

August 17, 2006

Colleagues:

Members of the Representative Assembly have raised concerns this year regarding the response of the campus administration to actions of the Committee on Privilege and Tenure. Some of those concerns were heightened by news reports of the legal action filed by Professor Robert Szabo, M.D. after Chancellor Vanderhoef rejected factual findings of the Privilege and Tenure Subcommittee on Hearings, and the findings of the Investigative Subcommittee. With the concurrence of the Committee on Privilege and Tenure, and with the permission of Dr. Szabo, I am posting Dr. Szabo's legal complaint and its attachments to the Senate web page so that interested faculty may make their own assessment. The Hearing Committee's report is redacted to remove the names of some of the individuals involved. In reviewing this material, be sure to note Chancellor Vanderhoef's letter referring the matter to the Dean of the Medical School for further review.

A handwritten signature in black ink that reads "Dan Simmons". The signature is written in a cursive, flowing style.

Daniel L. Simmons  
Professor of Law  
Chair, Davis Division  
Of the Academic Senate

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**ATTORNEYS FOR PLAINTIFF**  
**ROBERT M. SZABO, M.D.**

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF CALIFORNIA**

**ROBERT M. SZABO, M.D., M.P.H.**

**Plaintiff,**

**vs.**

**JOSEPH SILVA,**  
**M.D., INDIVIDUALLY, AND LARRY**  
**N. VANDERHOEF, INDIVIDUALLY,**

**Defendants.**

**CASE NO.**

**AMENDED COMPLAINT FOR DAMAGES,**  
**CIVIL RIGHTS (42 U.S.C. §§ 1983, 1988); AND**  
**PUNITIVE DAMAGES AGAINST JOSEPH**  
**SILVA**

**JURY TRIAL DEMANDED RULE 38(b)**

**PRELIMINARY STATEMENT**

1. Plaintiff Robert M. Szabo, M.D., M.P.H. is and at all relevant times was a resident of Sacramento, State and Eastern District of California. Dr. Szabo is a Board Certified Orthopaedic and Hand Surgeon, a distinguished, tenured Professor of Medicine at University Of California, Davis Medical School for the past twenty-three years and the Chief of Hand and Upper Extremities Service of the Department of Orthopaedics at U.C. Davis Medical School. As the Chief of Hand and Upper Extremities Service, Dr. Szabo has brought nationally and international recognition to U.C. Davis Medical School and has developed one of the premier and distinguished certified Hand and Upper Extremity Fellowship in the

1 United States. Under Dr. Szabo's leadership, the Hand and Upper Extremities Service's  
2 successful graduates have now distinguished themselves throughout the United States and in  
3 so doing have brought recognition and credit to U.C. Davis Medical School.

4  
5 2. Commencing in approximately 1998, Dr. Szabo, who was recently named acting  
6 Chief of Orthopaedic Surgery at U.C. Davis Medical Center, crossed paths with the then  
7 Dean of the Medical School, Defendant Joseph Silva, M.D. The tension between Defendant  
8 Silva and Dr. Szabo was based almost exclusively on Dr. Szabo's insistence on providing the  
9 highest quality of care, regardless of a patient's wealth or lack thereof, insurance or lack  
10 thereof, or race, creed or nationality, and Dr. Szabo's expressions of opinion in support of the  
11 highest quality of care provided without regard to wealth, status, color or nationality.

12 3. During former Dean Silva's tenure as dean, an atmosphere of distrust and hostility  
13 was created at the Medical School resulting in increased tension between the academic  
14 medical faculty whose interests were focused on the education and development of the best  
15 possible physicians, and patient care in strict accordance with the Hippocratic Oath.  
16 Defendant Silva's focus as Dean was on building U.C. Davis Health Care System as a  
17 behemoth healthcare provider, generating the highest possible income from cash and  
18 insurance patients, reducing the cost of expenditures on quality medical supplies, and  
19 reducing the number of Medicare and Medi-Cal patients because of the meager  
20 reimbursement the care of such patients generated, and finally, to generate bonuses for the  
21 administration. In reality, the management of a medical school such as U.C. Davis, with its  
22 mission of providing the best possible medical education and training for its students,  
23 residents and fellows in the atmosphere of an outstanding teaching hospital often times is at  
24 odds with the management of a behemoth healthcare provider, with its sole function of  
25 generating income and competing for "healthcare dollars" with other major providers in the  
26 greater Sacramento area such as Kaiser, Sutter and Mercy.

27 4. On January 28, 2004, Dr. Szabo contacted the University Compliance  
28 Whistleblower Hotline and registered a complaint concerning irregular billing practices by a  
physician and the inappropriate scheduling practices involving Medi-Cal patients at the U.C.  
Davis J Street Clinic. The portion of the complaint as to irregular billing practices concerned  
"upcoding" and the latter, pertained what appeared on its face to be discrimination against

1 the poor and impecunious; both of said practices were potential violations of State and  
2 Federal law. Former Dean Silva became aware of Dr. Szabo's Whistleblower complaint  
3 shortly after it was filed and an "investigation" was conducted by an employee of the U.C.  
4 Davis Compliance Department.

5 5. Despite findings of an internal audit of 100% "upcoding" at the J Street clinic  
6 based on a limited audit of charts, on May 11, 2004, Dr. Szabo received an e-mail from the  
7 head of U.C. Davis Compliance advising Dr. Szabo that his complaint was unsubstantiated.  
8 The very next day, May 11, 2004, former Dean Silva ordered Dr. Szabo's academic and  
9 clinical offices transferred from the U.C. Davis Hospital campus to the Carmichael,  
10 California U.C. Davis clinic and eliminated Dr. Szabo's block of operating room time at the  
University Hospital.

11 6. On May 25, 2004, Dr. Szabo availed himself of his rights as a member of the  
12 Academic Senate and filed a grievance. A Hearing Panel was appointed consisting of three  
13 distinguished professors of University of California, Davis. On September 2, 2005, the  
14 Hearing Panel, took evidence under oath and members of the Panel asked probing questions  
15 of the witnesses, including Defendant Silva.

16 7. On November 8, 2005, the Hearing Panel released a decision and report to the  
17 Chancellor Larry Vanderhoef, sustaining Dr. Szabo's grievance and making finds of fact as  
18 to inappropriate conduct of Defendant Silva in retaliating against Dr. Szabo for Dr. Szabo's  
19 Whistleblower complaint.

20 8. On November 16, 2006, Dr. Szabo wrote to Chancellor Vanderhoef asking the  
21 Chancellor to follow the findings of the Hearing Panel and poignantly asked for his "life  
22 back".

23 9. Unbenownst to Dr. Szabo a University lawyer in an unethical and unprofessional  
24 *ex parte* communication with the Chancellor advised the Chancellor not to consider Dr.  
25 Szabo's plea to "have his life back" until the University filed an application for  
reconsideration.

26 10. On December 1, 2005, the University sought reconsideration by the Hearing  
27 Panel and on February 9, 2006, the Hearing Panel reaffirmed its original decision and  
28 recommendation to the Chancellor. On March 29, 2006, despite overwhelming evidence of

1 willful misconduct and retaliation by former Dean Silva, Chancellor Vanderhoef, rejected the  
2 findings of the Academic Senate Hearing Committee.

3 11. This Civil Rights action concerns the intentional violation of Plaintiff's  
4 Constitutional rights of Speech and Due Process by state officials acting in intentional  
5 disregard of the rights of Plaintiff by abuse of power and contempt for the carefully crafted  
6 Academic Procedure Manual which is suppose to give meaning to the highly promoted  
7 concepts of academic freedom footed in the First Amendment and shared governance. As  
8 plead herein, power was abused by Defendants Silva and Vanderhoef to punish and retaliate  
9 against Dr. Szabo for exercising his right of free speech protected by the First Amendment of  
10 the United States Constitution and Article 1, Section 2(a), of the California Constitution and  
11 the statutory protection provided for in the Government Code against retaliation against  
12 Whistleblowers.

### 12 **PARTIES**

13 12. Plaintiff Robert M. Szabo, M.D. is and at all times relevant was a resident of  
14 Sacramento, California, State and Eastern District of California. Dr. Szabo is a physician  
15 duly licensed to practice medicine in the State of California and is a fully tenured Professor  
16 of Medicine at U.C. Davis Medical School, and Chief of the Hand and Upper Extremities  
17 Service of the Department of Orthopaedics at U.C. Davis Medical School.

18 13. Defendant Joseph Silva, M.D. was the Dean of U.C. Davis Medical School  
19 and/or the consultant and advisor to Chancellor Larry Vanderhoef. Plaintiff is informed and  
20 believes and therefore alleges that Defendant Silva was a resident of Davis, California, State  
21 and Eastern District of California. This Civil Rights action and the allegations herein, pertain  
22 to Defendant Silva in his individual capacity abusing his power to violate protected  
23 Constitutional Rights.

24 14. Defendant Larry Vanderhoef, is and at all times relevant to the allegations in this  
25 Complaint, was the Chancellor of U.C. Davis. This Civil Rights action and the allegations  
26 herein, pertain to Defendant Vanderhoef in his individual capacity abusing his power to  
27 violate protected Constitutional Rights.

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**CLAIM FOR RELIEF**  
**(CIVIL RIGHTS ACT 42 U.S.C. § 1983)**

16. Dr. Szabo is a world renowned orthopaedic surgeon, specializing in hand and upper extremity diseases and surgery. Dr. Szabo is Chief of the Hand and Upper Extremity Service at U.C. Davis Medical School, which is nationally and internationally recognized as one of the best in United States provides a certified Hand and Upper Extremity Fellowship. Under Dr. Szabo's leadership, the Hand and Upper Extremities Service's successful graduates have now distinguished themselves throughout the United States and in so doing brought recognition and credit to U.C. Davis Medical School and Dr. Szabo's skill as physician and teacher.

18. Dr. Szabo's complaint, supported by empirical data, demonstrated probable cause to believe that potential illegal billing practices were taking place at the J Street PCN, as well as discrimination against Medi-Cal patients. The communication was protected by the First Amendment to the Constitution of the United State and California law and Dr. Szabo could not as a matter of law be punished, harassed or disciplined directly or indirectly for reporting

1 potential violations of law by U.C. Davis Health Systems. A complaint to the Hotline need  
2 not be anonymous; in fact Dr. Szabo identified himself.

3 19. The Compliance Department of U.C. Davis Medical School conducted a very  
4 limited chart audit of billing records of the J Street clinic and discovered a physician at that  
5 clinic with 100% incidence of “upcoding”, an indication for a more extensive audit, but for  
6 some unexplained reason, perhaps to prevent the disclosure to potential private insurance  
7 and Medicare fraud by U.C. Davis Health Systems concluded on May 11, 2004, that Dr.  
8 Szabo’s complaint was unsubstantiated. At all relevant times, it was the practice and  
9 procedure of U.C. Davis Health Systems to have “billers” prepare all Medicare and private  
10 insurance billings based on physician reports of services rendered and U.C. Davis Health  
11 Systems did not require or insist that the physician rendering the services monitor and review  
12 the billings so that billings which were submitted were true and accurate. Unbenownst to Dr.  
13 Szabo, at the very same time the Compliance Department was “investigating” Dr. Szabo’s  
14 Whistleblower complaint, Defendant Silva and others had been meeting in executive session  
15 as part of the “Dean’s Council”, discussing and planning methods of reducing the number of  
16 Medi-Cal patients at UC Davis Health PCNs because of the poor reimbursement UC Davis  
17 Health received from Medi-Cal.

18 20. On May 12, 2004, Defendant Silva ordered Dr. Rab, the Chief of Orthopaedic  
19 Surgery, despite Dr. Rab’s protest, to transfer Dr. Szabo’s academic office and clinical  
20 practice to the Carmichael PCN and transfer his entire surgical practice to Mercy General  
21 Hospital, which effectively deprived Dr. Szabo of his allotted elective operating time at U.C.  
22 Davis. As a consequence of defendants conduct, medical students, residents and fellows  
23 have been deprived of the opportunity of watching Dr. Szabo perform the types of  
24 complicated hand and upper extremity surgeries, which serve as priceless educational  
25 opportunities, contrary to the fundamental purpose of a teaching hospital.

26 21. Defendant Silva has had personal animus towards Dr. Szabo for some time dating  
27 back to 1999, when Dr. Szabo served as acting Chairman of the Department of Orthopaedic  
28 Surgery; and despite Dr. Szabo’s outstanding performance as a surgeon, professor, and  
generator of significant positive publicity as one of the University’s outstanding physicians,  
Defendant Silva made every effort to undermine Dr. Szabo. The Whistleblower Hotline  
complaint was the last straw for Defendant Silva, and as soon as the Compliance Office

1 submitted its finding, Defendant Silva, motivated by animus and in retaliation for Dr. Szabo  
2 exercising federally and state protected right of speech and bring potential fraudulent acts to  
3 the attention of U.C. Davis by means of the Whistleblower hotline established for such  
4 protected acts, Defendant Silva wrongfully, intentionally, and maliciously retaliated against  
5 Dr. Szabo to punish him and make an example of Dr. Szabo to the damage of Dr. Szabo and  
6 indeed, the students, residents and fellows of the U.C. Davis Medical School.

7 22. Dr. Szabo is a vocal proponent that the practice of medicine and the education of  
8 medical students, residents and fellows, embodied in the Hippocratic Oath of treating rich  
9 and poor alike, and caring for patients irregardless of insurance or the lack thereof, with  
10 dignity and the best quality of medical care. Dr. Szabo is a full professor of Medicine at U.C.  
11 Davis for the past 23 years, and Dr. Szabo believed in the system of joint governance at U.C.  
12 Davis between the administration and the Academic Senate and further believed that  
13 Defendant Silva's act of retaliation footed in animus, and violated the principle of Academic  
14 Freedom dating back to 1934 and codified in Academic Procedure Manual Section 010  
15 which provides:

16 The University of California is committed to upholding and  
17 preserving principles of academic freedom. These principles reflect  
18 the University's fundamental mission, which is to discover  
19 knowledge and to disseminate it to its students and to society at  
20 large. The principles of academic freedom protect freedom of  
21 inquiry and research, freedom of teaching, and freedom of  
22 expression and publication. These freedoms enable the University  
23 to advance knowledge and to transmit it effectively to its students  
24 and to the public. The University also seeks to foster in its students  
25 a mature independence of mind, and this purpose cannot be  
26 achieved unless students and faculty are free within the classroom  
27 to express the widest range of viewpoints in accord with the  
28 standards of scholarly inquiry and professional ethics. The exercise  
of academic freedom entails correlative duties of professional care  
when teaching, conducting research, or otherwise acting as a  
member of the faculty.

26 23. On May 25, 2005, Dr. Szabo, in accordance with the Academic Procedure  
27 Manual filed a grievance with the Academic Senate. Dr. Szabo's grievance was referred to  
28 an Investigative Subcommittee of the Davis Division Committee on Privilege and Tenure



1 (the Committee) with regard to its primary investigation of Dr. Szabo's grievance of May 25,  
2 2004. The Committee's report stated:

3 [t]he dean's action appears to be highly irregular. Not only was the  
4 chair's recommendation overridden, but the Facilities Allocation  
5 Committee was also bypassed. Such direct, unilateral action by the  
6 dean is rare, and a plausible explanation is that the dean was indeed  
7 reacting in anger to this continuing thorn in his side, Prof. Szabo.  
8 **[Attached as Exhibit A is a copy of the Investigative  
9 Committee's Report].**

10 24. The Committee's findings were submitted to Barbara Horwitz, the Vice Provost,  
11 who refused to reverse Dr. Silva's decision. It should be noted that when Provost Horwitz  
12 rejected the recommendations of the Committee, Defendant Silva was simultaneously  
13 promoted to the position of Senior Advisor to the Chancellor.

14 25. After Provost Horwitz rejected the Investigative Committee's findings, Dr. Szabo  
15 believed and was concerned that he would not receive fair consideration from the U.C. Davis  
16 administration headed by Defendant Vanderhoef; Dr. Szabo's concern was not lost on the  
17 Investigative Committee, which in a letter to Ms. Horwitz of February 7, 2005, stated: "We  
18 were startled by your response, or actually lack of response and the possibility does suggest  
19 itself that the dean's pending transfer to your group played a role in your statement, whether  
20 consciously or unconsciously."

21 26. On September 2, 2005, a hearing was held before a Committee of the Academic  
22 Senate composed of three distinguished professors of U.C. Davis, Professor Bill Hing, of  
23 U.C. Davis Law School, Professor Lisa Pruett of U.C. Davis Law School and Professor Sally  
24 McKee of U.C. Davis. On November 11, 2005, the three member panel unanimously  
25 sustained Dr. Szabo's grievance and made findings reflecting both the acts of retaliation by  
26 Defendant Silva in violation of the law and made findings that reflected that: (1) Defendant  
27 Silva was disingenuous in his testimony; (2) There was compelling evidence that Defendant  
28 Silva was motivated by personal animus toward Dr. Szabo; (3) Dr. Szabo was the victim of

1 retaliation for his Whistleblower complaint; (4) That Dr. Szabo's grievance should be  
2 sustained; (5) That Dr. Szabo be restored to the University campus; and (6) that Dr. Szabo's  
3 attorney's fees be paid by the Defendant. **[Exhibit B is the Hearing Panel Committee**  
4 **Report of November 8, 2005].**

5 27. On November 16, 2005, Dr. Szabo wrote an e-mail letter to Defendant  
6 Vanderhoef, Chancellor of U.C. Davis requesting that the committee's recommendation be  
7 followed:

8 I've waited a long time to be returned to my normal academic life at UC  
9 Davis which has been needlessly disrupted. I want to be able to take care  
10 of my patients and fulfill my obligations to teaching my students as I have  
11 before Dean Silva decided to retaliate against me for filing a Whistle  
12 blower complaint. I have not asked for sanctions against Dean Silva. I  
13 have not as yet initiated any litigation against the University. I have  
14 followed the University's policy and procedures for my grievance to be  
15 heard and I have prevailed. I want my life back. I urge you to fulfill your  
16 responsibilities in this action fairly and expeditiously. **[Letter from Szabo**  
17 **to Vanderhoef attached as Exhibit C].**

18 Unbeknownst to Dr. Szabo, the lawyer who represented the University at the grievance  
19 hearing unethically and willfully communicated *ex parte* with Defendant Vanderhoef and  
20 advised the Chancellor that the University would be asking the Committee to reconsider its  
21 decision.

22 28. On December 1, 2005, the University filed its petition for reconsideration. On  
23 February 8, 2006, the three member hearing panel rejected the petition for reconsideration  
24 and in a scathing decision reaffirmed its original decision. **[Exhibit D, Hearing Panel's**  
25 **Decision of February 8, 2006, on Petition For Reconsideration].**

26 29. On March 29, 2006, Defendant Vanderhoef rejected the Committee's  
27 recommendations. **[Defendant Vanderhoef's letter to Dr. Szabo attached as Exhibit E].**

28 30. The acts of Defendant Silva acting individually, under his color of power as Dean  
of U.C. Davis Medical School, were an abuse of power and accomplished with the intent to  
punish Dr. Szabo from exercising his right to free speech protected by the First Amendment  
to the Constitution of the United States, and Article 1, Section 2(a), of the California  
Constitution and to intimidate Dr. Szabo in respect to future expression of opinion protected

1 by the Constitution. All of the acts complained of above, were also accomplished in  
2 retaliation for Dr. Szabo's exercise of speech as a Whistleblower.

3 31. The acts of Defendant Vanderhoef acting individually, under his color of power  
4 as Chancellor of the University of California, Davis, in rejecting the Hearing Committee's  
5 recommendations without a basis in law or, in fact knowing that his conduct would in fact  
6 ratify, condone and continue Unconstitutional punishment of Dr. Szabo for exercising Dr.  
7 Szabo's constitutional rights was an intentional and willful abuse of power with the intended  
8 result by Defendant Vanderhoef of punishing Dr. Szabo from exercising his right to free  
9 speech protected by the First Amendment to the Constitution of the United States, and  
10 Article 1, of the California Constitution. All of the acts complained of above, was also  
accomplished in retaliation for Dr. Szabo's exercise of speech as a Whistleblower.

11 32. Dr. Szabo has been damaged in his reputation, professional standing, and has  
12 been subject to emotional distress and upset and humiliation as he watched and experienced  
13 the unlawful, discriminatory and willful acts of the Defendants herein, jointly and severally.  
14 The acts complained of herein, in addition to punishing Dr. Szabo for his exercise of speech  
15 was also accomplished for the purpose of driving Dr. Szabo from the University campus and  
16 depriving Dr. Szabo of his significant joy and delight of teaching medicine, developing  
17 quality doctors and treating all patients regardless of wealth, color, national origin or  
18 insurance coverage.

19 33. As a result of the conduct of Defendants and each of them, Dr. Szabo has been  
20 damaged in the sum of \$ 2,500,000.

21 34. Dr. Szabo has been damaged because he has been compelled to incur legal fees  
22 and expenses in an amount in excess of \$15,000 for his representation through his Academic  
Senate proceedings.

### 23 **PUNITIVE DAMAGES AGAINST DEFENDANT SILVA**

24 35. Plaintiff incorporates each and every allegation contained in Paragraphs 1  
25 through 34, above as though fully set forth herein

26 36. Defendant Silva, willfully, intentionally, maliciously and oppressively  
27 deprived Dr. Szabo of his constitutionally protected right to Freedom of Speech and to  
28 be free of the fear of retribution. Defendant Silva accomplished all of the acts  
complained of herein, maliciously and oppressively for the purposes of punishing

1 Dr. Szabo for Constitutionally protected speech and to force Dr. Szabo to resign or  
2 retire from the University; accordingly, Dr. Szabo is entitled to punitive damages  
3 from Defendant Silva personally in the sum of \$1,000,000.00 or 13 times Dr. Szabo  
4 actual damage as determined by a jury.

5 Wherefore, Plaintiff Robert Szabo, M.D. prays for a judgment as follows:

- 6 1. General Damages in the sum of \$2,500,000.00 as to both defendants;
- 7 2. Punitive Damages against Defendant Silva in the sum of \$1,000,000.00 or  
8 13 times Dr. Szabo's actual damage as determined by a jury;
- 9 3. Attorney's fees and Costs pursuant to the Civil Rights Act, 42 U.S.C. §  
10 1988;
- 11 4. For such other and further relief as the Court believes to be just and  
12 equitable.

13 **TRIAL BY JURY**

14 **PLAINTIFF DEMANDS A TRIAL BY JURY PURSUANT TO**

15 **CIV. RULE 38(b)**

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18 Dated: May 8, 2006

DONALD H. HELLER,  
A Law Corporation

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21 /S/ DONALD H. HELLER  
DONALD H. HELLER

22 Attorney for Plaintiff  
23 ROBERT M. SZABO, M.D.  
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December 2, 2004

**BARBARA A. HORWITZ**

Vice Provost – Academic Personnel

RE: Grievance filed by Professor Robert Szabo dated May 25, 2004

Dear Vice Provost Horwitz,

The Investigative Subcommittee of the Davis Division Committee on Privilege and Tenure (P&T) (referred to as "the committee" below) completed its primary investigation of the grievance filed by Professor Robert Szabo on May 25, 2004. The investigation was conducted further during the summer of 2004, and the case was further discussed in the fall when much of the committee membership had changed. In the grievance:

- (a) Professor Szabo alleges that his rights or privileges as a member of the Academic Senate were violated when Dean Silva of the School of Medicine relocated Professor Szabo's surgical and clinical practices and his academic office to remote locations, severely hampering his ability to perform his work as a professor in the School of Medicine. Professor Szabo alleges that these relocations were procedurally invalid.
- (b) Professor Szabo alleges that these relocations were motivated by personal animus toward him.

It should be noted that while Prof. Szabo's grievance letter of May 25, 2004 focuses on (b), it also does allege (a), independent of whether (b) is valid.

There is no question that the relocations have significantly harmed Professor Szabo's ability to do his job. For example, 100% of the residents in the department signed a letter in which they bitterly protested the relocations, citing the harm it would bring to their educations. A faculty colleague of Prof. Szabo submitted to our committee a letter detailing how Prof. Szabo's physical proximity had enabled him to gain invaluable insight and give much-improved care to his patients, a proximity Prof. Szabo no longer has, due to the relocations.

It should also be noted that the relocations have harmed Prof. Szabo's professional reputation. Loss of operating privileges at a hospital is an exceedingly serious black

mark on a physician's reputation. Though technically Prof. Szabo did not lose his privileges at the University Medical Center, his access has been so severely restricted (e.g. to odd late-night time slots) that for all practical purposes he has indeed lost his status at that hospital. This is illustrated by the fact that hospital staff has been telling patients that Prof. Szabo does not have privileges at that hospital, which as mentioned, is a major, unwarranted blow to his reputation.

The issue, then, is whether this harm came about through violations of Professor Szabo's rights or privileges. The committee found sufficient reason to believe that this may have occurred.

We will first address allegation (a) above. APM 245, Appendix A, states the following about the requirements imposed on department chairs:

The [chair] is in charge of planning the programs of the department in teaching, research, and other functions. The chair is expected to keep the curriculum of the department under review, and to maintain a climate that is hospitable to creativity and innovation.

Geographically isolating a faculty member from his/her colleagues and students, especially in such a "hands-on" field as medicine, is clearly antithetical to "maintaining a climate that is hospitable to creativity and innovation."

The department chair was in fact opposed to the relocations, according to his memo of May 13, 2004 to Prof. Szabo. The dean ordered the relocations over the objections of the department chair. But APM 204.4(a) mandates that a dean has the "responsibility for insuring that [UC] systemwide and local policies, including Academic Senate regulations, are observed." In this case, the dean did not "insure" that APM 245.A was observed, and in fact ordered action contrary to that APM provision. Moreover, numerous other official regulations, such APM 025-6 and APM 670, state that systemwide/local policy is to promote excellence in teaching and research, again something demonstrably contrary to the effects of the relocations.

Granted, the dean must look at the "whole picture"; what may be for the greater good in terms of faculty, students and patients in general may be suboptimal for one particular faculty member, in this case potentially Prof. Szabo. Yet the dean did not make such a case. His failure to do so, in the face of very clear damage to Prof. Szabo and the mission of the university, runs counter to the APM as explained earlier.

It should also be pointed out that APM 670 requires the university to maintain "the quality of its health care services." The writings of Prof. Szabo's faculty colleagues and residents state clearly that Prof. Szabo's physical presence has greatly enhanced patient care provided by the university. Even the dean agrees that Prof. Szabo is an outstanding surgeon, and referred his own mother to Prof. Szabo for surgery. The dean's action to remove Prof. Szabo from proximity to patients in the university hospital, at which he was the only board certified hand surgeon, violates APM 670. It is even

conceivable that it puts the university at risk of patient litigation. Although that is not a direct violation of Prof. Szabo's rights, it adds to Prof. Szabo's contention that the dean was acting contrary to his responsibilities.

The dean contends that the relocations were merely an extension of Prof. Szabo's own request to be allowed to perform some of his surgeries at Mercy General Hospital. Yet Prof. Szabo only made the request as a supplementary venue, rather than asking to relocate there entirely, and of course even if the dean's claim were valid, it would not justify the relocation of Prof. Szabo's clinical and academic activities.

The dean also contends that he has the right to allocate space at the university hospital, which is a business, separate from academic activities. However, the committee notes that he is still subject to APM mandates.

Now turning to allegation (b) above, there has been ongoing friction between the dean and Prof. Szabo for a number of years. This began, ironically, when the dean fought against Prof. Szabo's use of Mercy General Hospital as a supplementary venue for his surgical work, even though medical school policy does have a provision for this. In addition, Prof. Szabo has had an ongoing dispute with the School of Medicine's Compliance Office regarding billing practices. Prof. Szabo claims that the dean's actions relocating Prof. Szabo's surgical, clinical and academic venues were due to the dean's personal resentment of him. Our committee's investigation found that there is sufficient evidence to believe Prof. Szabo's claim may be valid.

First, the timing of the dean's order to relocate is troubling. On May 11, 2004, Prof. Szabo received notification from the Compliance Office that his claims of improper billing practices had been dismissed. Two days later, on May 13, he was notified by the department chair that his surgical, clinical and academic activities were being relocated. This timing is difficult to ignore. And most significantly, the chair stated that the dean had been contemplating the action for several weeks, and that "This is a long-term reaction to interactions between you [Prof. Szabo] and the health system that have a history of many years."

Second, the dean's action appears to be highly irregular. Not only was the chair's recommendation overridden, but the Facilities Allocation Committee was also bypassed. Such direct, unilateral action by the dean is rare, and a plausible explanation is that the dean was indeed reacting in anger to this continuing thorn in his side, Prof. Szabo.

It should also be noted that the system is supposed to protect the anonymity of whistleblowers, yet Prof. Szabo's identity as the whistleblower was disclosed in widely disseminated e-mail messages. This contradicts the dean's contention that the review process for that whistleblower case "were exemplary and far exceeded the codes."

In summary, our committee finds that there is sufficient reason to believe both of Prof. Szabo's claims (a) and (b), and a hearing is warranted. However, given that a hearing is

exceedingly burdensome for all parties involved, we strongly suggest that the Vice Provost settle the matter, by reversing the relocations.

Sincerely,

A handwritten signature in black ink, appearing to read "N Matloff". The signature is fluid and cursive, with the first name "N" being large and prominent.

Norman Matloff  
Chair, Privilege and Tenure Investigative Subcommittee

cc: Robert Szabo



November 8, 2005

**CONFIDENTIAL**

**Chancellor Larry Vanderhoef**  
Mrak Hall

Dear Chancellor Vanderhoef:

Enclosed you will find the report of a panel of the Privilege & Tenure Hearings Subcommittee regarding the complaint filed by Dr. Robert Szabo against Dean Joseph Silva.

Please do not hesitate to contact me if you have any questions about this report.

Sincerely,



Bill Ong Hing  
Chair, P&T Hearings Subcommittee

## **In the Matter of the Grievance Filed by Dr. Robert Szabo**

### **Findings and Recommendations of the Privilege and Tenure Hearing Panel**

For the reasons set forth below, we recommend that the grievance filed by Dr. Robert Szabo against Dr. Joseph Silva, Dean of the School of Medicine be sustained. We recommend that Dr. Szabo be allowed to resume his academic practice in the Ellison Ambulatory Care Center, have his academic office back at the Ellison building and be reunited with his academic secretary, along with being able to perform surgery on patients in the university's hospital with the same privilege other faculty enjoy, specifically the same privileges he enjoyed prior to the events at issue. Additionally, Dr. Szabo should have the ability to perform surgery, when needed, on patients at Mercy General Hospital if the UC Davis Medical Center cannot provide space and time for his patients. We further recommend that the university reimburse Dr. Szabo for attorney's fees he has incurred in pursuit of his grievance.

### **INTRODUCTION**

Dr. Robert Szabo Filed a grievance against School of Medicine Dean Joseph Silva on May 25, 2004, after Dr. Szabo was informed that his clinical and academic activities would be moved outside the Ellison Building (at UCDMC) to the Carmichael Primary Care Network site. The Privilege and Tenure Investigative Subcommittee completed an investigation on or about December 2, 2004, not only finding that a hearing was warranted, but recommending to the Vice Provost that the relocation be reversed. The matter was not resolved, and on July 29, 2005 a pre-hearing conference was held. Both Dr. Szabo and the University were represented by counsel at this conference. Parties were urged to narrow the issues prior to hearing, but those efforts met with little success.

On September 2, 2005, the Privilege and Tenure hearing committee held a hearing regarding Dr. Robert Szabo's grievance. Professors Bill Hing, as chair, Sally McKee, and Lisa Pruitt were appointed to a panel to hear this matter. Dr. Szabo was represented by attorney Donald Heller. Steven Rosen, with the assistance of Julia Ann Lundberg, represented the University.

After substantial review, three key issues are relevant:

- 1) Was the decision to move Dr. Szabo to the Carmichael Primary Care Network ("PCN") site motivated by personal animus on the part of Dean Silva or others involved in the decision making process?
- 2) Was the Dean or other members of the Dean's Council aware of Dr. Szabo's whistleblower complaint at the time the decision to move him was made? If so, is Dr. Szabo protected by the UC Davis policy on whistleblowers?
- 3) Does Dr. Szabo's Hand, Upper Extremity and Microvascular Fellowship constitute an Academic Unit or Academic Program? If so, was his Academic Unit or Program moved when he was moved to the Carmichael PCN site? If the fellowship constitutes an Academic Unit

or Program and it was moved, was proper procedure followed in doing so?

Section I of this letter provides a brief timeline of pertinent events leading up to this grievance. Section II assesses the claim that personal animus was involved in the decision to move Dr. Szabo to Carmichael. Section III outlines the implications of Dr. Szabo's whistleblower complaint. Section IV assesses the claim that Dr. Szabo's fellowship is an Academic Unit or Program. Finally, Section V briefly concludes and provides our recommendations.

## **I. TIMELINE OF KEY FACTS**

On **March 8, 2001**, Dr. Szabo threw a stapler during surgery (UC Exhibits at 44). The incident is indicative of Dr. Szabo's occasionally "abrasive" nature (Hearing Transcript at 32) and was a source of friction between Dr. Szabo and Dean Silva.

On **September 23, 2003**, Dr. Szabo was notified by Allan Siefkin, M.D., Chief Medical Officer, UC Davis Health System, that "effective October 6, 2003, outpatient hand surgery services provided by Dr. [Szabo] at Mercy General Hospital will no longer be covered under the University of California professional and hospital liability self-insurance program" (Szabo Exhibits at 58). After Dr. Szabo received this notification, he notified [REDACTED] Mercy General Hospital that, "Unfortunately, for unknown reasons to me, our dean, Joe Silva, has decided that I can no longer perform surgery at Mercy General Hospital.....I was told that his decision is final (although he won't directly speak to me about it)" (Szabo Exhibits at 59).

On **September 24, 2003**, Dr. Szabo received an email response from Dean Joseph Silva informing him that they "will set up and (sic) appointment" after he emailed Silva the day before complaining that [REDACTED] specifically told him that [Silva] did not want to talk to him about" the ban on operating at Mercy General Hospital. (Szabo Exhibits at 60).

On **January 28, 2004**, Dr. Szabo contacted the hotline for whistleblower complaints to report what he believed to be incorrect billing practices by another faculty member surgeon. (Szabo Exhibits at 15) The Whistleblower complaint reported two potential violations of federal and state law regarding (1) billing practices (Post-Hearing Brief of Dr. Robert Szabo Page 2) and (2) clinic scheduling practices for Medi-Cal patients at the J Street PCN (Szabo Exhibits at 116-117). He testified, and there is evidence, that this complaint was received and reviewed by [REDACTED] Compliance Office, UC Davis Health System (Szabo Exhibits at 110-11), who later notified various administrators through email copies and forwarding that Dr. Szabo had filed such a compliance complaint. Administrators and physicians who were immediately notified that Dr. Szabo filed a compliance complaint included, but were not limited to, [REDACTED], [REDACTED], [REDACTED] and [REDACTED] (Szabo Exhibits at 109-111; Hearing Transcript a 331-334) This notification undermines Dr. Rab's testimony that he did not hear about the complaint until May 2004 (Hearing Transcript at 354).

On **February 12, 2004**, a regularly scheduled "Compliance Update" meeting was held with [REDACTED] (UC Exhibits at 133).<sup>1</sup> It is likely that Dr. Szabo's whistleblower complaint was discussed at this meeting. However, the notes from this meeting are missing. It is worth noting that in his testimony Dean Silva claimed there was no meeting in February (Hearing Transcript at 178). UC Exhibits at 133 undermine Dean Silva's credibility on this point.

On **March 22, 2004**, Minutes from the Dean's office meeting noted that, "...it was decided that Dr. Szabo would go to Carmichael and do surgery at Mercy Methodist..."

On **March 29, 2004**, Minutes from the Dean's office meeting noted that, [REDACTED] met with [REDACTED] regarding Dr. Szabo. He will be told to give us his clinic at [Ellison]ACC and do his surgeries at Mercy and his office at Carmichael."

On **April 12, 2004**, Minutes from the Dean's office meeting noted, "Dr. Szabo has requested to retain his office in Ellison. He will be asked to leave this office and go to Carmichael" (UC Exhibits at 10-12).

On **April 29, 2004**, Dr. Szabo was notified by [REDACTED] that [REDACTED] would make the "results of the compliance audit [ ]available next week, both via the hotline and in a written report" (Szabo Exhibits at 114-15). Dr. Szabo was not contacted again by the Compliance Office until the **May 11, 2004** letter [REDACTED] finding that, "[I]n conclusion, the allegations were not substantiated...[T]hank you for your patience during this review process" (Szabo Exhibits at 117).

On **May 11, 2004**, [REDACTED] e-mailed a letter to Dr. Szabo at 07:57AM advising Dr. Szabo that the allegations in Dr. Szabo's complaint were not substantiated. [REDACTED] copied the following supervisory employees of U.C. Davis Medical System with the e-mail: [REDACTED] and [REDACTED] served and continues to serve on the Dean's Council (Szabo Exhibits at 116-117).

On **May 12, 2004**, Dean Silva ordered [REDACTED] to tell Dr. Szabo that Dr. Szabo's clinical and academic practice was to be moved to the Carmichael PCN. While discussions of creating an orthopedic practice at the Carmichael PCN were held prior to **May 12, 2004**, there was never a mention of moving Dr. Szabo's academic office from the University Campus and eliminating his blocked time at the University Hospital.

On **May 13, 2004**, [REDACTED] wrote a letter to Dr. Szabo informing him that he had met with the Dean the previous day and "[T]he Dean's office has asked me, in addition to moving your surgical outpatient practice to Mercy General, to move your clinical and academic activities outside the Ellison Building to the Carmichael PCN site" (Szabo Exhibits at 69).

On **May 18, 2004**, Dr. Szabo wrote an email to Dean Silva asking to meet with him to discuss his intentions [for the Dean's office decision to move him] (Szabo Exhibits at 61). Dean Silva did not respond to Dr. Szabo's email until **May 27, 2004** (Szabo Exhibits at 51). However, a few days before Silva's response, Dr. Szabo wrote a formal letter to the Committee on Privilege and Tenure stating that he was "filing a grievance against Joseph Silva, M.D., Dean of the School of Medicine for violating my rights and privileges under the University of California policy for protection of whistleblowers from retaliation" (Szabo Exhibits at 15-16).

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<sup>1</sup> This exhibit is an email dated January 28, 2005 from Geneva Harris (Clinical Affairs) which carbon copies Dr. Jaffe and Teresa Porter.

## II. PERSONAL ANIMUS

Dr. Szabo alleges in his grievance that his relocation was due to Dean Silva's "personal animus" toward him (Szabo Exhibit at 15).<sup>2</sup> Indeed, throughout the course of the hearings on the removal of Dr. Szabo's clinic to Carmichael, the issue of personal animus toward Dr. Szabo on the part of Dean Silva and other UCDMC administrators arose frequently. While Drs. Silva and [REDACTED] as well as others, maintain that the decision to move Dr. Szabo's clinic was justified on pedagogical and economic grounds, Dr. Szabo alleges that personal feelings of animus were an important motivating factor – if not the single most important factor – in this decision.

In reviewing the Criteria for Space Allocations of the UCD Policy & Procedure Manual, practical concerns—as opposed to the gruff personality of one individual—should be paramount in the decision of whether or not to relocate a clinic. These criteria include workload factors, program requirements, adequacy of existing area, technological improvements, and environmental and geographic considerations (UC Davis Policy & Procedure Manual, Section 360-21).<sup>3</sup> While the Dean's authority to make the decision to relocate a clinic is not in dispute,<sup>4</sup> nowhere in the manual are personality or style of work listed as legitimate factors for such a decision.

Drs. Silva and [REDACTED] and [REDACTED] all presented testimony regarding the propriety of the relocation of Dr. Szabo's clinic, the details of which need not be repeated here. Dr. Silva's testimony in particular highlighted the many perceived advantages of moving Dr. Szabo's clinic: Economic (the move would expand the base of paying patients); pedagogical (there is at least an argument to be made that geographical diversity leads to a more diverse set of cases); logistical (the decompression of the Sacramento operating room as well as the geographical expansion of the network generally). Dr. [REDACTED] among others, agreed that sound reasons supported the move.

Dr. Szabo argued that the move was "illogical," particularly in light of the fact that the hospital is now contracting with a clinic in San Francisco to handle the very hand cases Dr. Szabo once handled. (Hearing Transcript at 290-291) Similarly, Dr. Szabo gave testimony as to the detriment to his hand surgery fellowship that resulted in the move to a less central location, particularly insofar as it led to the students being exposed to less complicated hand cases. Furthermore, the necessary facilities and resources were not even ready when Dr. Szabo was first asked to relocate. Surgery scheduling for Dr. Szabo has become more complicated. The testimony of Drs. [REDACTED] and [REDACTED] also highlighted the negative impact on the hand fellowship program, as well as on fellows' access to Dr. Szabo as a teacher.

While condoning Dr. Szabo's gruff and indeed self-indulgent manner is difficult, he is a highly regarded teacher and mentor, and his manner appears to be in part a

<sup>2</sup> Grievance Letter Against Dr. Joseph Silva dated May 25, 2004, Szabo Exhibits p 15.

<sup>3</sup> UC Davis Policy & Procedure Manual, Section 360-21 - Campuswide Space Allocation and Evaluation, 9/12/88.

<sup>4</sup> *Ibid.* (Deans delegated responsibility and authority for facilities planning and management).

manifestation of his desire to provide quality care to all patients—irrespective of class background. Dr. Silva's testimony that Dr. Szabo's transfer to the Carmichael PCN site was in part aimed at increasing the "diversity of the patient base" strikes us as a euphemism for decreasing the number of low-income patients who are able to pay less for services rendered. Thus, while planning and discussion by a committee may have indeed taken place with respect to a new program in Carmichael, the new program could have been implemented in a more thoughtful manner, with better planning, with less negative impact on the fellows and residents if another less highly-specialized orthopedist had been moved.

This all suggests that personal animus was at play in determining that Dr. Szabo would be relocated. The manner in which the decision was made, without including Dr. Szabo in the planning process, is further indication that personal animus was involved. Dr. [REDACTED] confirmed that the decision was "not an elected negotiation by the department, it was a specific decision by [Dean] Silva to move [Dr. Szabo to Carmichael]." Dr. [REDACTED] never consulted with Dr. Szabo about the proposed move. [Hearing Transcript 353-354] We find credible Dr. Szabo's testimony that he would have cooperated if he had been consulted during the planning process. "I am perfectly willing and desirous to continue continuing operating at Mercy also, and I have no objection to helping the University build a hand service that services and cares for and extends out to the network." [Hearing Transcript 337] On the other hand, Dean Silva was rather evasive on the point of whether the decision was made, at least in part, to quiet the friction between Dr. Szabo and others. Dean Silva finally acknowledged that as a factor, but only after follow-up questioning [compare Hearing Transcript 170-173, with 176-177]. This evasiveness damaged Dean Silva's credibility in our judgment.

Our finding with respect to whistleblower policies also supports the finding that Dean Silva acted out of personal animus toward Dr. Szabo in making the relocation decision.

### **III. WHISTELBLOWER POLICIES AND PROTECTIONS**

#### **I. UC Davis Policy Governing Whistleblower Issues**

The University of California has a Whistleblower Policy on reporting and investigating allegations of suspected improper governmental activity, including misuse of University resources (Academic Personnel Manual [APM] 190, Appendix A-1 and Appendix A-2), such as cash and other assets, intellectual property rights, facilities and the rights to use of University facilities, the University name, University records (including student and patient records), and other violations of University policies and state law. A whistleblower making a protected disclosure (confidential) may be a university employee, applicant for employment, students, patients, vendors, contractors, or the general public. Normally, a report by a University employee of allegations of a suspected improper University activity should be made to the reporting employee's immediate supervisor or other appropriate administrator, or to the Locally Designated Official (LDO), the person designated by the campus as the official with responsibility to receive reports of allegations of suspected improper use of University resources. APM 190 describes the protection of whistleblowers, and the method of reporting allegations. On the UC Davis campus, the LDO is the Assistant Executive Vice Chancellor (in the

Offices of the Chancellor and Provost) and all forms are to be forwarded to that official. (Whistleblower forms to be completed [UCD Policy and Procedure Manual Section 380-17], Improper Governmental Activities-- Exhibit A; Improper Activities Report, Improper Governmental Activities-- Exhibit B; Retaliation or Interference Complaint).

#### **UCD Directives from the Office of Campus Counsel**

In the year 2000, California renamed their whistleblower protection legislation. What was previously the "Reporting of Improper Governmental Activities Act" became the "California Whistleblower Protection Act." The new act expanded the classification of people who are protected from retaliation. UC Davis' implementation of this state law is contained within the University's "Whistleblower and Retaliation Policies" (See UC Davis Policy and Procedure Manual Section 380-17).

The law protects employees from retaliation for filing whistleblower ("improper governmental activity") complaints, or refusing to carry out illegal orders. Under present UC Davis policy, a protected whistleblower complaint (referred to as a "protected disclosure") is defined to include any good-faith communication intended to disclose improper governmental activity. Thus, any campus officer, director, manager, or supervisor may be the recipient of a "protected disclosure." Further, such complaints need not be in writing; they may be verbal. Accordingly, all campus officers, directors, managers, or supervisors should be sensitive to complaints of improper governmental activities and promptly refer them to the Executive Vice Chancellor (except where other established campus processes exist, i.e., sexual harassment, scientific misconduct, employee and student grievance procedures, etc.). The definition of an improper governmental activity is quite broad: California Government Code Section 8547.2. (b) "Improper governmental activity" means any activity by a state agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetence, or inefficiency. The other significant legislative change regards the burden of proof that applies to claims of retaliation in civil or administrative proceedings.

If the claimant demonstrates by a preponderance of the evidence that the filing of a protected disclosure was a *contributing factor* (emphasis added) to the alleged retaliation, then the burden shifts to the accused to demonstrate by clear and convincing evidence that the action claimed to be retaliatory "would have occurred for legitimate, independent reasons, even if the employee had not engaged in the protected disclosures or refused an illegal order." This standard will apply in any administrative grievance proceeding, including challenges to adverse personnel actions.

Dr. Szabo clearly engaged in protected conduct within the University's Whistleblower and Retaliation Policies. Dr. Szabo contacted the hotline for whistleblower complaints on January 28, 2004, to report what he believed to be incorrect billing practices by another faculty member surgeon. He testified, and documentary evidence supports his testimony that his complaint was received and reviewed by [REDACTED]

██████████ Compliance Office, UC Davis Health System (Szabo Exhibits at 110-11). She subsequently notified various administrators through email copies and forwarding that Dr. Szabo had filed such a compliance complaint. Administrators and physicians who were immediately notified that Dr. Szabo filed a compliance complaint included, but were not limited to, ██████████ ██████████ ██████████ and ██████████ (Szabo Exhibits at 109-111; Hearing Transcript a 331-334) This notification undermines Dr. ██████████ testimony that he did not hear about the complaint until May 2004 (Hearing Transcript at 354).

On February 12, 2004, a regularly scheduled "Compliance Update" meeting was held with ██████████ (UC Exhibits at 133).<sup>5</sup> It is likely that the whistleblower complaint was discussed at this meeting. However, the notes from this meeting are missing. It is worth noting that in his testimony Dean Silva claimed there was no meeting in February (Hearing Transcript at 178). Dean Silva claimed when he made the relocation decision, he was unaware that Dr. Szabo had filed a whistleblower complaint. UC Exhibits at 133 and the very public and widespread knowledge of Dr. Szabo's complaint as early as late January and early February 2004 undermine Dean Silva's credibility on this point.

We find that based on the totality of the circumstances, Dr. Szabo demonstrated by a preponderance of the evidence that his filing of a whistleblower complaint was a contributing factor in Dean Silva's decision to relocate Dr. Szabo, and that the relocation was retaliatory. The burden then shifted to the University at this point, and the University was not able to demonstrate by clear and convincing evidence that the action claimed to be retaliatory would have occurred for legitimate, independent reasons.

### **III. ACADEMIC UNIT OR PROGRAM**

#### **I. Does Dr. Szabo's Hand Clinic Qualify as an Academic Program or Unit?**

Dr. Szabo argues that the Hand, Upper Extremity and Microvascular Fellowship ("The Fellowship") he runs constitutes an Academic Unit or Academic Program. As such, moving him to Carmichael also means moving The Fellowship. Dr. Szabo thus claims that the decision to move him to Carmichael was made improperly (Szabo Pre-Trial Brief at 3).<sup>6</sup> Under direct examination Dean Silva testified that in his opinion, The Fellowship is a clinical program and not an Academic Unit (Hearing Transcript at 163). This contention was echoed in the University's closing brief, which noted that The Fellowship was not subject to Academic Senate Review as have other "programs" subject to the policy (UC Response Brief at 11-12). This raises three distinct sub-questions (1)

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<sup>5</sup> This exhibit is an email dated January 28, 2005 from Geneva Harris (Clinical Affairs) which carbon copies Dr. Jaffe and Teresa Porter.

<sup>6</sup> Szabo cites the UC Presidents Policy on Transfer, Consolidation, Disestablishment and Discontinuance of Academic Programs Units September 1979. It is worth noting that although Dr. Szabo referred to the Fellowship as a "program" (Hearing Transcript at 241), he does not explain whether his Fellowship is an Academic Unit or Academic Program.



does The Fellowship constitute an Academic Unit or Academic Program; (2) if so, was the Program or Unit moved; (3) if The Fellowship does constitute an Academic Program or Unit and the Unit/Program was moved, was proper procedure for such a move followed?

### **Academic Unit or Academic Program Defined**

The UC Davis Policy and Procedure Manual defines an Academic Unit as "a school, college, department, or division" (UC Davis Procedure Manual Section 200 - 25 (II) (A)). Similarly, Academic Program is defined as, "a regularized sequence of courses leading to an undergraduate degree or graduate degree, including those programs sponsored by groups formed by faculty members for the purpose of granting graduate or undergraduate degree program that is interdepartmental in nature. It does not include a concentration within a major" (UC Davis Procedure Manual Section 200-25 (II) (B)).

The UC Davis Medical School website describes The Fellowship as "[A fellowship that] offers comprehensive exposure to traumatic and reconstructive hand surgery, as well as microvascular surgery and surgical correction of congenital defects. On-call coverage is in cooperation with the Department of Plastic Surgery. The fellowship allots time for the completion of a laboratory or clinical research project, which should be of sufficient quality to be presented to a national meeting and submitted for publication. *Hand fellowships are ACGME accredited providing added certification* [italics added]. Our program participates in the National Resident Matching Program."<sup>7</sup> As noted in a letter by [REDACTED] Dr. Szabo is the only faculty member who has an accredited hand fellowship program at UC Davis.

The Fellowship is accredited by The Accreditation Council for Graduate Medical Education (ACGME). The ACGME is a private, non-profit council that evaluates and accredits medical residency programs in the United States.<sup>8</sup> In the academic year 2004-05, there were 8,037 ACGME-accredited residency programs available in 26 specialties, 84 subspecialties, and a number of transitional year programs. The number of active full-time and part-time residents for academic year 2004-05 was 101,810.<sup>9</sup>

The Fellowship fulfills the academic requirements for a certificate of added qualification (Hearing Transcript at 45). To receive a certificate of added qualification residents must complete The Fellowship, create a case collection and pass an examination. Adding to the value of ACGE accreditation is the fact that the American Board of Surgeons (ABS) accepts ACGME operative experience reports in lieu of ABS Forms.<sup>10</sup> Moreover, it seems that accreditation allows graduates to apply for membership in the American Association Hand Surgeons (AAHS).<sup>11</sup> The Fellowship's ACGME

<sup>7</sup> <http://www.ucdmc.ucdavis.edu/orthopaedics/education/fellowships/index.html>

<sup>8</sup> [http://www.acgme.org/acWebsite/newsRoom/newsRm\\_acGlance.asp](http://www.acgme.org/acWebsite/newsRoom/newsRm_acGlance.asp). It is worth noting that currently, there are 50 hand surgery programs which are accredited by the ACGME.

<sup>9</sup> Ibid.

<sup>10</sup> [https://home.ahsurgery.org/default.jsp?faq\\_certexams#faq9](https://home.ahsurgery.org/default.jsp?faq_certexams#faq9).

<sup>11</sup> [http://www.handsurgery.org/active\\_membership.html](http://www.handsurgery.org/active_membership.html). The AAHS lists among its requirements for membership "have training in hand surgery in an accredited residency or fellowship program." It is unclear from the site whether this refers to ACGME certification. This may warrant further investigation.

accreditation combined with the fact that it is an integral part of obtaining a certificate of added qualification makes it comparable to a degree granting program.

Therefore, we find that the Fellowship is an Academic Unit or Program within UC Davis Procedure Manual.

### **Was The Fellowship Moved**

The Davis Policy and Procedure Manual defines intercampus transfer as, "[the] transfer of an academic unit or program from one campus to another" (UC Davis Policy & Procedure Manual Section 200-25 (II) (D)). No one disagrees that part of Dr. Szabo's practice was moved to the Carmichael facility. The University notes that Dr. Szabo still maintains his Tuesday Clinic at the ACC (UCDMC location). However, as discussed in the hearing (most notably in the testimony of [REDACTED] and [REDACTED], the residency consists of many elements that were affected by Dr. Szabo's move to Carmichael. (Hearing Transcript at 39-44, 61-70) Clearly, a substantial part of The Fellowship was moved to Carmichael.

### **Proper Procedure for Moving an Academic Unit or Program**

The UC Davis Policy and Procedure Manual outlines a very specific procedure for transferring an Academic Unit or Program. First, a transfer proposal must be initiated. The initiation may be made by faculty members, department chairs, deans, the Vice Provost- Academic Programs, the Chancellor, and college, school, or divisional committees (UC Davis Procedure Manual Section 200-25 (IV)). Then the originator must prepare a proposal which is forwarded to the dean. The dean must then consult with the school's faculty executive committee, committee on educational policy or other relevant committees. The proposal must then be transmitted to the Vice Provost of Academic Programming (referred to as the Provost). The Provost then confers with the Committee on Academic Planning (CAPBR). In the event that the program is a graduate program, the Graduate Counsel for graduate programs must also be consulted. As an Academic Program, the Fellowship clearly is a graduate program (all participants must be licensed to practice medicine in CA).<sup>12</sup>

Additionally the President is to be consulted if the unit being considered for transfer, consolidation, disestablishment or discontinuance is unique within the University. As noted above, The Fellowship is the only hand fellowship at UC Davis. If, after consultation with CABR, Graduate Counsel and the President, the request is found to be without merit, no further action is taken. However, if the action is approved, CABR coordinates a review process and determines the appropriate Senate committees to be included in the process; consults with the Committee on Academic Personnel (CAP) regarding personal transfers; and upon completion of the review makes a written recommendation for action. The written recommendation is to be reviewed by the Executive Council of Davis Division and transmitted to the Vice Provost of Academic

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<sup>12</sup> <http://www.ucdmc.ucdavis.edu/orthopaedics/education/fellowships/#hand>. The UC Davis website notes that all applicants for fellowship must be licensed to practice medicine in California.

Programs. The recommendation for action is then passed on to the Chancellor for approval. If approved, the Chancellor informs the President.<sup>13</sup>

Because Dr. Szabo's Fellowship constituted an Academic Program or Unit, due process was denied him when The Fellowship was moved, at least in substantial part, to the Carmichael PCN site. Dean Silva and the Medical School did not follow the Davis Policy and Procedure Manual in effecting this move. The record is devoid of any mention of the CABR or other procedures required by University policy. Unfortunately, expediency took precedence over proper procedure in this case.

#### IV. Conclusion

The following is a summary of our findings:

1. Dr. Szabo's hand surgery clinic features the characteristics of an "academic unit" as defined in the UC Davis Procedure Manual 200-25. As such, the University administration was required to follow a procedure – also defined in UC Davis Procedure Manual 200-25 – in order to relocate Dr. Szabo's clinic. Dean Silva, in his decision to relocate the clinic, failed to follow this procedure.
2. According to UC Davis Academic Personnel Manual APM 190 and UC Davis Policy and Procedure Section 380-17, when adverse personnel action follows the filing of a whistleblower complaint, and that personnel action is later challenged by the faculty member affected, the burden is on the University to show by clear and convincing evidence that the action would have been undertaken even absent the complaint. The University has shown that a vague strategic plan was in place to decentralize the UCDMC in Sacramento prior to Dr. Szabo's complaint, and that his relocation served certain of the goals articulated in the plan.

However, the University has presented no evidence whatsoever of a pre-existing plan specifically to relocate Dr. Szabo's clinic. Indeed, the University's failure to follow the proper procedure for the relocation of an academic unit itself indicates a hasty, retaliatory measure. As such, Dr. Szabo satisfied the burden of proving that his relocation was in retaliation for his filing of a whistleblower complaint.

3. Given the totality of the circumstances and questions related to the credibility of Dean Silva and the manner in which the decision was made to relocate Dr. Szabo, we determine that Dean Silva's decision was based on personal animus he felt for Dr. Szabo. Because we have determined that the University failed to show that the clinic relocation would have been undertaken even absent the whistle-blower complaint, animus is also presumed as arising from Szabo's status as whistle-blower.

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<sup>13</sup> A useful outline of the entire process for transferring an Academic Unit or Academic Program can be found in UC Davis Policy and Procedure manual Section 200-25 (IV).

We are disappointed in how the decision to relocate Dr. Szabo was made. While we do not condone his self-indulgent behavior, the relocation decision was not made in accordance with University policy and procedure and, in fact, was motivated by personal animus and improper retaliation against Dr. Szabo.


To argue that the case before us is symptomatic of the reality facing teaching hospitals throughout the country is disingenuous. We understand that with the onset of managed health care, institutions such as UCDMC are increasingly forced to compete with more efficient private hospitals. However, making a reasoned decision to reorganize or establish new programs cannot and should not be done unilaterally without the input of those affected. That type of decision-making in this situation suggested that something other than wise and strategic planning was taking place. There is also reason to believe that Dr. Szabo's desire to see his fellowship continue in its current location, as well as his dedication to the service of indigent patients, ran counter to the long-term goals of the hospital administration. Rather than follow the proper procedures in addressing what might have been legitimate concerns, Dean Silva chose expediency. In doing so, valuable safeguards intended to ensure the rights of professors and to respect the structure of UCDMC's administration were bypassed. To allow such unilateralism in University decision-making – particularly in light of the likelihood of retaliation – would set a dangerous precedent.

Thus we recommend that the grievance filed by Dr. Robert Szabo against Dr. Joseph Silva, Dean of the School of Medicine be sustained. We recommend that Dr. Szabo be allowed to resume his academic practice in the Ellison Ambulatory Care Center, have his academic office back at the Ellison building, and be reunited with his academic secretary. He should also be able to perform surgery on patients in the university's hospital with the same privilege other faculty enjoy, specifically the same privileges he enjoyed prior to the events at issue. Additionally, Dr. Szabo should have the ability to perform surgery, when needed, on patients at Mercy General Hospital if the UC Davis Medical Center cannot provide space and time for his patients.

We further recommend that Dr. Szabo be reimbursed for the legal fees he has incurred through September 30, 2005, (the date his Closing Brief was filed) in pursuing his claims. We do not make this recommendation lightly, but we are particularly concerned about the time and expense that was required in order for Dr. Szabo to have his claims heard. We feel that basic fairness and the integrity of the grievance process require this result.

Respectfully submitted, 11/8/05 (date of last signature)

  
Bill Hing, Chair

  
Sally McKee

  
Lisa Pruitt

*November 20, 2005*

*CONFIDENTIAL*

*Chancellor Larry Vanderhoef  
Mrak Hall*

*Re: Report of the Privilege & Tenure Hearings Subcommittee of the  
Grievance of Robert Szabo against Dean Joseph Silva dated November 8, 2005.*

*Dear Chancellor Vanderhoef:*

*I have received a copy of the above referenced Report which was sent to you  
for your consideration and action on November 8, 2005, and I respectfully  
request a prompt and fair decision.*

*My grievance was filed on May 25, 2004 and was subsequently investigated by  
the Investigative Subcommittee of the Davis Division Committee on Privilege  
and Tenure. The Investigative Subcommittee's December 2, 2004 findings  
identified the following two possible bases for proceeding with my  
grievance:*

*1) School of Medicine Dean Joseph Silva relocated Dr. Szabo's surgical and  
clinical practices to Mercy General Hospital and the University of  
California, Davis Health System's ("UCDHS") Primary Care Network ("PCN") in  
November 2004 in a way that was "procedurally invalid," and*

*2) Dean Silva's decision to relocate Dr. Szabo was "motivated by personal  
animus."*

*Although Vice Provost Barbara A. Horwitz was asked by the Subcommittee to  
"promote a resolution" she did not attempt to do so. The Investigative  
Subcommittee in a February 7, 2005 letter to Vice Provost Horwitz suggested  
that "the entire administration recuses itself" from my case because of  
Dean Silva's new position as Senior Advisor to you, the Chancellor. There  
was an obvious concern by the Investigative Subcommittee that I would not  
get fair treatment from a hearing on our campus due to Administration's  
conflict of interest. Vice Provost Horwitz in a March 31, 2005 letter to*

**CORRECTED EXHIBIT C**

*Norman Matloff, Chair of the Privilege & Tenure Investigative Subcommittee, claimed that she "cannot agree to recusing the entire administration."*

*I assume by now that you have reviewed the Hearings Subcommittee's Report which I will not repeat other than to point out that the panel took its obligation seriously and spent almost ten hours in an evidentiary hearing and days evaluating the oral and evidentiary evidence before finally writing the reasoned report that was unanimously agreed to by the three distinguished and respected panel members. The Hearing Panel upheld my grievance.*

*I appreciate that the Hearings Subcommittee's report essentially places you right in the middle of passing judgment on this grievance against your friend and colleague, however, that being said, I am requesting that you favorably consider the recommendations of the Hearings Subcommittee to you.*

*I've waited a long time to be returned to my normal academic life at UC Davis which has been needlessly disrupted. I want to be able to take care of my patients and fulfill my obligations to teaching my students as I have before Dean Silva decided to retaliate against me for filing a Whistle blower complaint. I have not asked for sanctions against Dean Silva. I have not as yet initiated any litigation against the University. I have followed the University's policy and procedures for my grievance to be heard and I have prevailed. I want my life back. I urge you to fulfill your responsibilities in this action fairly and expeditiously.*

*Sincerely,*

*Robert M. Szabo, M.D., M.P.H.  
Professor of Orthopaedics and Surgery*

February 7, 2006

**Chancellor Larry Vanderhoef**  
Mrak Hall

Dear Chancellor Vanderhoef:

On November 8, 2005, I submitted to you the Panel report of the Privilege & Tenure Hearings Subcommittee regarding the complaint filed by Dr. Robert Szabo against Dean Joseph Silva. On or about December 1, 2005, the Panel received the University's Request for Reconsideration in the matter.

Enclosed you will find the Panel's response to the University's Request for Reconsideration. We have considered the matter carefully and reaffirm the recommendations that we made on November 8.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Ong Hing", written over the word "Sincerely,".

Bill Ong Hing  
Chair, P&T Hearings Subcommittee

**In the Matter of the  
Grievance Filed by Dr. Robert Szabo**

**Decision of the Privilege and Tenure Hearing Panel  
Regarding the University's Request for Reconsideration**

The Panel has carefully considered the University's Request for Reconsideration, dated December 1, 2005, in the above-entitled matter. The Panel affirms its original recommendations.

**A. Clarifying the Timeline's "Key Facts" Upon Which the Report's Conclusions are Premised**

The Request for Consideration (hereinafter, "Request") takes issue with the Panel noting that Dean Silva's credibility suffered because he stated that there was no Compliance Update meeting on February 12, 2004. (Hearing Transcript at p. 178.) The Request says that although the February 2004 Corporate Compliance Committee meeting was canceled, a less formal compliance update meeting between Dean Silva and the Hospital Director was held. (UC Exhibits at pp.132-34). We believe the Hospital Director informed Dean Silva of Dr. Szabo's complaint at this time.

The Request is unconvincing in regards to the question of whether Dean Silva was aware of the whistle blower complaint on or about February 12, 2004. No formal meeting was necessary for Dean Silva to be informed of the whistleblower complaint. The existence of any meeting, even an informal meeting, is of great relevance to the matter. Witnesses at the hearing agreed that Dr. Szabo made his whistleblower complaint without concealing his identity. Nothing new has been presented that persuades the Panel to alter its initial determination that Dean Silva lacks credibility on this issue.

The Request further notes that the Panel found Dean Silva to be indifferent to moving Dr. Szabo, as evidenced by Dean Silva's delayed response to an email Dr. Szabo sent him, requesting a meeting. The Request correctly notes that Dr. Szabo emailed Dean Silva on May 15, 2004, asking to arrange a meeting. (Szabo Exhibit at p. 61.) Dean Silva's assistant responded via email on May 18, 2004 that Dean Silva was abroad until May 24. (Szabo Exhibit at p. 61.) Dean Silva then met with Dr. Szabo on May 24, 2004. (Szabo Exhibit at p. 51.) *The Panel acknowledges that this is a more accurate statement of the timeline, but this does not change the Panel's view on Dean Silva's credibility.*

The Request notes that the Panel cites Dr. Szabo's whistleblower phone call on January 28, 2004 as reporting billing issues and clinic scheduling practices and claims the Record shows only the billing issues being raised at that time. In doing so the Request cites Dr. Szabo's Exhibit 116-17, an email from Teresa Porter on the conclusion of the Compliance Meeting, which addressed Dr. Szabo's concerns. (UC Exhibit 127). The Request is mistaken. The Request neglected to notice that in Szabo's Exhibit 116, paragraph 3 begins, "[a]dditionally, Dr. Szabo wanted compliance to address concerns related to the J Street PCN appointment scheduling of Medi-Cal patients." The paragraph continues to explain how Dr. Szabo was concerned that the J Street clinic does not see



any Medi-Cal patients, and these patients are routed to him at the Ellison clinic, which he believed impacted his compensation plan. *Therefore, the record supports the Panel's description of this matter on the timeline.*

## **B. Compelling Evidence of Personal Animus**

The Request argues that Dr. Szabo provides few facts to support the Panel's determination that Dean Silva's decision to relocate Dr. Szabo was motivated by personal animus. *Let us be clear: the consequences of the Dean's decision had such a negative impact on the care of patients and the training of the fellows that animus is the only explanation the Panel can come up with to explain why the Dean made this change.*

The most troubling aspect of this matter is that Dr. Szabo was not included in the planning process. The Request notes that Dr. Szabo's Chair was consulted (University Exhibit at pp.11, 12.) and asserts that UCDHS did everything reasonable to work with Dr. Szabo to facilitate the move once the decision was made. *But that presupposes that Dr. Szabo had no right to refuse to move, and it ignores the question of whether the decision had to be made in consultation with both Dr. Szabo and his Chair. The issue of consultation is not the same as simply informing Dr. Szabo in a timely fashion. The issue is whether the plans, goals, visions, and aspirations of the new facility should have been reviewed with Dr. Szabo. The issue is whether Dr. Szabo should have been given an opportunity to provide input and reactions to the plans. The Panel found credible Dr. Szabo's testimony that he would have been open to discussing these plans had he been given the opportunity. The Panel believes that including Dr. Szabo in the planning process could have averted the conflict that ensued, giving rise to this grievance.*

The Panel further explained that Dean Silva showed animus by expressing the belief that Dr. Szabo should treat more patients who could pay, rather than treating the poor. (Request at p. 5.) The Request argues that this discussion is irrelevant to the grievance. (Request at p. 6.) The Request further argues that Dr. Szabo's care for the needy is not unique among the physicians at the hospital. The Request quotes Dean Silva on the importance of paying patients to the operation of the hospital. (Request at p. 6.) *By quoting Dean Silva in this regard, the Request merely bolsters the Panel's belief that Dean Silva thereby disapproved of Dr. Szabo not having an "improved patient mix in terms of reimbursement" and that he developed and expressed animus toward Dr. Szabo as a result. The arguments provided in the Request are simply unconvincing. The Panel remains confident in its finding that the term "diversity of the patient base" as used by Dean Silva is a euphemism for decreasing the number of low-income patients who pay less for services rendered.*

The Request also takes issue with the Panel's conclusion that the creation of the new program in Carmichael could have been implemented in a more thoughtful manner, with better planning and less impact on the fellows and residents if another less highly-specialized orthopedist had been moved. (Request at p. 7.) The Request argues that "there were no alternative candidates from which to choose." (Request at p. 7.) *Yet, the Request names at least two junior hand specialists who could have been moved, albeit with some inconvenience. These arguments are not persuasive because Dr. Szabo was also inconvenienced by the move. Furthermore, the Request's argument that it was "undisputed" that a hand specialist had to be placed in the Carmichael facility is*

*problematic. In fact, this was a point of dispute, and the University did not present convincing evidence on this point.*

The Panel found Dean Silva “evasive” on the issue of whether the move was made to quiet friction between Dr. Szabo and others. The Request complains that the Panel cites no exhibits to substantiate this contention. (Request at p. 8.) *The Panel, as the finders of fact in this hearing, need not cite any particular bit of evidence to find testimony either evasive or lacking credibility. Indeed, a fact finder’s responsibility to judge credibility is often based on observations of witness demeanor and behavior at trial, in addition to any possible inconsistencies. When testimony of different witnesses conflict, it is the duty of the fact finder to determine which witness is more credible. That is what the Panel did.*

### **C. Evidence of Retaliation**

The Request argues that Dean Silva was unaware that Dr. Szabo filed the whistleblower complaint. (Request at p. 9.) The Request further argues that even if Dean Silva knew of the complaint, the complaint was so peripheral to the Department of Orthopedics that it did not affect Dean Silva’s decision making. (Request at p. 10.) As evidenced by email threads, several administrators were aware of the whistleblowing. (Szabo’s Exhibits at pp. 109-11.) Further, the Request itself points out the very public and widespread knowledge of Dr. Szabo’s complaint. *The Panel, as fact finders, determined that it was unlikely in these circumstances that Dean Silva did not know that Dr. Szabo filed the complaint. The Panel also found that Dr. Rab’s testimony asserting that the complaint filing was a peripheral issue to the department did not speak to the importance of the filing to Dean Silva, nor to his decision to move Dr. Szabo.*

### **D. Dr. Szabo’s Fellowship Is An Academic “Program” or “Unit” Under Campus Or University Policy**

The Request argues that Dr. Szabo’s Fellowship is not an Academic Program or Unit. (Request at p. 12.) In order to define the Fellowship as an Academic Program or Unit, the Panel examined the UC Davis Policies and Procedures Manual, the UC Davis Medical School website, and the Accreditation Council for Graduate Medical Education. The Panel is aware of the California Postsecondary Education Commission (“CPEC”). To paraphrase the CPEC quote in the Request: academic units and academic programs work best when faculty and administrators support them and when authority for graduate programs are placed on system-wide committees. (Request at p. 11). The quote also says that the CPEC creates a Five Year Perspective to promote cooperation within the UC system. *Nothing in this language requires the inclusion of a program in the Five-Year Perspective to attain status as a true “program.” Nor, as the Request implies, does this language imply that the Fellowship’s lacking approval from the Davis Divisional Senate in any way detracts from its character as an Academic Program or Unit.*

The Request further argues that if the Fellowship were an Academic Program or Unit, it was not involved in an interoffice transfer. (Request at p. 12.) The UC Davis Policies and Procedures Manual may support the point of the Request — the Fellowship was not involved in an interoffice transfer because that is a “transfer of an academic unit or program from one campus to another.” (UC Davis Policy & Procedure Manual Section

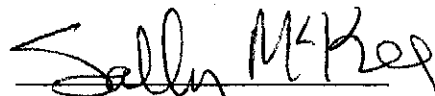
200-25 (II) (D).) Instead, the Fellowship was involved in an intraoffice transfer which is a "transfer of an academic unit or program from one campus administrative unit to another." (UC Davis Policy & Procedure Manual Section 200-25 (II) (C).) The protections afforded to an interoffice transfer and an intraoffice transfer are slightly different. Both of them require 10 identical initial steps for approval. (UC Davis Policy & Procedure Manual Section 200-25 (IV).) While the intraoffice transfer approval ends with the chancellor, an interoffice transfer requires the extra step of the President's approval. (UC Davis Policy & Procedure Manual Section 200-25 (IV).) The Panel correctly outlined the 10 steps, as they should have been followed, to properly approve the relocation of Dr. Szabo's Fellowship to Carmichael. *These steps were not followed.*


#### **E. An Award Of Attorney's Fees**

The Request takes issue with the Panel's recommendation that Dr. Szabo be reimbursed for attorney's fees incurred. *The Panel suggested awarding Dr. Szabo's attorney's fees not on the basis that there is currently a procedure for doing so, but rather with the understanding that such an award is fair. Awarding attorney's fees in a case such as Dr. Szabo's, where the faculty grievant has prevailed, would establish a precedent of fair play by the university. Given the resources of the University compared with those of an aggrieved faculty member, the University should reimburse attorney's fees when the complaint has been sustained. This serves as an added incentive for the University to act reasonably and quickly to resolve meritorious claims.*

Respectfully submitted, February 8, 2006 (date of last signature)

  
Bill Ong Hing, Chair

  
Sally McKee

  
Lisa Pruitt

UNIVERSITY OF CALIFORNIA, DAVIS

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March 29, 2006

**PERSONAL & CONFIDENTIAL**

**DR. ROBERT SZABO**

Professor of Orthopedic Surgery  
1040 44<sup>TH</sup> Street  
Sacramento, CA 95819

**Re: Grievance**

Dear Professor Szabo:

I am writing to convey my decision regarding the findings and recommendations made by the Hearings Subcommittee of the Committee on Privilege and Tenure, Davis Division of the Academic Senate, reflected in the Subcommittee's reports dated November 8, 2005, and February 7, 2006. Your grievance, as summarized by the Investigative Subcommittee of the Committee on Privilege and Tenure, included the following allegations:

"(a) Professor Szabo alleges that his rights or privileges as a member of the Academic Senate were violated when Dean Silva of the School of Medicine relocated Professor Szabo's surgical and clinical practices and his academic office to remote locations, severely hampering his ability to perform his work as a professor in the School of Medicine. Professor Szabo alleges that these relocations were procedurally invalid.

(b) Professor Szabo alleges that these relocations were motivated by personal animus toward him."

In reaching my decision I have reviewed the December 2, 2004, report of the Investigative Subcommittee, the reports of the Hearings Subcommittee referenced above, the briefs submitted by counsel for you and counsel for the University administration, the correspondence related to the University counsel's request for reconsideration, and more recent letters I have received from counsel, including a March 13, 2006, letter from your counsel, Donald Heller, and a March 15, 2006, letter from University Counsel Steven Rosen.

After careful consideration of this matter, I respectfully decline to accept the Hearing Subcommittee's recommendation that your grievance be sustained. In my view, the record does not demonstrate that you have either (1) met your burden of proving the validity of your grievance by a preponderance of the evidence, or (2) demonstrated by a preponderance of the evidence that your report of alleged improper governmental activity was a contributing factor in actions by Dean Silva.

Nevertheless, I respect the fact that the Hearings Subcommittee was troubled by the decision-making process that led to your relocation. I believe the space and resource distribution decisions that you have challenged could have been developed and implemented with better coordination and communication with affected individuals. As discussed further below, I am directing that these decisions be reviewed anew by the new School of Medicine administration.

I now briefly review the context of this matter as I find it relevant to the findings reached by the Hearings Subcommittee. To begin, the Dean has the authority to make space assignments that are appropriate to meet the missions of the UC Davis Health System. In this case, the focus of your concern appears to be the decision to relocate your Tuesday afternoon fellow clinic and your Wednesday patient clinics to the UCDHS Carmichael clinic, 16 miles away from the UCD Medical Center where your other office is located. You maintain Monday and Thursday operating room venues at Mercy General Hospital (a location you have requested), your Friday administrative day at the UCD Medical Center, and your Tuesday morning resident/fellow teaching program at the UCD Medical Center. Although with your Mercy operating room venue you no longer have dedicated blocks of UCD Medical Center operating room time, you retain privileges there and may schedule time there when needed. Your title and salary have not been impaired, and your clinical, research, and teaching responsibilities have not been substantially altered. Further, the record indicates that other similarly situated UCDHS orthopedic surgeons have participated in such relocations.

Absent findings of misconduct against Dean Silva, I do not find a preponderance of the evidence supports a conclusion that your rights and privileges as a faculty member have been violated. (See Academic Personnel Manual [APM] Policies 005, "Privileges and Duties of Members of the Faculty," and 015, Part I, "Professional Rights of Faculty.") Although the Hearings Subcommittee has the authority to make findings of faculty misconduct, such authority derives from Academic Senate Bylaw 336, concerning disciplinary cases, a process significantly different from that followed for faculty grievance cases such as this one. Further, a Privilege and Tenure Committee finding of faculty misconduct must be supported by clear and convincing evidence. (Academic Senate Bylaw 336.D.8.) In this case, I find neither a preponderance of the evidence to support such a finding, nor clear and convincing evidence.

I address the relevant findings of the Hearings Subcommittee in turn:

**1. Subcommittee Finding: Dean Silva acted out of personal animus towards you in making the relocation decision.**

I find no persuasive evidence to support a conclusion that Dean Silva's actions were based upon personal animus. Instead, the evidence demonstrates that Dean Silva's relocation decision was designed and implemented to achieve legitimate goals consistent with the mission of UCDMC. These goals include: (a) relieving chronic excessive demands on the Medical Center operating room, (b) allowing ample surgery time for surgical services being relocated, (c) furthering the UCDHS initiative to place more specialists at UCDHS clinics to meet patient needs and preferences and to enhance internal referrals, and (d) improving the patient mix for those specialists being relocated in order to improve the financial viability of the specialties. These fundamental logistical, pedagogical, economic, and programmatic goals were acknowledged by the Subcommittee.

The factors cited by the Subcommittee in support of its finding are not persuasive. The Subcommittee suggests that it was inappropriate for Dean Silva to consider your sometimes difficult personal interactions with others (as found by the Subcommittee) in the relocation decision. To the contrary, objective judgments by academic administrators of such interpersonal dynamics is a legitimate consideration in determining how best to meet the University's mission. (See, e.g., APM 245, Appendix A, concerning a department chair's responsibility "to maintain a climate that is hospitable to creativity, diversity, and innovation."). I disagree with the Subcommittee that personal animus can be inferred from such a consideration. In my view, the evidence supports the opposite inference, that Dean Silva has demonstrated great restraint and understanding towards you in dealing with your past behavior with colleagues and staff.

I also do not find persuasive the Subcommittee's reliance on your argument that the relocation was "illogical" or the fact that your clinical facilities at the Carmichael clinic were not ready for your practice at the time you were apprised of the relocation plan; in fact, the clinic was upgraded to meet your requirements before the move was made. Nor do I find that certain inconveniences to some that may have resulted from the move indicates animus. In all cases where operational changes occur there will be trade-offs, with the expectation that the balance will better serve the University's mission. I also find that no reasonable inference of personal animus can be drawn from the desire to diversify the patient base in order to improve the financial viability of the health system.

There is no credible evidence to support the Subcommittee's most emphasized factor in its finding of personal animus, highlighted in italics in its February 7, 2006, report to me: *"Let us be clear: the consequences of the Dean's decision had such a negative impact on the care of patients and the training of the fellows that animus is the only explanation*

*the Panel can come up with to explain why the Dean made this change.*" I note that this claim was not a basis of the grievance and, as a result, was not a focus of the hearing. As well, there is also no reasonable basis for such a claim based upon a short geographic relocation (16 miles) of part of your practice where you remain committed full-time to serving the UCDCM community.

The evidence also does not support the Subcommittee's suggestion that selecting you for the move, "rather than another less highly specialized orthopedist," demonstrates personal animus. The evidence shows that a hand specialist was the best fit at the Carmichael clinic and there were no reasonable alternative candidates.

There is no substantial support for the Subcommittee's suggestion that Dean Silva intended to exclude you from the planning process for the move. The evidence shows that Dean Silva consulted Chairman Rab, whom he anticipated would consult you, and that you were extensively consulted in making preparations for the physical move.

**2. Subcommittee Finding: Dean Silva retaliated against you based upon your filing of a whistleblower report.**

I disagree with the Subcommittee's finding and conclude that you have not met your burden of demonstrating, by a preponderance of the evidence, that your whistleblower report was a contributing factor to Dean Silva's relocation decision. I find no compelling evidence to indicate that Dean Silva was aware of your report at the time the relocation decision was being considered. Instead, only argument and inference is offered to support such a conclusion. In fact, the only evidence introduced was the undisputed testimony of witnesses that Dean Silva was not aware of your whistleblower report at the time the relocation decision was contemplated.

Further, even if Dean Silva were aware of your whistleblower report, as noted above there is no persuasive evidence that he had any personal animus or other motivation to retaliate against you based upon such information. Even if inferences are drawn, I find that such inferences support a conclusion that Dean Silva's decision was not motivated by personal animus. UCDCM receives well over a dozen whistleblower complaints and grievances from employees each month, and there is no evidence to suggest that Dean Silva has ever engaged in retaliatory conduct in response to such complaints. While the campus values and encourages good faith reports of suspected improper governmental activity, there was nothing particularly remarkable about your reported allegations of dual billing standards and there was no evidence that such a report would be considered personally threatening or upsetting to Dean Silva. I understand that your dual billing allegation involved your concerns about increased numbers of Medi-Cal patients you were seeing, and related concerns about impacts to your salary and bonus. In my view, your relocation to the Carmichael site, where you see fewer Medi-Cal patients, could only be seen as responsive to such concerns, not retaliation. Further,

there is no persuasive evidence that your relocation to the Carmichael clinic was inconsistent with moves made by other specialists to clinics.

- 3. Subcommittee Finding: The Hand, Upper Extremity and Microvascular Fellowship constitutes an "Academic Unit" or "Academic Program," relocation of which must comply with University procedures governing such a program, and Dean Silva failed to comply with these procedures.**

The Subcommittee's finding is not supported by a preponderance of the evidence or reason. Even if the Fellowship is viewed as having characteristics that make it eligible for establishment as an "academic program" or "academic unit," it has not been so established in accordance with the University's formal review and approval process. (See UC Davis Policy and Procedure Manual, Policy 200-20, "Establishment of Academic Units and Programs;" and a compendium entitled "Universitywide Review Processes for Academic Programs, Academic Units, and Research Units," <http://www.ucop.edu/acadaff/accomp/>). Dean Silva cannot reasonably be found to have violated University procedural requirements that apply to transfer of such a program if the activity in question has not yet been officially approved as an "academic program" or "academic unit."

I would be pleased to consider a formal proposal for establishing the Fellowship as an "academic program" or "academic unit," if such a proposal reaches me following the formal review process required by University policy. Absent this review process, neither I nor the Subcommittee has the authority to recognize the Fellowship as an "academic program" or "academic unit."

- 4. Subcommittee Recommendation: Dean Silva's relocation decision should be reversed and you should be returned to your location and operation circumstances that existed prior to your move.**

I respectfully decline to reverse Dean Silva's decision for the reasons described above. Further, I believe neither the Subcommittee nor I can best evaluate whether returning you to your former space and arrangements at this time best meets the mission of UCDHS. However, I do respect the fact that the Subcommittee was troubled by the decision-making process that led to your relocation. I also believe the space and resource distribution decisions that you have challenged could have been developed and implemented with better coordination and communication with affected individuals. As a result, I will direct that Dean Claire Pomeroy, current Dean of the School of Medicine and Vice Chancellor for Human Health Sciences, coordinate a new review of the UCDHS orthopedic surgery program in consultation with relevant faculty and administrators, including you and the Chair of the Department of Orthopedic Surgery Department. The primary focus of this new review will be to evaluate the best way to utilize your talents in a manner that also best meets the UCDHS mission, including programmatic, logistical, pedagogical, and economic goals.



**DR. ROBERT SZABO**

March 29, 2006

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**5. Subcommittee Recommendation: University reimbursement of legal fees you have incurred through September 30, 2005.**

I respectfully decline to pay legal fees you may have incurred in pursuing this grievance.

I recognize that this grievance process involved a great investment of time and energy by all involved. I am hopeful that the new review will permit you and the new School of Medicine administration to participate in a positive and collaborative effort in evaluating the current needs and objectives of the orthopedic surgery program and defining your role within this program.

Sincerely,



Larry N. Vanderhoef  
Chancellor

/mcs

c: Professor Norman Matloff, Chair, Privilege and Tenure Committee  
Professor Bill Hing, Chair, Hearings Subcommittee  
Donald H. Heller ✓