b. The Committee considered jurisdiction carefully, both in our initial consideration of the grievance, and again as part of our Preliminary Review. The Committee decided that all faculty have a "right and privilege" to be protected from retaliation for whistle blower complaints. And we decided, based on the Whistleblower Protection Policy (APM190 – Appendix A2), that it is the choice of a faculty member whether to grieve before P&T, or to use other avenues for complaints of retaliation for whistleblower activities.
- c. P&T deliberations were based solely on the written grievance, as required by APM 335. Given the importance of the issues involved, the Committee decided to hold a "Preliminary Review" before moving on to a formal Grievance Hearing (as outlined in APM 335). The Committee requested additional comments on jurisdictional issues from the grievant and from the Office of General Counsel (attached). These documents were carefully considered by the P&T Committee during the "Preliminary Review," prior to our final decision to move on to a formal Grievance Hearing.

- d. The Committee also considered the UCSF Divisional Legislative Ruling 1296. We concluded that the wording of this Divisional Ruling especially supported our consideration of the grievance.
- e. The Committee proposes, however, a modification to the request for a Legislative Ruling from UCSF R&J to UC R&J. We propose that the request be modified to read as follows:
 - 1) Does a Divisional Privilege and Tenure Committee have jurisdiction under Academic Senate Bylaw 335 to hear the grievance of a member of the Academic Senate asserting retaliation in violation of the University's Whistleblower Protection Policy (APM-190, Appendix A-2)?
 - 2) If the answer to Question 1 is affirmative, does the jurisdiction so affirmed extend to such a grievance asserted by an Academic Senate member who holds an at-will administrative appointment?

Although we find that we are required to expeditiously proceed to the Hearing phase of this grievance, we will reconsider jurisdictional issues as a University R&J Committee Legislative Ruling (or relevant advice) addresses these issues.

Thank you for your consideration of these highly important issues.

Sincerely,

UCSF Committee on Privilege and Tenure

Cc: Daniel Hirschberg, PhD , Chair, University Committee on Rules and Jurisdiction
Paulette Kessler, Counsel for David A. Kessler, MD
Charles F. Robinson, (Attn. J. Blair) Office of General Council
Wilson Hardcastle, UCSF Office of the Academic Senate

encl:/ [April 30, 2008 Letter from David Kessler to UCSF Committee on Privilege and Tenure](#)
[May 9, 2008 Letter from Office of General Counsel to UCSF Committee on Privilege & Tenure](#)

VIA EMAIL AND US MAIL

April 30, 2008

Dr. Girish Vyas, Chair
Committee on Privilege and Tenure
UCSF Academic Senate
500 Parnassus Avenue, MUE 230
San Francisco, CA 94143-0764

Re: Kessler Grievance

Dear Dr. Vyas,

Pursuant to your letter of April 23, 2008, I am responding to your request to state the reasons why the Committee has jurisdiction of this matter. You are, of course, in receipt of the letter accompanying the initial filing of Professor Kessler's Grievance which discussed jurisdiction and of the letters that followed the University's raising of the jurisdictional issue following notice that the Committee had found a *prima facie* case of retaliation against Professor Kessler. This letter will incorporate many of the points we made in that initial letter and in response to the University's raising of the issue.

At all times relevant to his Grievance, Professor Kessler has been a member of the Academic Senate.

Professor Kessler's initial appointments were as Professor, APM 220, Academic Dean, APM 240 (which carries a requirement of a concurrent appointment in the Professor series), and Vice Chancellor. All three capacities conferred Academic Senate membership. (See, Regents' Standing Order 105.1(a)). He remains a tenured professor today.

Because of his Academic Senate membership, all the relevant sources of law support the Privilege and Tenure Committee's exercise of jurisdiction over Professor Kessler's retaliation claim.

Regental Standing Order 103.2 states that, "Any member of the Academic Senate shall have the privilege of a hearing by the appropriate committee or committees of the Academic Senate on any matter relating to personal, departmental, or University welfare." The literal language of the Order plainly covers Professor Kessler in his capacities as Professor, Dean, and Vice Chancellor.

Senate By Laws 334 and 335 specifically grant jurisdiction to the Divisional Privilege and Tenure Committee when a member of the Senate claims injury through the violation of his/her rights and privileges, as follows:

"334. Privilege and Tenure: Divisional Committees -- Jurisdiction

A. Divisional Privilege and Tenure Committees shall have jurisdiction to deal with three distinct categories of cases:

1. grievance cases (SBL335), where a member of the Senate claims injury through the violation of his/her rights and privileges;

335. Privilege and Tenure: Divisional Committees -- Grievance Cases

A. Scope:

1. Any member of the Academic Senate may grieve to the Divisional Privilege and Tenure Committee (hereafter, the Committee) that the member's rights or privileges have been violated.”

As a member of the Academic Senate, Professor Kessler is specifically covered by both the jurisdictional provision of SBL 334 (“a member of the Academic Senate”) and the scope provision of SBL 335.A (“Any member of the Academic Senate”). In particular, it is clear that the right to be free from retaliation for whistleblowing is one of the rights held by members of the Academic Senate, as it is incorporated into the Academic Personnel Manual (APM). (See, APM 190-2 (incorporating the University of California Policy for Protection of Whistleblowers from Retaliation and Guidelines for Reviewing Retaliation Complaints (“Whistleblower Protection Policy”))). The jurisdiction of the Committee is reinforced by the Academic Personnel Manual’s governing the appointment, review, and termination of Academic Deans who are faculty members. (See, APM 240)

The Whistleblower Protection Policy further confirms that the right to be free of retaliation for whistleblowing is one that an Academic Senate member may properly assert before the Divisional Privilege and Tenure Committee. It states, in pertinent part, the following:

“Academic Personnel: Academic personnel may file complaints alleging retaliation, if eligible, as follows:

Members of the Academic Senate	Senate Bylaw 335
Non-Senate Academic Personnel	APM – 140...

Staff Personnel: Staff personnel may file complaints alleging retaliation, if eligible, as follows:

Senior Managers	PPSM II-70...”
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This policy is explicit and unambiguous. Academic personnel who are members of the Academic Senate may file grievances for retaliation in accordance with the Senate By Laws. Both as a Professor and as a Dean, Professor Kessler's job titles are unambiguously academic and both are listed in the Academic Personnel Manual, with the latter position requiring appointment to the former. And as noted above, Senate By Law 335.A is explicit in extending jurisdiction to "any member of the Academic Senate" without limitation of any kind.

To the extent that these provisions require an independent demonstration that the academic's grievance is "eligible" for consideration by this Committee, that requirement is doubly satisfied here. First, the actions that Professor Kessler took in raising the issues that allegedly led to retaliation were taken in his capacities as Dean and Professor, both well understood as academic titles. Second, eligibility is also established by this Committee's February 4 and April 23, 2008 determinations that there is a *prima facie* case concerning alleged retaliation, since such a finding necessarily establishes "that the allegations as stated in the written grievance, if true, would constitute a violation of the faculty member's rights and privileges," a classic basis for jurisdiction.

That Professor Kessler was once a Senior Manager does not relieve this Committee of its obligation to hear his retaliation claim.

The heart of the University's position is that because Professor Kessler was also a Senior Manager and because the form of the retaliation taken was his removal from the Deanship and Vice Chancellorship, this Committee is without jurisdiction to hear his claim.

The view that dual status as a Senior Manager and an Academic Senate member deprives this Committee of jurisdiction is inconsistent with the text of all four relevant jurisdictional provisions, none of which contains an exception for Senate members who happen also to be administrators.

1. Regents' Standing Order 103.2: "Any member of the Academic Senate..."
2. SB 334: "a member of the Senate..."
3. SB 335.A: "Any member of the Academic Senate..."
4. Whistleblower Protection Policy: "Academic Personnel [who are] members of the Academic Senate."

The view that there is an implied exception to these grievance provisions for Senate members who serve in dual academic and administrative roles has also been squarely rejected in the secondary authorities. Academic Senate Legislative Ruling 3.93 A expressly establishes that "an administrator whose title

confers membership in the Academic Senate may...invoke the privilege of a hearing guaranteed by SOR 103.2.” One holding in that Ruling is that in imposing discipline upon an at will administrator who is also a Senate member, the University is required by SOR 103.2 to provide some kind of Senate hearing even *prior* to discipline, although the University is not required to conform to all the disciplinary procedures established by APM 336. But the Committee on Rules and Jurisdiction drew a sharp distinction between the Senate member-administrator’s right to insist upon full compliance with disciplinary procedures and the right to file a grievance after the fact. Thus, the Committee wrote:

SBL 335.A [now 334.A] characterizes grievances and disciplinary actions as "distinct categories of cases" and this distinction must carefully be observed. Among other differences, grievances may be brought before the Committee by *any member of the Academic Senate*, whereas disciplinary proceedings come to the Committee as a consequence of actions proposed against a member of the Academic Senate by the chancellor. [emphasis added]

The Committee’s careful reservation of the Academic Senate member’s rights to grieve, its express reference to “any member of the Academic Senate,” and the fact that it applies this reasoning to “an administrator whose title confers membership in the academic Senate,” *that is, to an administrator who may not have any professorial or other academic appointment*, constitutes a comprehensive and authoritative rejection of the University’s argument for lack of jurisdiction over a grievance by a former administrator, like Professor Kessler, who clearly holds academic appointments as well.

The University’s argument is also rejected in the text of the Whistleblower Protection Policy. Echoing SOR 103.2 and SB 335.A, that provision states that Academic Personnel who are Senate members “may file” under the Privilege and Tenure procedures. This permissive formulation makes clear that Professor Kessler’s dual status as an academic appointee does not deprive him of rights to grieve held in either capacity, but rather gives him the option of filing before Privilege and Tenure or other fora, such as those available to the Senior Management Group. This is the only view that is consistent with SOR 103.2 and with Ruling 3.93A. It also has the virtue of consistency with the APM’s position that the Personnel Policies for Senior Managers do not displace the Whistleblower Policy or other provisions of the APM, but simply supplement them. (See, APM 240.16.b (“The personnel policies herein apply to all appointments, regardless of percent time. For Deans and Provosts appointed in the Senior Management Program, the Personnel Policies for Senior Managers *also* apply.” [emphasis added])

The University has previously cited APM 016 in support of its argument against the Committee’s jurisdiction. APM 016 does not deal with jurisdictional limitations. The portion of APM 016 that the University has cited describes one

“traditional role” of Privilege and Tenure Committees. It does not exclude other potential “roles.” More important, it cross references to the relevant Senate By Laws whose jurisdiction and scope provisions have been cited above.

Finally, UCSF Divisional Legislative Ruling 12.96 confirms the need to read these provisions to permit Academic Senate members access to Senate grievance processes wherever possible. The Ruling repeats the fundamental requirement cited above: that “according to Appendix II, Legislative Rulings by the University Wide Committee on Rules and Jurisdiction, section 3.73, the Standing Orders of the Regents 103.2 guarantees to each member of the Academic Senate ‘the privilege of a hearing by the appropriate committee or committees of the Academic Senate on any matter related to personal, departmental or University welfare.’” More important, the Ruling states that in cases where there are different tribunals available to review a matter, one of which is a Divisional Committee on Privilege and Tenure, “[m]ultiple administrative remedies cannot, by themselves, be a reason for failing to entertain the grievance or to find if a prima facie case exists. *Every effort should be made to be inclusive rather than exclusive in this process.*” [emphasis added]

The form of the retaliation taken against Professor Kessler for reporting potentially improper governmental acts has no effect on the jurisdiction of this Committee.

Those who report potential improper governmental acts, according to UCSF’s Whistleblower Policy, “shall not be retaliated against in any manner.” While the form of retaliation will be relevant in shaping remedies should the Committee make a finding of retaliation, the form of retaliation and the steps necessary to implement any such remedies do not affect jurisdiction. Whistleblower retaliation has taken many forms in other cases, from reassigning employees to menial tasks, to firing relatives, to reducing pay or hours, none of which, in and of themselves were rights of the persons reporting potentially improper activities.

It is the right to be free from retaliation for reporting potential improper governmental acts, not the right to hold a senior administrative position that is the central issue in Professor Kessler’s Grievance. Professor Kessler enjoyed that right as a faculty member and as an academic Dean. Even if that right were not the central issue here, the Committee would still have jurisdiction in this matter because, among other reasons, the APM covers the appointment, review, and termination of an academic dean. In addition, the University’s acts of retaliation have directly affected Professor Kessler’s personal welfare by, among other effects, seriously damaging his reputation. (See, Regental Standing Order 103.2)

Professor Kessler’s decision to file his Grievance with a forum available to him, the Academic Senate, is necessary because to do otherwise would seriously undermine his ability to receive a fair review of his Grievance and

threaten norms of shared governance on the UCSF campus and more broadly.

As discussed in Professor Kessler's letter of January 8, 2008, there is a final important reason why the Academic Senate Privilege and Tenure Committee is the appropriate forum for hearing this grievance. The highest levels of the University were involved in this matter, including the President, General Counsel, Provost, Chancellor, and their outside counsel. As a consequence, senior administrators of the University of California have serious conflicts of interest in this case. Moreover, public statements made in the University's name show that the University administration has prejudged this case. To argue that the Grievance should be submitted to any individual who reports through the chain of command to individuals who were involved in the retaliation cannot be viewed, under any analysis or system of justice, as being fair and affording due process. In addition, requiring Professor Kessler to file his Grievance with administrators who report to individuals who fired him would bury the important issues of institutional integrity raised by his Grievance while depriving this Committee of any role in ensuring a full and fair hearing and airing of the relevant institutional issues. It would be hard to imagine a holding with more dangerous implications for the principle of shared governance embodied in the right to a Senate hearing guaranteed by Regents Standing Order 103.2.

Thank you for this opportunity to address you and the Committee.

Sincerely,



Paulette S. Kessler
Counsel to David A. Kessler, MD

cc: Jeffrey A. Blair (via email on the date determined for the University submission)

Shilpa H. Patel (via email)

Charles F. Robinson (via email on the date determined for the University submission)

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May 8, 2008

Via E-Mail and US Mail

Girish Vyas, Ph.D.
Chair, Committee on Privilege and Tenure
Executive Office
500 Parnassus Avenue, MUE 230
San Francisco, CA 94123-0764

Re: David A. Kessler, M.D., Senate Faculty Grievance I

Dear Dr. Vyas:

Thank you for kindly offering the parties the opportunity to explain the jurisdictional issues underlying the above matter. As we have explained previously, the University has respectfully concluded that the Committee on Privilege and Tenure ("P&T") lacks subject matter jurisdiction to process this matter, and that any further action by your Committee would substantially and perhaps irreparably destabilize the balance between and erode the separation of the academic and administrative communities of the University.

Summary of Jurisdictional Issues

Dr. Kessler's Grievance I undisputedly concerns only the loss of his administrative titles of Dean and Vice Chancellor and not his tenured faculty position in the Department of Pediatrics. That is the key reason why the Academic Senate grievance process does not apply, and why the SMG rules pertaining to senior administrators and the University's Whistleblower Protection Policy administrative rules and procedures do apply.

We firmly believe this is the only logical and sensible outcome under the circumstances. Otherwise, any time a President were dismissed by The Regents, that President could grieve to the Academic Senate; any time a University Provost were dismissed by the President, the Provost could grieve to the Academic Senate; any time a Chancellor were dismissed by a President, the Chancellor could grieve to the Academic Senate. This would be true merely because those senior administrators are members of the Academic Senate, even though their

Girish Vyas, Ph.D.

May 8, 2008

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“grievances” have no connection to any loss of a faculty right or privilege. Taken to the extreme, if the P&T grievance process is available to Senate members regardless of whether there has been a violation of a faculty right or privilege, then a Senate member who has been injured in an accident on campus could grieve under the P&T process.

While Dr. Kessler’s asserted view regarding the scope of this Committee’s jurisdiction would compel such results, the conclusions cannot logically or legally be sustained. To that end, it is not surprising that we are unable to find a single like case where a senior administrator who also holds a faculty appointment has grieved the loss of solely his at-will administrative title (while retaining his faculty appointment and all of its attendant rights and privileges) through the Academic Senate P&T process.

Dual appointees can and should use the Academic Senate processes for allegations of violations of rights and privileges as faculty members, and use the SMG procedures to grieve the loss of at will administrative titles. The Academic community is best able to police itself when issues of faculty rights and privileges are at stake. The same simply is not so with respect to purely administrative duties under which the administrator serves at the pleasure of the Chancellor or President. That is the realm of the administration, and the rules and procedures applicable to senior administrators. Just as it would not be appropriate for a person with a dual appointment to have their faculty rights adjudicated under the SMG rules merely because of the dual appointment, so too is it improper to adjudicate rights relating to the administrative appointment under the faculty procedures.

Nor can it be said that the SMG processes provide a lesser or insufficient remedy in this circumstance. The University has advised Dr. Kessler that he can avail himself of the SMG procedures and the University’s Whistleblower Protection Policy administrative rules and procedures.¹ These provide Dr. Kessler with due process protection and the opportunity for the same remedies that he has sought before your Committee. The California Supreme Court has ruled that the University’s Whistleblower Protection Policies and Procedures, “allow the Regents to provide the complainant with ‘any appropriate relief’ and to impose any sanctions on the offending employees ‘in accordance with existing disciplinary policies or contract provisions.’” (*Campbell v. Regents* 35 Cal.4th 311, 328). Those procedures also provide a mechanism to ensure that those individuals who participated in the decisions do not also participate in the retaliation review.

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¹ The Senate Bylaw 335 procedure is explicitly stated in the Whistleblower Protection Policy to be only available to those “eligible” for that review, and, as set forth in this letter, Dr. Kessler is not “eligible” for that review. He can, however, file a grievance under the SMG rules or with a Locally Designated Official (“LDO”).

Under University Policy, Separate Sets of Procedures Govern the Faculty and Administrative Roles of Dual Appointees

As you know, there are a small number of University employees in administrative leadership positions who simultaneously hold faculty positions. Examples include Chancellors, Vice Chancellors, Deans, the President, Academic Vice Presidents, and so forth.² These employees are governed by faculty rules and procedures as those rules pertain to their faculty appointment, and are governed by a different set of administrative rules and procedures relating to their administrative appointment. The most common set of administrative policies for this cohort is the Senior Management Group Policies and Procedures (SMG), the set of policies applicable to Dr. Kessler's appointment as Dean of the UCSF School of Medicine and Vice Chancellor.

There is a very principled reason for the separate rules and procedures and for the need to maintain clear separation between the two roles in these cases. Senior level administrators, such as Vice Chancellors and Deans, serve at will, or at the pleasure of the appointing official, often the Chancellor or President. As such, they have no vested right to continued service in that capacity. Faculty, on the other hand, particularly those with tenure, have a very clear and distinct right to continued service in their faculty capacities. They have additional rights and privileges, including the acknowledged interest in academic freedom. This freedom is embodied in the University Policy on Faculty Conduct and the Administration of Discipline (APM 010).

The idea of shared governance and that faculty will review themselves in processes and procedures they themselves have established, protects academic freedoms and faculty pursuits. But where, as in this case, an employee complains about the administrative appointment, and not the faculty appointment, the reasons for proceeding under the Academic Senate rules cease. The Senate's own rules and procedures make clear that the Academic Senate grievance procedure is only available where a faculty right or privilege is alleged to have been violated. For example, the Academic Personnel Manual states:

The Academic Senate has established Committees on Privilege and Tenure in each of the nine Divisions. The composition and duties of these committees are defined by the Academic Senate. One of the traditional roles of the Divisional Committees on Privilege and Tenure is to conduct hearings on disciplinary charges initiated by the Chancellor under this policy and make findings of fact and recommendations to the Chancellor regarding proposed disciplinary sanctions. The procedures for disciplinary hearings are set forth in Academic Senate Bylaw 336.

Another traditional role, to be distinguished from the conduct of disciplinary hearings, is to consider grievances by members of the Academic Senate regarding their rights and privileges as faculty members. The procedures for considering grievances are

² While not all of these administrative employees must hold faculty appointments, most do.

set forth in Academic Senate Bylaw 335. A disciplinary action is distinguished from a grievance action in that a disciplinary action generally is commenced by the administration against a faculty member based on charges that the faculty member has violated the Faculty Code of Conduct. A grievance action is initiated by a faculty member who believes that he or she has suffered *injury as the result of a violation of the faculty member's rights or privileges*. A grievance action specifically requests the administration to take appropriate action to eliminate or mitigate the faculty member's injury. A grievance alleging misconduct by another member of the Academic Senate may result in disciplinary proceedings commenced against that faculty member. (APM 016 at 6, emphasis added)

To further reinforce the point, APM 016 provides that the removal of an administrative title from a faculty member is governed by administrative procedures and not by the procedures outlined in the Faculty Code of Conduct or Senate Bylaws. APM 016 continues:

A disciplinary action against a faculty member holding an administrative title may proceed in two parts. One part involves the removal of the administrative title or other administrative action under procedures established by The Regents and the administration. Such action need not adhere to the disciplinary procedures set forth in this policy. (APM 016 at 7, emphasis added.)

It follows logically that if a dismissal of a Senate member from an administrative position is governed by "procedures established by the Regents and the Administration," not by Academic Senate procedures, then that dismissal can only be challenged under "procedures established by the Regents and the Administration," and not under the very procedures the rules state the Chancellor need not have followed.

In the case of an academic Dean (such as Dr. Kessler), the Academic Personnel Manual itself prescribes the precise level of Academic Senate involvement pre-termination:

240-24(d) Deans and Provosts and acting appointments to those titles serve at the discretion of the Chancellor. The Chancellor may end the appointment of a Dean or Provost at will and at any time, after discussion with an appropriate group of the faculty determined by the Chancellor after consultation with the Chair of the Division of the Academic Senate.

Such consultation did take place in this case.

Dr. Kessler's Grievance Relates Solely to His Dismissal From His At-Will Administrative Appointments as Dean and Vice Chancellor

Dr. Kessler's grievance pertains solely to his administrative appointment. He makes that clear in his letter to you of January 8, 2008. He writes:

“Grievance-I asserts that the University officials terminated me as Dean and Vice Chancellor in retaliation for my seeking the truth about the state of financial integrity and controls at the University.”

We also know that Dr. Kessler could not be asserting anything related to his faculty appointment as the administration has made clear no right or privilege relating to the faculty appointment has been affected. (See letter of Chancellor Bishop asking for Dr. Kessler's resignation.) Dr. Kessler's grievance thus relates exclusively to his dismissal from his at-will positions as Dean of the UCSF School of Medicine and Vice-Chancellor of Medical Affairs. There also can be no question that the appointment as Dean and Vice Chancellor was at will, and subject only to the SMG policies. His appointment letter, dated June 13, 2003, not only states that the “position of Dean is at will and can be terminated at any time,” but also repeatedly references the SMG policies and procedures that pertained. Under California law, at-will employment is defined as “an employment, having no specified term, [that] may be terminated at the will of either party on notice to the other.” California Labor Code § 2922.

The SMG policies also make clear that the appointment was at will, noting that these positions are “at the discretion of the Chancellor.” See Section 64.A of the SMG (“A Senior Manager serves at the discretion of the Chancellor or Laboratory Director, the President, or The Regents, as appropriate. A Senior Management appointment may be terminated *at will and at any time with or without cause*”) (emphasis added).

Dr. Kessler Fundamentally Misconstrues University Policy in His Effort to Encourage This Committee to Assert Jurisdiction over His Grievance

In various correspondence to your Committee, Dr. Kessler has described his position on jurisdiction. In brief, Dr. Kessler asserts Regental Standing Order 103.2³ is so broad as to encompass a grievance by a Senate member that does not involve any faculty rights or privileges. (Kessler letter to Dr. Vyas, dated February 27, 2008.) He also asserts that a Legislative Ruling by the University Committee on Rules and Jurisdiction supports his interpretation. He is mistaken on both points.

Standing Order 103.2 must be read in the context of other regulations on the topic. The most relevant citation is APM 016 where the Academic Senate itself has described the ways a Senate member may file a grievance before P&T. APM 016 could not be clearer:

³ SO 103.2 states: “Any member of the Academic Senate shall have the privilege of a hearing by the appropriate committee or committees of the Academic Senate on any matter relating to personal, departmental, or University welfare.”

A grievance action is initiated by a faculty member who believes that he or she has suffered *injury as the result of a violation of the faculty member's rights or privileges*. A grievance action specifically requests the administration to take appropriate action to eliminate or mitigate the *faculty member's injury*.

Thus, read in proper context, Standing Order 103.2 preserves and protects the right of a hearing before P&T but only in appropriate circumstances -- such as where faculty rights and privileges have been affected -- of an Academic Senate member.

Dr. Kessler also misconstrues Legislative Ruling 3.93A. Dr. Kessler cites that Ruling as apparently supporting his position that a Senate member who is dismissed from his administrative position under the at will terms of the appointment may file a grievance under Bylaw 335 to challenge that dismissal after the fact. Ruling 3.93A does not support the assertion because the section of the Ruling cited concerns itself with a pre-termination hearing before P&T under Bylaw 336 (not Bylaw 335) in cases where there is no pre-termination consultation with the Academic Senate. The Ruling first states that

Under Standing Orders 100.2, 100.4(c), and 100.6(a), the suspension or dismissal of an administrator from an administrative title or appointment is reserved to the Regents, the President, and the Chancellors, *with no requirement for consultation with the Academic Senate*.

This Ruling does not pertain to our case because under APM 240-24(d), there was a requirement for Academic Senate consultation in this case. ("The Chancellor may end the appointment of a Dean or Provost at will and at any time, after discussion with an appropriate group of the faculty determined by the Chancellor after consultation with the Chair of the Division of the Academic Senate.")

Ruling 3.93A goes on to provide a right to a Bylaw 336 type hearing *before* discipline is imposed on the assumption that there is no other Academic Senate consultation provided for:

An administrator whose title confers membership in the Academic Senate may, however, invoke the privilege of a hearing guaranteed by SOR 103.2. In that case, the Divisional Committee on Privilege and Tenure or another hearing committee constituted as provided for in Senate Bylaw 335.C [now 336] shall consider the case and render its advice *prior to the imposition of discipline*. Since Senate Bylaw 335.F(1) [now 336.B(1)] uses the term "member of the Academic Senate," the procedures outlined in Senate Bylaws 335.F and 335.G [now 336.B and 336.D] must be followed, but other procedures established for discipline of faculty under the Faculty Code of Conduct need not be applied. (emphasis added)

Girish Vyas, Ph.D.
May 8, 2008
Page 7

As can be seen, the Legislative Ruling describes a pre-termination hearing through Bylaw 336, but only in cases where there is no other mechanism for Academic Senate consultation. The Ruling read any other way would render APM 240-24(d) meaningless. (Notably, Dr. Kessler does not cite the entire passage of Ruling 3.93A in his February 27, 2008, letter to you.)

Review of the Merits of the Dismissal Is Inappropriate Until the Issue of Jurisdiction Has Been Finally Adjudicated

The University does not believe any activity or action to review the merits underlying the dismissal of Dr. Kessler as Dean and Vice Chancellor is appropriate until the issue of jurisdiction has been fully and finally adjudicated and all appropriate appeals have been exhausted. For that reason, the University respectfully declines at this time to provide the Committee with any records or other evidence discussing or describing the facts and circumstances underlying Dr. Kessler's grievance.

Conclusion

We hope the foregoing establishes that the SMG Policies and Procedures and the University's Whistleblower Protection Policy, and not the P&T grievance process under Academic Senate Bylaw 335, provide the correct administrative remedies in this matter. As we know you understand, this jurisdictional issue is considered to be of grave importance to the University, such that the Office of the Provost and Executive Vice President has written you directly expressing its view.

We appreciate your consideration, and look forward to your advice. As always, if you have any questions or concerns please do not hesitate to contact me.

Respectfully submitted,



Jeffrey A. Blair
University Counsel

cc: Chancellor J. M. Bishop
175319.1



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David Gardner, MD, Chair
Elena Fuentes-Afflick, MD, MPH, Vice Chair
Mary J. Malloy, MD, Secretary
Jean Olson, MD, Parliamentarian

Communication from the Committee on Rules and Jurisdiction, San Francisco Division

John Imboden, MD, Chair

September 15, 2008

Daniel Hirschberg, PhD
Chair, University Committee on Rules and Jurisdiction
Office of the Academic Senate
1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200

Re: Request for Legislative Ruling

Dear Dr. Hirschberg:

Based upon a review of a communication provided by the UCSF Committee on Privilege and Tenure, the UCSF Committee on Rules and Jurisdiction (R&J) would like to modify its request for a Legislative Ruling submitted August 20, 2008.

Pursuant to system-wide UC Academic Senate Bylaw 206.A, the Chair of the UCSF Committee on Rules and Jurisdiction requests a Legislative Ruling from the University Committee on Rules and Jurisdiction (UCRJ) as to the following:

Request for Legislative Ruling:

1. Does a Divisional Privilege and Tenure Committee have jurisdiction under Academic Senate Bylaw 335 to hear the grievance of a member of the Academic Senate asserting retaliation in violation of the University's Whistleblower Protection Policy (APM-190, Appendix A-2)?
2. If the answer to Question 1 is affirmative, does the jurisdiction so affirmed extend to such a grievance asserted by an Academic Senate member with regards to an at-will administrative appointment?

Sincerely,

A handwritten signature in black ink that reads "John Imboden MD".

John Imboden, MD
Chair, UCSF Committee on Rules and Jurisdiction

cc: Martha Winnacker, JD, Director of the UC Office of the Academic Senate
Girish Vyas, PhD, Chair, UCSF Committee on Privilege and Tenure

Hardcastle, Wilson

From: Dan Hirschberg [dan@ics.uci.edu]
Sent: Monday, October 27, 2008 10:17 AM
To: Hardcastle, Wilson
Cc: martha.winnacker@ucop.edu; Imboden, John; Vyas, Girish; Patel, Shilpa
Subject: Legislative Ruling

In response to the request from the Chair of UCSF Committee on Rules and Jurisdiction, UCRJ has issued the following Legislative Ruling:

10.08 Jurisdiction of Divisional Privilege and Tenure Committees

A divisional P&T committee has jurisdiction to hear the grievance of an Academic Senate member asserting retaliation in violation of the University's Whistleblower Protection Policy, provided that "the allegations as stated in the written grievance, if true, would constitute a violation of the faculty member's rights and privileges." [Senate Bylaw 335.B.2] If no faculty right or privilege would have been violated, then P&T does not have jurisdiction to hear the grievance.

Inasmuch as having an at-will administrative appointment is neither a right nor a privilege of Academic Senate members, a divisional Privilege and Tenure Committee does not have jurisdiction to hear a grievance that is asserted with regard to the loss or withdrawal of such an appointment.

However, if the grievant were to allege that concomitant with the loss/withdrawal of his/her at-will administrative position there was a violation of that person's faculty rights or privileges and gave adequate indication in the written grievance of the respect in which this were so, then P&T would be required, as with all other complaints, to consider "whether or not the grieving Senate member has made out a prima facie case" [Senate Bylaw 335.B.2] and to proceed accordingly.

Sincerely,

Daniel S. Hirschberg
Chair, UCRJ

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||                               phone: (949) 824-6480    ||
| http://www.ics.uci.edu/~dan/   fax: (949) 824-4056    ||
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