

AMERICAN ASSOCIATION OF	)	
UNIVERSITY PROFESSORS,	)	
UNIVERSITY OF AKRON CHAPTER	)	ARBITRATOR JACK BUETTNER
	)	
and	)	
	)	
THE UNIVERSITY OF AKRON	)	

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**OPENING BRIEF ON BEHALF OF  
THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,  
UNIVERSITY OF AKRON CHAPTER**

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## **I. INTRODUCTION.**

The American Association of University Professors, the University of Akron Chapter (the “Akron-AAUP” or the “Chapter”) has been the exclusive bargaining representative of all full-time faculty at the University of Akron, with certain exclusions, since 2003. The bargaining unit faculty (“BUF”) consists of both tenured/tenure-track (“TT”) and non-tenure track faculty (“NTT”). The current CBA between the University and the Akron-AAUP was negotiated in 2016 and is effective through December 31, 2020.<sup>1</sup>

### **A. Nature Of Faculty Appointments.**

TT faculty (except those hired with tenure) are subject to a probationary period that typically lasts six years, with annual review and appointment during that time. When tenure is awarded, the faculty member is “appointed for an indefinite term without the necessity of reappointment each year.” Ex. 1, Art. 13, §2.C.1. If probationary TT faculty are not recommended for reappointment for the upcoming academic year, they are notified by the fifth week of the spring semester. Art. 13, §5.A.

Under Article 29, all NTT faculty must be notified by the end of week 12 of the spring semester if they will not be reappointed in the fall. Art. 29, §5.C. For the 2020-21 academic year, the deadline for notice of non-reappointment was April 3, 2020.<sup>2</sup> NTT at the assistant rank are reappointed annually. However, NTT faculty at the associate rank receive three-year fixed-term appointments, and during this three-year term, the NTT faculty member may only be terminated for just cause. Art. 29, §4.E. NTT faculty at the professorial rank are similarly appointed for five-year fixed terms. *Id.*, §4.G. NTT at the associate or professorial rank enjoy a presumption that they will be renewed after their three-year or five-year term absent unsatisfactory performance or a change in the University’s needs; at any rate, if they will not be

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<sup>1</sup> The Arbitrator was previously provided with a copy of the current CBA and so it is designated as “Ex. 1” but not being provided contemporaneously with this brief and the other accompanying exhibits.

<sup>2</sup> All dates herein refer to 2020 unless otherwise noted.

renewed at the end of their term appointment, they must be notified by week 12 of the spring semester of the last year of their term appointment.

Outside of the bargaining unit, there are part-time adjunct faculty and temporary full-time “visiting” faculty which the Administration may use to more quickly address an increase or decrease in enrollment or other demand for faculty.

**B. Retrenchment, “Financial Exigency” And “Catastrophic Circumstances.”**

The only exceptions to the appointment provisions summarized above, apart from termination for cause, are the procedures for retrenchment under Article 15. Article 15 permits the University, under certain circumstances, to reduce the number of bargaining unit faculty. Relevant to this case, these circumstances include the “discontinuation of a college, department or program” and “financial exigency”, which the CBA defines as “financial problems so severe that they threaten the University’s ability to maintain its operations at an acceptable level of quality.” Art. 15, §1.

Article 15, Sections 2 through 5 contain procedures that must be followed prior to the Board of Trustees making a final determination to implement retrenchment – the Administration must, *inter alia*: (i) attempt to achieve the reductions through attrition before turning to layoffs, (ii) provide evidence to the Akron-AAUP, and (iii) receive recommendations from a Joint Committee on Retrenchment.

Sections 6 through 11, however, provide substantive protections and rights to faculty that are terminated via retrenchment. Section 6 sets the order of release for faculty within an academic unit: generally, non-tenured faculty are released before tenured faculty and lower-ranked faculty are released before higher-ranked faculty.<sup>3</sup> Section 7 provides the minimum notice required to lay off BUF, ranging from March 15 of the preceding academic year for faculty in a first or second one-year contract to 18 months (three academic semesters) for tenured faculty.

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<sup>3</sup> The Administration has engaged in grave inconsistency as to whether or not NTT are within the scope of Article 15. As explained in Section VI, NTT are included.

Section 8 obligates the University to endeavor to place released BUF in other available positions. Sections 9 and 10 provide for reinstatement rights and a right of first refusal for part-time teaching positions. Section 11 provides that reinstated BUF are returned to their previous rank and tenure status. It also provides that BUF terminated due to financial exigency will receive one year of health insurance without charge, starting with the date of release.

The crux of the dispute between the Parties is Article 15, Section 12, which states:

Section 12. The procedure for retrenchment set forth in this Article is designed to accommodate both the orderly change in the University and reductions that must accompany more abrupt changes in circumstances. The parties recognize that catastrophic circumstances, such as force majeure, could develop which are beyond the control of the University and would render impossible or unfeasible the implementation of procedures set forth in this Article. Therefore, this Section 12 shall not be used to accomplish retrenchment as set forth in this Article. If such unforeseen, uncontrolled and catastrophic circumstances should occur, then the University agrees that, before taking any action that could be interpreted as bypassing the retrenchment procedures, representatives of the University will meet with representatives of the Akron-AAUP to discuss and show evidence of the circumstances described above and that this evidence will at least satisfy the requirements outlined in Section 3(A) of this Article and to discuss the proposed course of action.

The University proceeded to lay off 96 BUF, approximately 18.5%<sup>4</sup> of the bargaining unit, on July 15 under the belief that this section gives it unfettered authority and discretion to lay off BUF without any meaningful notice and without regard to tenure status, rank, seniority, or any other apparent guiding criteria. Ex. 2. (Board Resolution 7-7-20).

The Akron-AAUP disputes this interpretation and the University's action on the following bases:

- (1) There are not catastrophic, unforeseen, and uncontrolled circumstances which render compliance with Article 15 "impossible or unfeasible." The circumstances at best constitute "financial exigency", which Article 15's retrenchment procedures were designed to address. Therefore, Section 12 is not properly invoked.
- (2) Assuming *arguendo* that catastrophic circumstances sufficient to trigger Section 12 are present:
  - Section 12 only excuses the University from complying with Sections 2 through 4 of Article 15 before the Board of Trustees makes a final determination.
  - Section 12 does not give the University the right to eliminate faculty without notice and without regard to tenure status, rank, or years of service.
  - Section 12 only excuses the University from the procedures of Article 15 that are impossible or unfeasible. Section 12 does not excuse the University from honoring the substantive rights granted in Article 15, such as the right to reinstatement if the same or similar position is reauthorized.

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<sup>4</sup> As of June 2, 2020, the Akron-AAUP had a total of 518 faculty on its bargaining unit list.

- Section 12 may only be used to address issues caused by the unforeseen circumstances, not problems in place before the *force majeure* event, such as the Administration’s ongoing financial imprudence.
- (3) The University failed to discuss its proposed course of action with the Akron-AAUP and failed to show evidence that clearly documents the need to release bargaining unit faculty, before taking actions that bypassed the retrenchment procedures, as required by Section 12.

**C. Exigent Circumstances And Article 33.**

Article 33, Section 3 contains an agreed-upon midterm bargaining dispute resolution procedure in the event the University seeks midterm modifications because “immediate action is required” due to “exigent circumstances that were unknown at the time of negotiations.” This “exigent circumstances” standard comes from State Employment Relations Board law which permits employers to unilaterally implement a modification after bargaining to impasse if the contract does not contain a midterm bargaining dispute resolution procedure.<sup>5</sup> The procedure in the Akron-AAUP CBA provides for binding arbitration if agreement cannot be timely reached, as either side may determine.

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<sup>5</sup> *Toledo City Sch. Dist. Bd. Of Ed.*, 18 OPER P1645, SERB Op. 2001-005 (Oct. 1, 2001).

## **II. ISSUES PRESENTED TO THE ARBITRATOR.**

- A. Are catastrophic circumstances present such that the University may act under Article 15, Section 12?
- B. If so, what procedures of Article 15 are “impossible or unfeasible”?
  - 1. Does Section 12 permit the University to disregard Article 15, Section 6 which establishes tenure-status, rank, and seniority considerations to be followed when selecting bargaining unit faculty for layoff?
  - 2. Does Section 12 permit the University to disregard the notice that bargaining unit faculty are entitled to before release under Article 15, Section 7?
  - 3. Does Section 12 permit the University to disregard its obligation to place bargaining unit faculty in other available teaching positions under Article 15, Section 8?
  - 4. Does Section 12 permit the University to disregard the reinstatement rights of laid-off faculty under Article 15, Section 9?
  - 5. Does Section 12 permit the University to disregard the right of first refusal for part-time teaching to laid-off faculty under Article 15, Section 10?
  - 6. Does Section 12 permit the University to disregard the right of bargaining unit faculty released due to financial exigency to receive one year of health insurance without charge under Article 15, Section 11?
- C. Did the Administration show evidence that clearly documents the necessity to release faculty and discuss its proposed course of action with the Akron-AAUP before taking action that bypassed the retrenchment procedures, as required by Section 12?
- D. Are Non-Tenure Track Faculty Within The Scope of Article 15?

### **III. PROCEDURAL HISTORY AND OVERVIEW OF 2020 NEGOTIATIONS.**

With President Miller joining the University in August 2019, Joe Urgo joining the University as Interim Executive Vice President & Provost in November 2019, Interim Chief Financial Officer Stephen Storck joining in January 2020, and a new Provost (John Wienczek) joining the Administration in April 2020 the Parties began meeting in January 2020 to see whether an early successor agreement could be reached to give the new leaders stability while they acclimated to the University. A new CBA would have also permitted the Administration to publicize that there were stable labor relations at the University, given that the current collective bargaining agreement terminates in the middle of the 2020-21 academic year. In early March, the Parties had efficiently reached tentative agreements regarding a few modifications to the CBA, continuing the status quo on health care contributions, and 2% salary increases for FY 2021 and FY 2022. However, before the tentative agreement was presented for ratification by either party, Governor DeWine declared a state of emergency regarding COVID-19 and stay-at-home orders were issued, which resulted in the closing of the campus on or about March 10.

Given these developments, the Akron-AAUP, although disappointed, understood that the Board of Trustees would want to revisit the tentative agreement. The Administration began reviewing which tentative agreements it was still willing to move forward on. However, in April 2020, the Administration indicated it was considering retrenchment and began providing financial information to the Akron-AAUP on April 20 under a non-disclosure agreement. The Parties' negotiating teams met virtually on April 21, 24, and 30 and May 8 and negotiated in person through July 13.

These "post-COVID" negotiations were characterized by the Akron-AAUP's willingness to come up with cost-savings solutions so long as savings from the bargaining unit were "credited" against layoffs of BUF. Initially, the Administration's position was that it was considering, but did not want to invoke "force majeure" because they thought it would create bad press and depress enrollment, thereby adding to the University's difficulties. Despite the Akron-AAUP's efforts, the Administration refused to consider any solution other than laying off BUF with no notice and without regard to any discernible objective criteria. From week to week, the

Administration flip-flopped on its positions and dragged its feet in responding to Akron-AAUP proposals and key information requests.

On May 19, the Administration formally invoked Section 12 for the intended reduction in force, along with advancing its interpretation that Section 12 excused the University from any obligation to comply with or consider any other provision of Article 15. Ex. 3. The Administration also submitted a proposal for midterm modifications under Article 33, Section 3. *Id.* After the Administration made clear its intent to lay off faculty without any notice or regard for tenure or seniority, the Akron-AAUP filed the instant Grievance on June 8, 2020. Ex. 4. The Administration filed its Answer on July 31. Ex. 5.

The Parties agreed to continue bargaining, without prejudice to the disagreement regarding Article 15. Counsel for the Parties agreed to combine the instant dispute with the binding arbitration provided for by Article 33, Section 3 in the event a final agreement could not be reached. However, just days before the Akron-AAUP membership was to begin voting on whether the proposed agreement would be ratified (i.e., while it was still being determined whether a final agreement could be reached), the Administration stated it was no longer willing to combine the issues in one arbitration. When the Akron-AAUP filed a grievance under Article 33, Section 3 after the membership rejected the proposed agreement, the Administration formally withdrew its request for midterm modifications. Ex. 30.

The Parties finalized the proposed agreement for ratification on July 13, 2020, which incorporated the reduction in force desired by the Administration. Ex. 6. If the proposed agreement had been ratified by the Akron-AAUP membership, the instant grievance would have been resolved without prejudice to either party's position regarding Article 15 in the future. The Board approved the agreement on July 15, the same day that it acted to lay off 96 bargaining unit faculty with total salaries of approximately \$8.6 million.

As of August 16, as a result of subsequent retirements and other departures, the list contains 72 individuals with total salaries of approximately \$5.85 million. Including a 29%

increase for benefits, the total annual cost of the 72 faculty members whose jobs are still at issue is approximately \$7.55 million.<sup>6</sup>

#### **IV. THE CURRENT CIRCUMSTANCES ARE NOT CATASTROPHIC AND DO NOT JUSTIFY THE INVOCATION OF SECTION 12.**

The University's economic situation does not justify the elimination of bargaining unit positions, let alone such eliminations without any notice, severance, or reinstatement rights. The first sentence of Article 15, Section 12 states that the retrenchment procedures in Article 15 are designed to accommodate "both the orderly change in the University *and* reductions that must accompany more abrupt changes in circumstances." (Emphasis supplied.)

Section 12 serves only to excuse compliance with parts of Article 15 (which parts are addressed below) when circumstances are more extreme than "abrupt changes." These circumstances must:

- (i) be catastrophic;
- (ii) be beyond the control of the University;
- (iii) render impossible or unfeasible the implementation of the procedures in Article 15; and
- (iv) be unforeseen.

The Akron-AAUP asserts that the University's current circumstances are not "catastrophic." Although the pandemic was unforeseen and the coronavirus is outside the control of the University, the University's financial situation is neither unforeseen nor beyond the University's control. Furthermore, the pandemic has not rendered adherence to the procedures of Article 15 impossible or unfeasible.

##### **A. The University's Financial Situation Is Not "Catastrophic."**

As summarized above, the CBA contains three *different* standards relevant to the actions taken by the Administration: (1) the "exigent circumstances" standard for mid-term modification requests; (2) the "financial exigency" standard for retrenchment generally; and (3) the "catastrophic circumstances" standard in Article 15, Section 12. The Akron-AAUP conceded

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<sup>6</sup> Attached as Exhibit 7 is the list of 72 faculty members whose layoffs are at issue in this Arbitration.

that the effects of the pandemic constituted “exigent circumstances” – the modest bar set by SERB – for purposes of engaging in bargaining over mid-term modifications. However, the Administration has abandoned its request for midterm modifications. The Akron-AAUP has never conceded that “financial exigency” exists, let alone “catastrophic circumstances”, as necessary for triggering the severe action of retrenchment.

By acting without regard to Sections 1-11 of Article 12, the Administration has limited itself to obtaining relief only if it can demonstrate “catastrophic circumstances” that render compliance with Article 15 “impossible or unfeasible.”<sup>7</sup> For the reasons explained below, it cannot do so.

## **1. April**

On April 20, the Administration provided (subject to a non-disclosure agreement) the Akron-AAUP Negotiating Team with a presentation from the April 15 Board of Trustees Executive Session. These materials projected a \$65 million draw on reserves for fiscal year ending 2021 (“FY21”). Ex. 7.<sup>8</sup> The Akron-AAUP understands that projected \$65 million deficit was based on the following major assumptions:

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<sup>7</sup> The Administration states in its Step 2 Answer that the Akron-AAUP did not dispute the University’s contention in its Catastrophic Circumstances Letter that “Akron-AAUP’s recognition that the COVID-19 pandemic has triggered the exigent circumstances of Article 33, Section 23 evidences a concession that the “catastrophic circumstances of Article 15, Section 12 exists.” First, the Akron-AAUP was under no obligation to respond to the many inaccurate statements and unfounded allegations in this letter. Second, the Akron-AAUP should not need to explain to the Administration that “catastrophic circumstances” and “exigent circumstances” are different standards. “Exigent” means “requiring immediate aid or action.” <https://www.merriam-webster.com/dictionary/exigent>. Its synonyms are “compelling, imperative, urgent.” *Id.* And, as explained above, this is a standard from SERB law. Meanwhile, “catastrophe” means “utter failure” – its synonyms are “apocalypse, calamity, disaster.” <https://www.merriam-webster.com/dictionary/catastrophic>. The language of Section 12 makes clear that “catastrophic” is a much higher bar than “exigent” – “financial exigency” is one of the triggers for the normal retrenchment process as defined in Section 1.

<sup>8</sup> See Ex. 8 at p.8, stating “the resulting draw on reserves in FY21 is estimated to be \$65.4M...” and at p.10, highlighted number of “65,445,000” (highlighting in original).

- (1) a 20% decrease in enrollment (p.2) (\$30.65 million net reduction in tuition and fees);
- (2) a 20% reduction in state funding for FY21 (p.4) (\$19.3 million); and
- (3) a structural deficit of \$13.8 million (p. 8).<sup>9</sup>

The Administration's basis for claiming a "structural deficit" is not clear. Perhaps significantly, the first two numbers can be easily discerned from the summary on page 10 of the presentation, but the "structural deficit" is not readily apparent.<sup>10</sup>

## 2. July

After the Akron-AAUP repeatedly stressed the importance of providing this information to faculty, the Administration ultimately decided to release a video presentation by Dr. Storck.<sup>11</sup> This video was posted nearly two months after the presentation to the Akron-AAUP NT under the non-disclosure agreement, on July 10 – a mere five days before the Board abolished the 96 BUF positions and only two weeks before the Akron-AAUP membership was to vote on the proposed agreement. Dr. Rudy Fichtenbaum prepared a responsive video on behalf of the Akron-AAUP. Ex. 10.

In the July 10 video, Dr. Storck reviews essentially the same projections presented to the Board of Trustees nearly three months prior. He explains that he began his analysis using the February 29, 2020 budget reports and projected through the end of the 2020 fiscal year (June 30). Even though nearly three months had passed since the projections from the April 15 Board

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<sup>9</sup> The presentation states on page 8 that the University is receiving \$7,075,909 in CARES Act funding. As noted in Exhibit 9, the American Council on Education reports an amount approximately \$800,000 more than in the presentation.

<sup>10</sup> On page 10 of Exhibit 8, the \$30.65 million is shown under the column "FY21, Variance, \$" on the fourth line as "(30,653,00)". The next column over shows a decline of 21.5%--a rounding issue when compared with the 20% figure on page 2. The reduction in State Share of Instruction ("SSI") shows "(14,903,000)", representing a -15.8% variance, but as Dr. Storck explained, when using a 20% reduction in SSI (p.4), that reduction equates to the \$19.3 million referenced on page 4. There is no similar explanation/extrapolation for the "structural deficit" noted on page 10 so far as the Akron-AAUP can ascertain.

<sup>11</sup> The Chapter understands the Administration is submitting the July 10 video with its brief, to which the Chapter does not object.

meeting, Dr. Storck proceeds to use the same assumptions listed above (except that the reduction in SSI is increased from \$19.3M to \$19.97M) and came up with the same \$65 million shortfall.

Only toward the end of the video does Dr. Storck reference the substantial changes in the University's financial outlook which occurred between his original analysis and his video. Most significantly, he notes that on July 6 – four days before the video was posted – the Ohio Department of Higher Education updated its State Share of Instruction (“SSI”) projections.<sup>12</sup> This change decreased UA's reduction in SSI from \$19.9M to \$9M. This reflects a net positive change of approximately \$11M for the 2021 fiscal year. Despite this substantial change, Dr. Storck makes no adjustment in his analysis because the reduction in SSI “remains a concern and significant decline in revenue.” This is quite perplexing—a reduction of \$9M is certainly concerning, but it is less than 50% of the previously projected \$20M reduction. To not account for an \$11M swing, when the \$65M figure was being used to justify extraordinary action, is incomprehensible. Dr. Storck may decide it is not prudent to make any adjustment to his projections for purposes of planning, because there is currently significant uncertainty, but extreme caution and prudence cannot be used to manufacture catastrophic circumstances that render compliance with Article 15 “impossible or unfeasible.” This standard requires a present catastrophe – not the possibility of one in a future worst-case scenario. Considering that the total amount of salaries and benefits for BUF currently remaining on the RIF list is approximately \$7.6 million, the failure to account for this \$11 million change for the better is egregiously mistaken.

With respect to the second major assumption, enrollment for the fall semester has fared significantly better than when these projections were presented to the Board of Trustees in April. Dr. Storck acknowledges this fact in the video, stating that enrollment at the time was down 15% versus the projection of 20%. *Video at 7:55-8:04*. However, this 15% number is not consistent with the enrollment updates provided to the Akron-AAUP at that time.<sup>13</sup> The enrollment report dated July 8 showed an 11.4% decline in Fall Course Registrations as compared to registrations

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<sup>12</sup> Storck Video at ~9:00.

<sup>13</sup> The Administration has provided, under the NDA, weekly enrollment updates to the Akron-AAUP's negotiating team throughout the summer.

the same week of last year.<sup>14</sup> Neither did Dr. Storck make any adjustments based upon the significant improvement in summer course enrollments since his April 15 report. Significantly, over time, the weekly Enrollment Updates have shown steady improvement in both Summer Course and Fall Course Registrations. As of the April 14th report (the report closest in time to the April 15 presentation to the Board of Trustees), the difference between 2019 and 2020 was a decline of 17.8% for Summer Course Registrations and a decline of 19.9% for Fall Course Registrations. Ex.12. The most recent report in the Chapter's possession, dated August 12 (Ex. 13) shows a decline of only 8.1%, less than half of the 20% decline projection and substantially less than the 15% claimed by Dr. Storck in his video.

Dr. Storck estimated a net \$30,653,000 loss in tuition and fees from a 20% decline in enrollment. If this is so, then each 1% decline represents an estimated loss of approximately \$1.5 million. Therefore, even if one were to use Dr. Storck's July 10 estimate of a 15% decline, that represents approximately \$7.5M in additional revenue that he is choosing to ignore in insisting upon the \$65M deficit projection. This ignored revenue is the approximate cost to the University of the salaries and benefits of all the bargaining unit faculty remaining on the RIF list. The facts are simply not as bad as the Administration is trying to make them out to be. This is especially true here, where, notwithstanding the ongoing pandemic, the number of Fall Course Enrollments has continued to improve as the University moves closer and closer to the beginning of the semester. We may not know why that is – perhaps, as some have speculated, regional public universities will be the beneficiaries of students who want to study closer to home. Whatever the reason, the trend is unmistakably and consistently positive, and the Administration is simply choosing to ignore these positive developments to justify its summary dismissal of faculty. Indeed, less than two weeks before the start of the Fall term, the overall enrollment for Fall courses is down only 8.1%. This is a gain of 11.9% from Dr. Storck's 20% assumption – an increase in projected revenue approximating \$18 million.

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<sup>14</sup> Enrollment Update as of July 8, 2020, Ex.11. This Enrollment Update also includes headcount comparisons for 2019 and 2020 for the following categories: (i) Summer Course Registrations; (ii) New Freshman Admits; (iii) New Freshman Confirmations; and (iv) New Freshman Enrollments. Only one of these categories shows a decline at or above 15% (New Freshman Enrollments at -16.1%). The Chapter believes that Fall Course Registrations is the most accurate category because it the most comprehensive in scope.

How can Dr. Storck possibly justify this huge discrepancy between what he assumes and what the most recent data shows? How can the Administration point to the previously projected deficit of \$65 million to justify terminating faculty without following the procedures of Article 15, when the current projections are nearly \$30 million to the better?

On page 2 of the spreadsheet that was used in Dr. Storck's July 10 video presentation (Ex. 14), there is a \$13.8 million transfer-in to the General Fund for FY 20, which represents a draw from operating reserves. (Green highlighting added). We assume that this number provides the justification for the claim of a \$14 million "structural deficit." Note that this number differs from the planned draw on operating reserves of \$11.6 million in the approved budget for FY20. Ex. 14 (Blue highlighting added); Ex. 15 at 1 (Yellow highlighting added). However, the report of actual spending through May 31, 2020 and projected spending through June 30, 2020, presented at the Board's recent meeting on August 12, projects only a \$2,573,000 draw on operating reserves. Ex. 15 at 1 (Yellow highlighting added). Here again, we see a clear discrepancy between what is being assumed and what the most recent data actually shows.

Dr. Storck posits that an uptick in COVID-19 could occur when classes are in session, requiring the University to revert to all-remote learning and to refund room and board as it did in the spring.<sup>15</sup> This concern does not justify ignoring the \$30 million improvement described above, particularly with respect to Section 12. Section 12 is triggered if "catastrophic circumstances should occur" – this requires the catastrophe to have already occurred – it is not triggered simply because future catastrophic circumstances are conceivable. Second, and of significantly lesser importance, Dr. Storck does not attempt to quantify the cost of the future event. What the cost would be is unknown, perhaps unknowable, and therefore not a basis for invoking Section 12. Third, many courses are only being taught online or in a hybrid model this fall – so there would be little-to-no cost incurred with moving these courses online. In addition, residence hall capacity is being reduced, and a separate quarantine facility has been arranged, which will reduce the likelihood of needing to completely close dorms.<sup>16</sup>

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<sup>15</sup> Storck Video at ~8:22.

<sup>16</sup> See <https://www.uakron.edu/return-to-campus/residence-halls-and-dining>.

Moreover, during negotiations for midterm modifications under Article 33, the Akron-AAUP proposed, and the Administration accepted, a furlough policy that would have permitted the University to save significant funds should the campus be shut down and classes suspended (or if enrollment suddenly and substantially decreased due to dangers to health or safety). *See* Ex. 6 at 4-5. As more fully explained below, the Parties did not reach a negotiated resolution because the Chapter's membership rejected the proposed agreement, and so the Chapter sought binding arbitration under Article 33. Instead of completing the process provided in the CBA, and submitting the mid-term modifications to the Arbitrator along with this Article 15 grievance as previously discussed, the Administration decided to walk away from this tool as well as salary concessions the Akron-AAUP was willing to accept. The Administration's abandonment of midterm modifications belies its claims of catastrophe.

In short, the financial presentation the Administration relies on to justify laying off full-time faculty, including tenured faculty and NTT faculty in the middle of multiple year appointments, ignores recent positive developments reducing its budget shortfall by nearly \$30M. The total annual cost of the faculty remaining on the RIF list is approximately \$7.6M, still leaving the University with a surplus of \$22.4M from where they thought they were when they decided to take this terrible and contractually unsupported action (even if one accepts the \$14M structural deficit claim, of which we do not see the evidence).

### **3. August**

At its August 12 meeting, the Board received an updated financial report for the fiscal year ending June 30, 2020 ("FY 20"). This report includes the actual data for eleven of the twelve months in that fiscal year, through May 31, 2020. Ex.15. This is the most recent financial information that will be available before briefs are submitted to the Arbitrator.

A review of the information contained Exhibit 15 shows the following, and it is worth noting that the actual revenues and expenditures through May 31 as well as the projections of revenues and expenditures through June 30 take into account the impact of COVID-19.

In the report, the Administration presents budgeted revenues and expenditures for FY 20 and projected actual revenues and expenditures through June 30, 2020. The revenues and

expenditures are for the General Fund (p. 1), Auxiliaries (p. 11), and Department Sales & Service (p. 40). These three funds are the three components of the University's budget.

The budgeted revenue for the combined three funds was \$322.1 million<sup>17</sup> and budgeted expenditures were \$314.4 million.<sup>18</sup> Thus, the Administration budgeted a surplus of \$7.7 million. However, projected actual revenues were \$312.2 million<sup>19</sup> and projected actual expenditures were \$296 million.<sup>20</sup> Therefore, the actual projected surplus for the University is \$16.2 million. In short, the surplus for the fiscal year just ended was double what the Administration projected.

These numbers show us that there is no evidence of a "structural deficit." In fact, it appears that on a cash basis, the University is running a multi-million dollar surplus.

This data also shows us that the surplus would have been considerably larger were it not for the deficit in auxiliary operations. The University projects that Auxiliaries are projected to run a deficit of \$8.6 million for FY 20. This entire deficit is due to intercollegiate athletics which is projected to run a \$19 million deficit. In fact, all other auxiliaries combined are projected to run a \$10.4 million surplus.

Finally, the Administration has acknowledged that of its \$158,784,000 in Expendable Net Assets (Ex. 16), that approximately \$65 million "are sufficiently liquid to be utilized as working capital to pay operating expenditures, including payroll." Ex. 17 (Administration's Response to Dr. Fichtenbaum's Report) and Ex. 18 (Dr. Fichtenbaum's rebuttal). Thus, the total cost of the faculty RIF list is approximately 11.54% of that reserve, the expenditure of which would not be "catastrophic" or "impossible" or "unfeasible"—the standards set forth in Article 15, Section 12. The sky is not falling. Wright State University, which reported only \$48,052,080 in Expendable

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<sup>17</sup> General \$246,840,000; Auxiliary \$42,450,000; Department Sales and Services \$32,784,000.

<sup>18</sup> General \$230,345,000; Auxiliary \$49,789,000; Department Sales and Services \$34,259,000.

<sup>19</sup> General 247,463,000; Auxiliary \$36,446,136; Department Sales and Services \$28,261,000.

<sup>20</sup> General \$217,669,000; Auxiliary \$45,027,309; Department Sales and Services \$33,300,000.

Net Assets (Ex. 16), is not taking the drastic, immediate cuts to faculty that are being attempted at the University of Akron (nor is any other public Ohio university).

#### **4. Projections for FY 2021 (July 1, 2020-June 30, 2021)**

The materials from the August 12 Board meeting contain the proposed budget for FY 21. Ex. 19 (highlighting added). This budget shows revenues of \$271,218,000 and budgeted expenditures of \$186,173,000, for a surplus (before transfers) of \$31,045,000. **After transfers, the total budget deficit is \$7.8M. This projected deficit is less than one-eighth of the projected \$65M deficit that was used to justify the faculty layoffs at issue in this grievance.**

There are additional details to consider in this proposed budget for FY21. First, the Administration continues to use a -15% assumption for enrollment, even though the most recent report of August 12 shows only a -8.1% decline. As discussed above, with a 1% decline equaling approximately \$1.5M, the Administration is ignoring approximately \$10.5M of additional revenue. This \$10.5M more than offsets the \$7.8M deficit projected, for a surplus of \$2.7M.

Therefore, reinstatement of the laid-off faculty with back pay and benefits at a cost of approximately \$7.6M for the year would require a budgeted deficit of only about \$5M,<sup>21</sup> even based upon the University's own assumptions and projections (apart from the overly pessimistic 15% decline in enrollment). This deficit is miles away from the purported \$65M deficit it invoked to justify the conduct at issue in this arbitration. The University's own facts and figures damn its conduct.<sup>22</sup>

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<sup>21</sup> The temporary salary reductions that the Akron-AAUP agreed to would have saved more than \$2M from the bargaining unit (pre-reduction in force) which would lower this estimated deficit to approximately \$3M for FY 21. *See* Ex. 58 (salary reductions from bargaining unit estimated to save \$2.37 million).

<sup>22</sup> Toward the bottom of Exhibit 19, four situations are noted that could cause an additional disruption to the budget. The last three are all hypothetical, unknown, all and do not constitute current catastrophic circumstances. The first one is the subject of this arbitration. Note that the Administration shows a cost of \$8,163,120 if the reduction in force of bargaining unit faculty is not permitted. That number is higher than the Akron-AAUP's estimate of \$7.6M – we believe this is because our estimate takes in to account additional faculty from the RIF list who have retired. The original RIF list had 96 faculty, but more than 20 individuals have been removed, the vast majority of whom retired between July 15, when the Board approved the list, and today. For those eligible to retire, if they do so by August 21, their last day of

**5. The proposed reductions are contrary to the University's mission statement.**

The University's mission statement is:

The university of Akron, a publicly assisted metropolitan institution, strives to develop enlightened members of society. It offers comprehensive programs of instruction from associate through doctoral levels; pursues a vigorous agenda of research in the arts, sciences, and professions; and provides service to the community. The university pursues excellence in undergraduate education and distinction in selected areas of graduate instruction, inquiry, and creative activity.<sup>23</sup>

Nowhere in the mission statement does it say that it is committed to subsidizing intercollegiate athletics.

As long as an institution can carry out its mission with the resources that are available it is not facing a catastrophic financial situation. The fact that the Mid-America Conference (MAC) has postponed football for the fall is more evidence that intercollegiate athletics are not essential. The administration is not postponing instruction and research. Why? Because they are at the heart of the mission of the University.

We have shown that the Administration has over-estimated its revenue losses and has presented no evidence of a structural deficit. Furthermore, even if there is a revenue shortfall during FY21, the University has adequate reserves and the flexibility to further reduce spending by making additional cuts to athletics. Therefore, there is simply no support to claim "catastrophic circumstances" and the use of force majeure; the actions taken by the Administration and the Board are contrary to the standard to which they agreed in the CBA.

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active employment (and the date this brief is due), they will be eligible to be paid their sick leave benefit. We will not have a final number, and therefore a final cost, until the reply briefs are submitted.

<sup>23</sup> Exhibit 20, Univ. Rule 3359-20-01(A)(3).

**6. Reinstating the laid off faculty will ensure that the University meets its obligations under the CARES Act.**

As noted above, the University has received CARES Act funding. The University's portion of the funding—half for its use and half to go directly to students—is between \$7M and \$8M, which is the same range as the dollars at issue in this Arbitration. That federal law requires the University “to the greatest extent practicable . . . pay all of its employees . . . during the period of any disruptions or closures related to the coronavirus.” Ex. 21 at ¶4(c). This arbitration is not about the CARES Act, but it certainly is worth noting that an award reversing what the University has done and reinstating these faculty with backpay and benefits will help assure that the University complies with its obligations under this federal law and the funds it secured thereunder.

**B. The University's Actions, And Inaction, Belie Its Claim That The Sky Is Falling.**

The Administration has not cut low-hanging fruit before taking the most extreme action of eliminating faculty without notice. The Administration has claimed the circumstances are so dire that it warrants the summary dismissal of faculty. However, the University has not acted in a manner consistent with its claims in any area of potential cost savings apart from the reduction in force of full-time faculty.

For instance, senior administrators, including the President, vice presidents, and deans, took a 10% salary reduction for FY21,<sup>24</sup> while other public Ohio universities, including some in much better financial condition, implemented larger pay cuts for senior personnel:

- Bowling Green State University – President 15% reduction; senior leadership 10% reductions.
- Kent State University – President 12.5% pay reduction; 10% reductions for cabinet, deans, and those with salaries greater than \$200,000.
- Miami University – President 25%.
- University of Toledo – Senior leadership 20%.
- Wright State University – President and upper administration 20% reduction.<sup>25</sup>

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<sup>24</sup> See Ex. 22 at page 5.

<sup>25</sup> Exhibit 23 contains news articles regarding these items.

Other touted cost-savings measures, such as the consolidation of colleges, have not actually been shown to save money.<sup>26</sup> The Administration has failed to provide even an estimate of savings from the reorganization or any plan for how the reorganization will actually reduce expenditures. Instead, the Administration admits that this action will have an anticipated loss of revenue.<sup>27</sup>

On May 29, the Board adopted rules allowing it to furlough non-bargaining unit employees including staff, contract professionals, and coaches. However, it has yet to furlough any employees. This is the case even though the campus was shut down essentially all summer. No athletic staff were furloughed over the summer even though there was a known loss of revenue even before fall sports were postponed. Even with the postponement of fall sports, no athletic staff have been furloughed.<sup>28</sup> In addition, the Administration has not revoked any professional development leaves granted for the academic year, which reduce costs incurred with obtaining faculty to cover courses of faculty on professional development leave.

### **C. “Shared Sacrifice” And The Administration’s Abandonment Of Mid-Term Modifications.**

In its Step 2 response, the Administration claims that the Akron-AAUP’s actions “demonstrate its lack of awareness and indifference to its responsibility as an employee [sic] to share as other employees have – to sacrifice in an appropriate manner for preservation of the institution and in support of academic programs and students.” P.13. Apart from the obvious fact that the Akron-AAUP is not an “employee” of the University and its responsibility is in fact to represent the interests of bargaining unit faculty – which happen to coincide with supporting

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<sup>26</sup> The Administration stated that its goals for the reorganization were savings of more than 25% savings in administrative expenses. Ex. 24 (Administration response to June 1, 2020 Akron-AAUP information request). The Administration noted: “Detailed planning and execution will occur in June.” After June had come and gone, the Akron-AAUP requested an update. The Administration responded: “Since these expenditures require year end actual expenditures to be accurate, and the follow on changes will take at least a year to effect, the accurate savings, or more appropriately the actual expenditures, will not be known for until **October 2021 or later.**” Ex. 25 (Administration response to July 23, 2020 Akron-AAUP information request) at 3 (emphasis added).

<sup>27</sup> Exhibit 26 – Letter from S. Nobil dated May, 22, 2020 at II(c).

<sup>28</sup> See Administration’s August 13<sup>th</sup> response to August 10 request, Ex. 27 at # 3: “There have been no furloughs for any employee classification at the University.”

strong academic programs and student success – the Administration is flatly wrong in its accusations. The truth is that the Administration has demonstrated its lack of awareness of what makes the University work – its faculty – and its indifference to working with the Akron-AAUP to cooperatively solve problems as previous administrations have.

When the Parties met on May 13, the Administration’s team acknowledged the need for the Administration to demonstrate they are taking all other actions possible before cutting faculty. However, the Administration utterly failed to do so. The Akron-AAUP repeatedly informed the Administration’s team that most bargaining unit faculty were not going to support any proposed agreement if the Administration did not provide financial information to the bargaining unit, including proof of the need to eliminate faculty positions, and did not show that serious cuts were being imposed on athletics, which has been a “money-pit” threatening the University’s financial stability for years. Throughout negotiations, the Administration failed to identify one administration position that was being eliminated and refused to commit to deeper athletic reductions than the paltry cuts discussed below.

**1. Missed savings opportunities from the bargaining unit and the abandonment of midterm modifications show the administration is not in catastrophic circumstances.**

Contrary to the Administration’s accusations, when the Akron-AAUP offered cost-savings during negotiations this summer, the Administration obstinately said no. The Administration rejected the Akron-AAUP’s suggestion that retirement-eligible faculty who were not eligible for recent retirement incentive programs be approached and, under Article 16, Section 11, small incentives such as a few months of health insurance coverage be leveraged to secure voluntary retirements and reduce the number of layoffs.

The Akron-AAUP was willing to explore furloughs of 12-month bargaining unit faculty over the summer while CARES Act unemployment supplements were available, but the Administration refused to commit to counting the savings toward saving bargaining unit positions. The Akron-AAUP could not do right by its members to make this concession with no corresponding commitment from the Administration – especially when we did not know how many or which faculty the Administration would move forward with laying off. The Chapter

could not in good conscience ask faculty to take furloughs when they would need those weeks of unemployment in the event they were on the RIF list.

While other bargaining units agreed to furlough provisions, those provisions did not make sense when applied to faculty. The Administration's furlough proposal (Ex. 28) would have allowed the furlough of faculty when they were not required to teach. However, faculty obviously work at times other than during their class meeting times. Most bargaining unit faculty members do not have set work hours – they prepare course materials, lectures, and assignments and communicate with their students at all hours. The Administration's furlough proposal – which permitted faculty to be furloughed between December 25-January 1, or over spring break — would have been merely an additional pay reduction with no corresponding reduction in duties or work expectations from BUF. In contrast, other University employees have set work schedules and would at least receive time off of work when furloughed. The Akron-AAUP never claimed to be “an island” exempt from sacrifices (assuming such sacrifices are actually necessary) – the Akron-AAUP simply asked the Administration to acknowledge that the work of faculty is different than the work of other University employees and to come up with proposals that would not cause more harm than good. (Indeed, the Akron-AAUP readily agreed to the same wage and benefit concessions that the Administration either imposed on the non-union workers or agreed to with other unionized University workers). Ultimately, the Akron-AAUP proposed furlough language that addressed the Administration's concerns about a pandemic-related shutdown while also addressing the unique nature of faculty work, which the Administration accepted. *See* Ex. 6.

The University also rejected the Akron-AAUP's proposal for steeper temporary pay cuts for the bargaining unit in exchange for fewer BUF layoffs. Ex. 29. The University argued that these savings would be temporary while permanent savings were needed.<sup>29</sup> The Akron-AAUP responded that additional layoffs could be made next year if necessary. The University flatly refused and insisted that all cuts must be made now in one fell swoop, even if that resulted in deeper cuts than necessary, worse press coverage than necessary, and more chaos in re-assigning and preparing for fall courses in the midst of a pandemic already creating enough uncertainty

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<sup>29</sup> Presumably the reduction to athletic coaches' salaries are temporary, but are counted toward the \$4.4 million reduction from athletics.

around fall planning. Notably, while reductions in instructional costs were necessary to implement all at once, the Administration claimed that further athletics cuts would come in the future, but that now was not that time to make them. The “get all the pain over with at once” principle only applied to BUF, not the administration or athletics.

In short, the Akron-AAUP was willing to agree to concessions – including equivalent reductions to salaries and increases in health care contributions that have been applied to other employees. But the Akron-AAUP membership was not willing to abide the extreme, inhumane layoffs pursued by the Administration.

On May 22, the Administration claimed that the University “requires relief from current financial obligations under the Labor Contract to ensure continued operations of the University during FY 21 and beyond.” Ex. 26 at p.9. However, on August 6, 2020, in response to the Akron-AAUP submission of the proposed mid-term modifications to arbitration, the University withdrew its request for midterm modifications. Ex. 30. Apparently, relief from the current contract is not actually needed, including the wage concessions to which the Akron-AAUP agreed for this year,<sup>30</sup> which undercuts the Administration’s claim of catastrophic circumstances.

## **2. Cuts to athletics are too little and too late to constitute “shared sacrifice.”**

Even though the University has been on shaky financial ground for years, institutional support for Athletics has steadily increased. Between 2010 and 2019, direct institutional support for Athletics increased by 59% (from \$16.4M to \$26M).<sup>31</sup> Over this same time period, the number of bargaining unit faculty decreased by 18.5%.<sup>32</sup>

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<sup>30</sup> While the ballot did not ask faculty why they rejected the proposed agreement, it is clear that the reason was the termination of 96 faculty, not the wage reductions for those who would remain.

<sup>31</sup> See Exhibits 31 and 32, excerpts from Athletics financial statements for FY 2010 and FY 2019.

<sup>32</sup>As confirmed by the Administration in its response to the Akron-AAUP’s position paper regarding athletics, online at: <https://www.uakron.edu/president/news-and-messages/response-about-athletics>. The Akron-AAUP’s position paper is available online at: <https://akronaaup.org/akron-aaup-position-paper-on-athletics-spending-at-the-university-of-akron/> and the response to the Administration at: <https://akronaaup.org/akron-aaup-corrects-the-universitys-response-on-athletics/>. These documents are not included as exhibits but can be provided upon request.

The Administration claims that it reduced athletic expenses proportionally with the cuts to academics. However, the \$4.4 million reduction planned for Athletics represents only a 12% reduction in the total 2019 athletics budget (\$37M) and a 17% reduction in the 2019 institutional support for athletics (\$26M).<sup>33</sup> Exs. 31 and 32. The Administration points to a different number – the approximately \$19M from the General Fund for operating support over the last three years, which excludes approximately \$5M in debt service for the football stadium and the field house, to claim that it is reducing athletic support by 23%. *See* Ex. 31.

Moreover, the \$4.4 million reduction in the General Fund’s support to athletics simply reduces the amount of support to \$21.6M — still significantly more than it was ten years ago.

The Administration also contends that the \$37M in total expenditures should not be used as the reference point for reducing Athletics spending because that figure includes the revenue generated by Athletics. However, the 25% reductions requested from the academic side are not being reduced to account for the revenue generated by academics. Instead, the expected cut is from total expenditures, and Athletics should be measured by the same standard.

In April, athletics was expected to end the year with a deficit of approximately \$1.6 million because of “overspending and below target fundraising.” Ex. 8 at 5. The Board materials note that “certainly Zip Athletics will have to undergo significant transformation.” *Id.* However, according to the Administration, this transformation can occur *later*. For faculty who are the core of the University, the transformation must occur *now* and without due regard for faculty rights under the collective bargaining agreement.

While every coach has a *force majeure* clause in his or her contract, the Administration has not invoked those clauses.<sup>34</sup> The three highest-paid coaches took a voluntary 20% pay reduction for 20-21. Ex. 22 at 6. No cuts were made for the 2020 year, even though the

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<sup>33</sup>According to his April 23<sup>rd</sup> speech, the President “directed the Athletic Director to provide a plan for a 20% reduction in athletic expenditures for FY21.” Ex. 33. However, athletics has only been subject to a 23% reduction in the University’s subsidy from the general fund – it has not cut its entire expenditures by 20%, which would be a reduction of approximately \$7.4M.

<sup>34</sup> We are not providing all these contracts because we believe the facts are not contested, these contracts can be provided should the Arbitrator so request.

cancellation of spring sports resulted in losses of \$658,350 from NCAA distributions. Ex. 8 at 5. Furthermore, the salaries for the three highest-paid coaches – after the reductions – still total more than \$1.1 million – when it is not even clear that there will be college sports this year and the University is expecting to lose significant revenue from athletics. Meanwhile, classes still need to be taught.

The Administration’s claim that the Akron-AAUP expects not to share in the hurt is preposterous when one examines the decimation of the bargaining unit in recent years. As shown in the table below,<sup>35</sup> if the reduction in force is permitted, the total salaries of the bargaining unit will be **reduced by 31%** in just four years. Meanwhile, administrative salaries are only 15.5% less and 12-month Athletics salaries are only 1.8% less than they were in FY17 – *even taking into account the salary reductions temporarily in place for FY21*.

Before the reduction in force, there were already 15% fewer bargaining unit members than there were three years prior (from FY17 to FY20, the BUF decreased from 669 to 567). **If the reduction in force is permitted, there will be 37% fewer bargaining unit faculty in FY21 than there were just four years ago in FY17 (a reduction from 669 to 420).** Even without the reduction, given that more than 20 faculty from the July 15 list have severed employment, and others who have left who are not on the list, the reduction would be approximately 20% (from 669 to 490).

TOTAL SALARIES, FY2017-2021											
<i>Note: All Groups except BUF include pay reductions for FY21</i>											
	2017	2018	% Change 17-18	2019	% Change 18-19	2020	% Change 19-20	% Change 17-20	2021	% Change 20-21	% Change 17-21
<b>Bargaining Unit Faculty</b>	\$56,119,963	\$55,925,256	-0.3%	\$52,209,571	-6.6%	\$51,952,784	-0.5%	-7.4%	\$38,680,694	-25.5%	-31.1%
<b>Number of BUF</b>	669	647	-3.3%	584	-9.7%	567	-2.9%	-15.2%	420	-25.9%	-37.2%
<b>Administrative</b>	\$10,725,011	\$9,953,878	-7.2%	\$10,024,711	0.7%	\$11,253,201	12.3%	4.9%	\$9,057,294	-19.5%	-15.5%
<b>Contract Professionals (excl. Athletics, Incl. Law)</b>	\$26,024,881	\$25,640,070	-1.5%	\$27,202,926	6.1%	\$27,437,514	0.9%	5.4%	\$26,497,545	-3.4%	1.8%
<b>Athletics (12-Month)</b>	\$5,924,922	\$6,022,160	1.6%	\$6,450,495	7.1%	\$7,049,696	9.3%	19.0%	\$5,820,702	-17.4%	-1.8%

<sup>35</sup> Also attached as Exhibit 34, computed from salary spreadsheets provided by the University on August 13, 2020 which are available upon request but not provided due to volume.

### 3. Questioning “managerial discretion”

The Administration claims that the Akron-AAUP is “wrangling with managerial discretion” in how to address its budget deficit, thereby conceding that catastrophic circumstances exist. Ex.5 at 5. This statement betrays a complete misunderstanding of Section 12. The Akron-AAUP is questioning the Administration’s plans to address its proposed deficit *because Section 12 requires the Administration to prove that compliance with Article 15’s procedures is impossible and unfeasible*. If it is possible – not to mention easier and more logical – to address the deficit by means other than retrenchment, the Administration cannot properly invoke Section 12.

The heart of this grievance is not whether the Administration wisely exercises its discretion in addressing its finances. The issue is whether the circumstances are so catastrophic that the Administration can disregard the procedures of Article 15.

#### **D. The Administration Is Attempting To Accomplish Goals Unrelated To Its Financial Situation.**

The constitution of the RIF list reveals that the Administration has goals other than simply reducing its expenses.

For example, in the Dance program, there are no full-time faculty remaining after the layoff of the only tenure-track professor in the program, apart from one visiting professor.<sup>36</sup> The University acknowledged this visiting professor has been hired to replace a laid-off, tenured professor – not because of financial circumstances caused by the pandemic, but because the University wants to take the Dance program in a new direction with new people (without going

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<sup>36</sup> See Ex. 35, FY 21 bargaining unit list provided by the Administration on August 13 – showing no dance faculty. See also Ex. 36 (rationale for eliminating the only Dance BUF position – noting that the position “is needed” but misstating that the work will be covered by part-time faculty).

through the proper channels in Article 15 or Faculty Senate first). This is an inappropriate and unjustified use of Section 12.<sup>37</sup>

On May 22, the Administration’s negotiation team said that no programs were identified for elimination. However, the RIF list provided on June 24 revealed the Administration’s intent to eliminate all the full-time faculty in two programs – Public Administration and Urban Studies (“PAUS”) and Developmental Programs.<sup>38</sup>

All full-time faculty in Developmental Programs were on the reduction in force list.<sup>39</sup> The rationale forms provided to those faculty for their layoffs stated that the University “will be moving to a co-requisite model.”<sup>40</sup> Currently, Developmental Programs houses remedial courses that must be taken before ordinary courses. Moving to a co-requisite model, in which the courses are housed within the corresponding department and occur along with the ordinary course, is not a new idea. As of April 2019, all of the program’s courses were intended to be moved by the Fall of 2020.<sup>41</sup> Many members of the program’s faculty spent the last year obtaining qualifications to

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<sup>37</sup> See Ex. 25, July 23 Akron-AAUP request and Administration response:

4. Is it true that the University has hired a visiting professor to replace Robin Pritchard? If so, what, if any, rationale does the University have for severing the employment of a tenured Associate Professor and replacing her with a part-time contingent employee?

**RESPONSE: The plan is to revitalize and rebuild the Dance program from the ground up with new people with new skill sets.**

Ex. 25 at 1. (Note the question mistakenly assumed the replacement was part-time – the replacement is a full-time faculty member excluded from the bargaining unit as a visiting professor).

<sup>38</sup> See Exhibit 37 (rationale form for PAUS faculty member stating “program is being discontinued”) and Exhibit 38 (rationale form for Developmental Programs faculty member stating the University “will be moving to a co-requisite model”).

<sup>39</sup> See Ex. 39, stating “All full-time developmental education faculty at the University of Akron were subject to the reduction-in-force.”

<sup>40</sup> See, e.g., Exhibit 38.

<sup>41</sup> See Exhibit 40 (April and May 2019 emails regarding the planned transition of the Developmental Programs courses).

teach in other units. If the Administration wanted to terminate them when the program was eliminated, it could have done so by giving them notice when these discussions were taking place last spring.

Discontinuing this program could have and should have been done by following Article 15. All of the faculty in Developmental Programs are non-tenure track, and therefore, were entitled to only a maximum of 12 months' notice under Article 15, Section 7. The plan to eliminate this program has been in the works for more than a year. The Administration is seizing upon the circumstances of the pandemic to strip the faculty in this program of the notice to which they are contractually entitled. Furthermore, the transition to the new model is not actually happening this fall. Instead, the Administration asked many Developmental Program faculty members to return as part-time faculty members this Fall<sup>42</sup> – essentially asking these employees to subcontract themselves.

On July 8, the Administration proposed that faculty on the RIF list could be reinstated to an open position at the University's discretion – essentially providing them with no rights, in contravention of Article 15, Section 9. When the AAUP pointed out that this proposal was essentially meaningless, the Administration responded that people were on the list for a reason. The Administration explained that the chairs/deans in place now would not necessarily hire faculty that were hired by past chairs/deans. The AAUP finds the Administration's refusal to provide laid-off BUF with the reinstatement rights provided for in Article 15 to be a maneuver intended to undermine the tenured appointments provided under Article 13 and multi-year contracts provided to NTT under Article 29.<sup>43</sup> This refusal also indicates their motivation to get rid of faculty it finds problematic without bothering with the disciplinary process and the faculty's due process rights.

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<sup>42</sup> On August 10, the Akron-AAUP requested the Administration to identify all faculty on the reduction in force list who had been offered part-time teaching assignments. The Administration has not provided this information as of August 19, but the Akron-AAUP is aware of multiple instances.

<sup>43</sup> After multiple requests, both verbal and in writing, on the cusp of filing this brief, on August 13, the Administration provided rationales that the Chapter is only beginning to review—this occurring some three months late.

**E. The Remaining Projected Deficit Is Not New And Is Not Due To The Pandemic.**

The situation in which the University finds itself is only partially attributable to the pandemic, as the Administration itself admits. It is inappropriate for the Administration to address its systemic financial problems under Section 12 when it has had time, and continues to have time, to do so under the general procedures of Article 15.

As noted at the Board meeting on April 15, the University “was operating within an unsustainable financial model prior to the COVID crisis.” Ex. 8 at 19. To the extent that the University’s financial struggles are not new and are not attributable to the pandemic, the University is merely seizing upon the circumstance of the pandemic to take its past financial imprudence out on the faculty instead of where the issues lie: overspending on athletics and administration.

The University points to declining enrollment, but enrollment has been declining since 2011. Such declines over time are exactly what the Article 15 retrenchment procedures are designed to address.<sup>44</sup> Enrollment declines over time are not “catastrophic circumstances” under Section 12. The University is using the pandemic as an excuse to do all at once what could have been done over time and with proper notice to faculty.

The resolution abolishing the positions states that the Administration determined the positions should be abolished “due to a lack of continued need for the positions, including but not limited to the following reasons: (1) as a result of a reorganization for the efficient operation of the University; and/or (2) reasons of economy...”. Ex. 2 at 2.<sup>45</sup> The reorganization was simply a consolidation – it had no effect on the courses that need to be taught this year, and provides no justification for eliminating BUF. Furthermore, “reasons of economy” – that

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<sup>44</sup> Article 15, Section 1(A) states that retrenchment may be necessary when there is “[s]ignificant reduction in enrollment of a college, department, or program continuing over five (5) or more academic semesters (not including summer) and which is expected to persist.”

<sup>45</sup> Note that for at least one position (Dance), the Administration has stated the position is needed, and its multiple offers of part-time teaching to laid-off faculty suggests that the positions are still needed.

something could perhaps be done more economically – do not constitute “catastrophic circumstances” as required by Section 12.

**F. The Cuts Required Of Academic Units Failed To Take In To Account Substantial Numbers Of Faculty Separating At The End Of FY19 And FY20.**

Dr. Wiencek, the new Executive Vice President & Provost installed this April, understood from Dr. Storck “that we need to immediately reduce the general fund expenditures and transfers by at least \$65 million per year. . .”. Ex. 41. Dr. Wiencek was put in charge of reducing expenditures from the “academic side” of the University – including a 25% reduction in instruction and departmental research – i.e., faculty.

We pause here to give some context to the situation Dr. Wiencek was addressing. So far as the Chapter is aware, there was no analysis performed regarding the cost, in lost revenue, of substantially reducing faculty. Students attend the University to obtain a degree and to learn – this fundamental purpose is fulfilled by the faculty. Reducing course offerings in profitable academic units will not save the Administration money. Reducing the quality of instruction by having fewer full-time faculty will not increase enrollment. This is a fundamental flaw in the Administration’s approach to address its financial situation this summer. It fails to consider that faculty are the revenue-generators of the University.

While enrollment has decreased from its recession bubble, the number of full-time faculty has already been proportionally reduced through attrition and voluntary retirement incentives. Through various retirement incentive programs, the bargaining unit has lost a net 63 positions for a savings of \$6,117,000 in salary alone (for the period December 2017-May, 2020). Ex. 42. The bargaining unit was reduced by 49 members during this fiscal year just ended, from 567 faculty on September 30, 2019 to 518 on June 2, 2020, according to bargaining unit lists provided by the Administration. The loss of these faculty is important when considering Dr. Wiencek’s process.

To determine how academic cuts should be allocated, Dr. Wiencek used Delaware Cost Study (DCS) data to benchmark the University’s programs. After a month of the Chapter’s insisting upon some explanation of how academic cuts were being determined, Dr. Wiencek

provided a summary of his DCS analysis to the Akron-AAUP Negotiating Team on June 18.<sup>46</sup> Dr. Wiencek asked for additional time to revise the document before it was further distributed, and asked the Akron-AAUP to provide their questions and comments in writing so that he could address them in the revised document. The Akron-AAUP provided these comments on July 6, and the Provost issued a supplementary memo on July 30, along with the revised June 18 memo—all of which is combined into Exhibit 43. Dr. Wiencek noted that the comparisons between UA’s programs and the DCS programs were approximations, but in his view this benchmarking process was a helpful and useful guide in determining how to allocate, broadly speaking, the target percentage of cuts across the colleges (even though the benchmarking was done at the lower level of departments/programs). He noted that this process was “to guide preliminary target setting in the budget reset process.” Ex. 43 at 2 (underlining in original). The chart on page 3 summarizes the program comparisons, showing the distribution of academic unit expenses for the University of Akron as a percentage of the national average funding level. For example, one program is operating at 25% of the national average, while most programs are operating at 75% to 125% of national average funding. On page 3, Dr. Wiencek acknowledges that the database is made up of R1 and R2 institutions - R1 institutions are larger, more research-intensive universities than UA, which is an R2 institution. Dr. Wiencek explained that R2s are “anecdotally” benchmarked at 80% of the funding of combined R1 and R2 institutions in the DCS study.

Dr. Wiencek said that those academic units at the University of Akron that were on the high end of the scale would be better able to absorb budget reductions. Ex. 43 at 4. Dr. Wiencek took his findings at the academic unit (departmental) level, bundled them up at the (new) college level, and gave each Dean their target budget reductions. These targets ranged from 15% to 35% and were adjusted by the Provost in consultation with the deans. Ex. 43 at 3. Dr. Wiencek did not “micro-manage” the deans as they allocated their cuts across their departments. He generally accepted the deans’ recommendations. We understand that the chairs and directors were told to ignore Article 15 of the collective bargaining agreement when determining which faculty to cut.

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<sup>46</sup> Exhibit 43 contains the memorandum provided to the Akron-AAUP on June 18 (pages 2-4)(Dr. Wiencek incorrectly states that the document was provided on June 17), the Akron-AAUP’s questions in response (page 5), and the Provost’s July 30 update (page 1).

There are several fundamental problems with Dr. Wienczek's analysis. First, the demand from the Budget Office to Dr. Wienczek to cut instruction/departamental research by 25% was not acceptable under the CBA because the Administration's failure to cut other costs first shows the lack of "catastrophic circumstances." Second, as explained above, the financial assumptions regarding the University's overall revenue were unduly pessimistic and have turned out to be unfounded.

Putting aside these two defects, there are other significant problems with the Provost's analysis. As pointed out by the Akron-AAUP NT,<sup>47</sup> Dr. Wienczek started with a data set of department expenditures from FY 2019 but, between September 30, 2019 and June 2, 2020, the number of bargaining unit faculty decreased by 49. Dr. Wienczek failed to consider this loss of 49 faculty members.

Dr. Wienczek's response? "[T]he point raised is valid." Ex. 43 at 1, ¶5. This raises the question—how material is this valid point? If the loss of these 49 faculty had been included as part of the "cuts", presumably 49 of the positions on the RIF list could have been taken off. There are currently 72 BUF remaining on the list. If the already-scheduled loss of faculty had been included in the analysis, at least 65% of those faculty on the list would still have jobs. Thirty-five percent of the cost of those 72 positions is approximately \$2.6M in salary and benefits. This is not an amount of money that will make or break the University. \$2.6M, or less than 2.5% of the \$186M expenditures in the FY 21 budget, cannot create or alleviate "catastrophic circumstances." Ex.19.

In his opening remarks in response to the Akron-AAUP's questions, Dr. Wienczek states: "The questions [from the Akron-AAUP NT] were in many cases reasonable but no longer relevant by the time they were received." He is mistaken. Ignoring the loss of 49 positions (8.6% of the 567-member bargaining unit as of September 2019) is relevant when considering the additional cuts sought by the Administration. The Administration cannot ignore an 8.6% reduction in the bargaining unit when determining how much the bargaining unit should be cut. The Board resolution abolishing the positions claims that reductions were issued "strategically

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<sup>47</sup> Ex. 43, at 5, question 5.

and in a differential manner.” Ex. 2. However, by ignoring the reductions that already had occurred, the process was arbitrary.

If the RIF list stands, the bargaining unit for FY21 will consist of 420 faculty. Ex. 35. This is a 26% reduction in bargaining unit faculty in one year, on top of the 15% reduction in the previous three years. *See* Ex. 34.

**V. SECTION 12 DOES NOT PERMIT THE UNIVERSITY TO DISREGARD ALL OF ARTICLE 15.**

Article 15 requires the Administration to comply with certain procedures before implementing retrenchment. If the need for retrenchment is due to financial exigency, the Administration must attempt to alleviate the financial exigency through attrition, including voluntary early retirement. Art. 15, §2. “If, after completing this *procedure*, the Board makes the judgment that retrenchment requires reductions in bargaining unit faculty beyond those conducted through attrition, the following *procedures* establish the process for implementing *any* retrenchment.” Art. 15, §2(C)(emphasis supplied).

Section 12 permits the Administration to skip over Article 15 *procedures* when the implementation of those procedures is rendered impossible or unfeasible by catastrophic circumstances, such as force majeure. The procedures in Sections 2-4 are the “procedures” referenced in Section 12. Sections 6-11 do not set out “procedures”—they set out substantive rights of faculty when bargaining unit members are to be laid off.

**A. Only Sections 2 Through 4 Provide “Procedures” That May Be Excused During Catastrophic Circumstances.**

The distinction between the procedures of Sections 2-4 and the rights in Sections 6-11 is clear. Section 2 explicitly refers to the required attrition and voluntary retirement step as a “procedure.” Attrition, developing a retirement incentive program, and enrolling faculty in that program obviously take significant time. There may not be time for this procedure in the event of catastrophic circumstances, so Section 12 permits the Administration to skip over that procedure in such a case.

Section 3 sets out more procedures: The Administration must provide evidence to the Akron-AAUP that: (i) retrenchment is needed based on the criteria set forth in Section 1; (ii) efforts to accomplish the retrenchment via attrition and voluntary retirement incentives remain insufficient; and, (iii) it is necessary to release bargaining unit faculty. The Administration also must notify the dean or director of affected units that retrenchment may be required, including a rationale for the proposed reductions, a copy of which notification must be provided to the Akron-AAUP. Faculty in the affected unit(s) must be given the opportunity to provide input on how to carry out the proposed retrenchment. These recommendations then must be forwarded to the Joint Committee on Retrenchment formed pursuant to Section 4 within ten days of the dean/director receiving notice.

Section 4 requires the establishment of a Joint Committee within five days of the evidence being provided to the Akron-AAUP. The Joint Committee is required to make recommendations to the President within 30 days of the Administration providing the evidence for retrenchment to the Akron-AAUP. Only after considering these recommendations may the Board make the final determination to implement retrenchment. Art. 15, §5. These procedures require at least 31 days – and days are defined only as weekdays during the fall and spring semesters. Therefore, these procedures could take months. Section 12 recognizes that in catastrophic circumstances, there may not be time to complete these procedures before the Board decides retrenchment is necessary.

Significantly, Section 4(D) of Article 15 states that the University will not take action regarding retrenchment until the President and the Board have reviewed the recommendations from the Joint Committee on Retrenchment, *other than* as provided in Section 12. This is the only reference to Section 12 throughout Sections 1-11 of Article 15 and supports the conclusion that the “escape hatch” provided by Section 12 goes only to whether the Board may decide to implement retrenchment before following the procedures in Sections 2-4. The reason this exception is noted here, and not in Sections 6-11, is that Section 12 does not suspend the substantive rights provided to faculty under those sections. This conclusion is further supported by Section 12’s requirement that the Administration provide evidence that at least satisfies the requirements of Section 3(A), because that is one of the procedures in Sections 2-4 that can be dispensed with under Section 12. Section 12 simply allows the University to act more quickly to

implement retrenchment consistent with Sections 6-11 than it could if it had to follow the procedures in Sections 2-4 first.

**B. Sections 6 Through 11 Provide Rights To Faculty In The Event Of Retrenchment; These Rights Are Not “Procedures.”**

In contrast to Sections 2 through 4, Sections 6 through 11 do not require the University to take any additional time before implementing retrenchment.

Section 6 provides the criteria for determining which faculty will be released. First, faculty are separated into tenured and probationary (or “non-tenured”) categories. Then, faculty are categorized by rank. BUF are selected for release in order such that tenured faculty and higher-ranked faculty have greater job protection. Within ranks, affirmative action, quality of service, academic program considerations, and length of service are considered. The Provost makes the final decision about whom to release, but must abide by the order of release provisions. For example, non-tenured faculty must be released before tenured faculty and non-tenured faculty of lower ranks must be released before non-tenured faculty of higher ranks. The Administration flatly refused to follow these criteria in selecting individuals for layoff and waited until August 13 to provide the reasons why it picked one faculty member in a unit over another.<sup>48</sup>

Section 6 is not merely a procedure to follow, but the actual guidelines for selecting faculty to be released and a substantive protection of tenure, rank, and seniority. If cherry-picked tenured faculty could be released before non-tenured faculty, that would seriously undermine tenure, which is not only a matter of job security – it is also essential to secure academic freedom and enable shared governance. Allowing the University to cherry-pick tenured faculty for termination would severely chill academic freedom of speech and independent contributions to shared governance.

Furthermore, the Administration’s failure to follow the order-of-release guidelines in Section 6 has resulted in layoffs that have an obvious disparate impact on older BUF members.

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<sup>48</sup> The Akron-AAUP is in the process of reviewing those materials at the same time as preparing this brief. That review will not be completed by the time this brief is submitted.

While only 24% of the bargaining unit is age 60 or older, 42% of the faculty on the original June 24 reduction in force list were age 60 or older. While only 18% of bargaining unit members who were ages 40-49 were on the June 24 list, 34% of bargaining unit members who were ages 60-69 were on the list, and 58% of bargaining unit members who were 70 or older were on the list.<sup>49</sup>

Thus, it is not only in the faculty's interest that Section 6 be followed – it is also in the University's interest to follow the objective criteria for selection. Failing to do so has opened the University up to significant legal liability, undermining the savings that the Administration seeks.

Section 7 requires certain advance notice before BUF may be released. Such a deadline is not a procedure – this deadline is the minimal job security that BUF can rely on when the University is facing financial exigency. It is a substantive right to advance notice before BUF are unemployed through no fault of their own.

For BUF on a first or second one-year contract expiring at the end of an academic year, the notice must be provided by March 15 (e.g., if the BUF were not going to be retained for the 2020-21 academic year, they must have been notified by March 15, 2020). For a BUF holding more than a second one-year contract, the notice must be provided by December 15 (e.g., if the BUF were not going to be retained for the 2020-21 academic year, they must have been notified by December 15, 2019). A tenure-track BUF who is under tenure consideration must be given at least 12 months' notice and a tenured professor must receive at least 18 months' notice.

When examining whether the pandemic's effects on the University's situation rise to the level of a catastrophe that renders compliance with Article 15 impossible or unfeasible, consider that even in the immediate devastating aftermath of Hurricane Katrina, Tulane and Loyola provided a year or more of notice, or severance in lieu of notice, to tenured faculty.<sup>50</sup> But even if

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<sup>49</sup> See Ex.44, Age Analysis of June 24 RIF list provided to the Administration Negotiating Team on July 8, 2020 (backup Excel spreadsheet not included here, but was simultaneously provided to the Administration).

<sup>50</sup> See Report of an AAUP Special Committee: Hurricane Katrina and New Orleans Universities, online at: <https://www.aaup.org/report/report-aaup-special-committee-hurricane-katrina-and-new-orleans-universities>; Section VII, p. 122.

the advance notice of release required by Section 7 were too onerous, the University could have requested a midterm modification to the notice periods via Article 33, Section 3 to give faculty some less amount of time (or severance) to allow them to secure other employment before they were booted without pay or health insurance after the academic hiring season had passed.<sup>51</sup> Although it requested salary reductions and other concessions under Article 33, Section 3, the University made no such request.

Section 8 provides additional substantive rights — the University must endeavor to place released BUF in other available positions for which they are qualified.

Section 9 provides a substantive right to reinstatement if the same or similar position is reauthorized within three academic years. Section 10 provides for a right of first refusal for part-time teaching positions.

The reinstatement rights provided by Section 9 and the right of first refusal for part-time teaching in Section 10 impose no time or financial burden before implementing or completing retrenchment. These sections are inconsistent with the interpretation that Section 12 overrides all of the guarantees in Article 15. How could circumstances be so catastrophic that the University would be precluded from guaranteeing a BUF reinstatement to their position if the position is re-opened two years from now? If the position is not re-opened, there is no reinstatement right. Similarly, if there is a need for part-time teaching that the laid-off BUF is qualified to fill, how could the University's financial circumstances preclude first offering that work to the laid-off member?

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<sup>51</sup> Significantly, the Administration indicated its interest in retrenchment not long after the March 15 deadline to notify faculty holding a first or second year one-year contract of release. At Bowling Green State University, the AAUP and the Administration agreed to extend the deadline to notify a comparable group of non-tenure track faculty in years one through three in exchange for severance benefits in the event of non-renewal. *See* Exhibit 45. This permitted BGSU to keep the number of layoffs to the bare minimum and minimized the need to back-fill instructors for fall courses. The University of Akron was not interested in such common-sense solutions, despite the Akron-AAUP's expressed willingness to discuss them. The Administration is now struggling to staff the courses that the laid-off faculty would have taught. Also notable is that these NTT faculty with only 1-3 years of service at BGSU would have received greater severance (minimum of \$14,750) than what the University of Akron Administration was offering tenured faculty with decades of service under the proposed agreement (maximum of \$12,000) (Ex. 6 at 14, Paragraph 4).

Finally, Section 11 provides that a reappointed BUF will be credited with their previous rank and tenure. It also provides that BUF released due to financial exigency will receive one year of health insurance without charge. That is, when retrenchment is due to financial exigency, BUF are not only entitled to the notice provided in Section 7; they also receive an extension of health care coverage after separation. The Administration is terminating the health insurance for faculty who are subject to the reduction in force effective August 21, 2020, even though Section 11 contemplates that one year of health insurance will be provided when the layoff is due to financial problems.

The Administration claims that Sections 8-11 “arise from” Sections 6 and 7 and therefore “carry no obligation and have no legal force or effect where Section 6 and Section 7 are impossible or unfeasible.”<sup>52</sup> There is no basis for this conclusion. In particular, there is no basis for concluding that the right to reinstatement if the BUF’s position is reauthorized stems from the order of release provisions or the notice requirements in Sections 6 and 7 – this is an entirely separate right, which, even in “catastrophic circumstances” the University has no justification for disregarding.

**C. The Status Quo Prior to the First CBA Supports The Akron-AAUP’s Position.**

When the Parties began negotiating for the first CBA, there was a University Rule regarding retrenchment which served as the status quo before the agreement. Ex. 46. The Rule required temporary and part-time faculty in an affected program to be released before probationary faculty, and probationary faculty before tenured faculty. *Id.* at B(6)(d). Within these categories, seniority controlled, absent “extraordinary and compelling circumstances.” *Id.* at B(6)(d)(iii).<sup>53</sup> There was no exception in the rule that would have allowed the release of tenured faculty before non-tenured faculty.

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<sup>52</sup> Ex. 26 at III.

<sup>53</sup> Furthermore, if seniority were overridden, the administration was required to provide “the adversely affected faculty members with a written explanation of the decision to disregard seniority in the instance in question.” As noted above, the Administration has only just recently provided such information after months of requests to do so by the Akron-AAUP.

As with Article 15, faculty released due to financial exigency had “the right to fill any existing faculty vacancy for which he is qualified” as well as reinstatement rights for three years. *Id.* at B(6)(a), B(7). In addition, as with Article 15, faculty released due to financial exigency were to receive one year of health insurance continuation without charge. There were no exceptions to this provision. *Id.* at B(7). Notably, the Rule applied to an “emergency” caused by “some serious event or condition requiring anticipated or unanticipated major expenditure reductions” as well as declines in enrollment or state appropriations. *Id.* at C.

The Akron-AAUP successfully negotiated to keep these protective provisions from the status quo before the first CBA.

**D. Lack of Notice is Particularly Egregious for Faculty And More Notice Was Given To Other Employees.**

The notice provided by Section 7 is especially important because hiring of full-time faculty for the academic year typically begins the fall of the preceding year, or, for non-tenure track positions, in the preceding spring semester. The Administration’s decision to lay off faculty in July all but guaranteed they will not be able to get full-time employment this academic year.

In May of this year, the University revised its rule regarding contract professionals to permit reductions in force with less notice than previously required by the rule; however, a contract professional with five or more years of service is provided at least 45 days’ notice before being terminated, 30 of which can be paid leave.<sup>54</sup> Even though contract professionals generally do not have appointments for a specific term (as BUF do) and are not eligible for tenure, they are receiving more notice than tenured faculty (the great majority of whom are 9-month faculty who were not paid for the time period between July 15 and August 21 unless they were teaching additional summer courses). This is so even though the hiring timeframe for faculty positions had completely passed by the time faculty were notified. If the University is in such dire straits that it must terminate faculty without any notice, why are contract professionals granted this benefit while the University refused to even extend health care for laid-off faculty through the end of August?

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<sup>54</sup> Exhibit 47, Rule 3359-22-01, revised at May 29, 2020 Board meeting.

Furthermore, the University granted non-bargaining unit employees who were subject to the reduction in force continuing tuition benefits for themselves and their dependents. However, the same benefit for BUF under the proposed agreement was contingent upon the BUF signing a general waiver of claims. It seems the University's actions are motivated at least in part by anti-union animus rather than budgetary concerns, since it is treating non-union employees with less job security better than it is treating BUF.

## **VI. NON-TENURE TRACK FACULTY ARE INCLUDED IN THE SCOPE OF ARTICLE 15.**

When the Administration provided its Step 2 Response on August 4, the Akron-AAUP's counsel asked the Administration whether it was reviving its previously abandoned claim that NTT are excluded from the scope of Article 15. Ex. 48. After repeated requests for confirmation, and with the opening brief deadline looming, the Administration finally confirmed on August 11 that it was in fact resurrecting its argument that NTT are excluded from Article 15 and that NTT may be eliminated (apparently without notice) under Article 29. Ex. 49. The Administration is taking this position even though it cited only Article 15, Section 12 when it gave laid-off NTT written notice that their positions were eliminated.<sup>55</sup> The Administration did not tell NTT that they were being laid off pursuant to Article 29.

Even more baffling, the Administration is taking this position even though the Board's resolution terminating bargaining unit faculty, including non-tenure track faculty, cites only Article 15, Section 12 and does not refer to Article 29.<sup>56</sup> Ex. 2.

The Administration's position stems from the fact that Article 15, Section 6 first categorizes BUF into either "probationary" or "tenured" faculty. The Administration claims that "probationary" cannot encompass non-tenure track faculty. This claim is baseless. Although tenure-track faculty who have not yet been granted tenure are referred to as "probationary faculty," that is not the exclusive meaning of "probationary." Probationary can also mean a

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<sup>55</sup> See Exhibit 50, sample letter provided to laid-off NTT faculty member.

<sup>56</sup> In the resolution, the Board cited O.A.C. 3359-9-02 regarding NTT faculty. This provision is preempted by the CBA, so its citation is inappropriate. However, to the extent the administration relies on 3359-9-02, that rule has also not been updated. It still references college lecturers and instructors, titles that no longer exist.

faculty member who does not have indefinite tenure – whether or not that employee is eligible to apply for tenure at some point.

The frivolous nature of the Administration’s argument is evident from the language of Section 6(B), which lists subcategories including Instructor.<sup>57</sup> There were no tenure-track Instructors at the time of the first contract. Instructor was a title given exclusively to non-tenure track faculty.<sup>58</sup> If “probationary” in Section 6(A) means only tenure-track faculty in their probationary period, the inclusion of “Instructor” would be nonsensical.

The fact that “Instructors” were not tenure track positions at the time of the first contract is also clear from the contract itself. Section 3 of Article 28, regarding Spousal Hires lists levels of opportunity for the spouse of a new-hire and distinguishes a tenure track position (subsection A) from an Instructor position (subsection C). Again, in Article 28, Section 6, regarding hiring procedures, the contract distinguishes between Instructor positions and tenure track positions: “If the accommodation includes the creation of a new instructor **or** tenure track position, the procedure for hiring the person to fill that position must conform to all provisions of Article 11, Initial Appointment. . . .” (Emphasis added.) Ex. 53.

The Administration may also object that “College Lecturers” are not listed in Section 6(B). College Lecturer was a title for NTT faculty until the most recent CBA. However, at the time of the first contract, the Akron-AAUP initially sought to eliminate the position of College Lecturer and elevate all non-tenure track bargaining unit faculty to Instructors, who received better benefits. This intent is documented in Article 16, Section 19 of the first CBA, which provides that faculty at the rank of College Lecturer shall receive the same benefits as Instructors. Ex. 53. Not listing Lecturers along with Instructors was an oversight not caught

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<sup>57</sup> The Administration’s August 11 statement bafflingly claims that Instructors “never have been mentioned in Article 15...”. Ex. 49. Section 6(B) lists “Instructor” and has since the first CBA.

<sup>58</sup> Attached as Exhibit 51 and Exhibit 52 are two versions of University Rule 3359-20-03 which were obtained from the University of Akron website. This rule has since been rescinded. Exhibit 51 reflects changes to the rule as adopted in May 2002, when a section regarding Instructors was added. This section defines the Instructor rank as “full-time non-tenure track faculty” and provides that an “appointment at the rank of Instructor does not lead to nor count toward promotion or tenure.” Exhibit 52 is the rule as amended in 2007, which contains this same language. Neither rule mentions the rank of College Lecturer.

after the Akron-AAUP relented on eliminating the position of College Lecturer during the two years of negotiations. Moreover, as of July 2005, the bargaining unit consisted of more than 600 faculty, only nine (9) of whom were College Lecturers; all nine were faculty in Developmental Programs. Ex. 54, Ex. 55.

Apart from the addition of Section 8(B) in 2009, the language of Article 15 has not been modified since the initial CBA. *See* Ex. 53. Since that time, the titles of NTT faculty have changed. Because Article 15 was never modified in subsequent negotiations, it was not updated to reflect these title changes. This technical oversight does not change the intent or the meaning of Article 15.

The Administration admits previously abandoning its argument that NTT are excluded from Article 15 after discussing this issue with past-Interim President John Green, who had been the primary negotiator for the Administration regarding non-tenure track faculty issues when substantial changes were made to Article 29 in 2015. *See* Ex. 48, Ex. 49. Dr. Green confirmed that changing the titles of non-tenure track faculty from “College Lecturers” and “Instructors” to “Professors of Practice” and “Professors of Instruction” was not intended to remove any NTT faculty from the scope of Article 15. The Akron-AAUP’s primary negotiator on NTT issues in 2015, John Reeves, confirmed this understanding. Ex. 48. The Administration acknowledges that it re-issued its May 21 “force majeure” letter on May 22 with this argument removed.<sup>59</sup> *Compare* Ex. 56 (highlighting added) with Ex. 26. Despite the agreement of the Administration’s prior legal counsel that NTT were included in the reference to “Instructors” in Article 15, the Administration resurrected this dispute at the 11<sup>th</sup> hour and only after the ratification vote failed. The University’s outside counsel makes the rather curious argument that because the relationship was more “amicable” in May, it relented to the Chapter’s position that NTT faculty are covered but, a couple of months later, when the relationship was “less amicable,” the Administration changed its position 180 degrees. Ex. 49. A party’s position regarding the interpretation and application of an important CBA issue cannot depend upon the atmospheric at the time it takes a position.

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<sup>59</sup> The Administration’s claims that it did so in the “amicable context” of May 2020 (Ex. 49) is disingenuous, considering the original May 21<sup>st</sup> letter accused the Akron-AAUP of acting in bad faith and putting its interests above that of students simply because it maintains a different interpretation of the CBA. *See* Ex. 56 at 9 (highlighting indicating removed paragraph added).

As a final consideration, as noted above, prior to the completion of the first CBA in 2005 there was a University Rule titled “Guidelines for academic retrenchment due to financial exigency.” Ex. 46. This rule provided, *inter alia*, that:

(i) All temporary or part-time faculty within the affected program will be released before any probationary faculty.

(ii) All probationary faculty within the affected program will be released before any tenured faculty.

(iii) Within any academic department... faculty reduction in force will proceed according to seniority **within each classification of faculty status defined as tenured, probationary, temporary, part-time:** The least senior faculty member in terms of length of academic service at the university is released first ...

(b) [sic] In computing seniority, the most pertinent point is total full-time service at the university of Akron (in any of the ranks of **instructor**, assistant professor, associate professor or professor).(Also included herein are those who occupy the position of **full-time lecturer**.)

Ex. 46 (emphasis supplied).

Thus, even before the first CBA, non-tenure track faculty were included in the retrenchment guidelines and were to be released before tenure-track faculty. Non-tenure track faculty were also categorized as “probationary faculty” under this rule – they were not temporary (visiting) or part-time (adjuncts), which leaves only two possibilities: tenured or probationary.

## **VII. THE UNIVERSITY DID NOT PROVIDE EVIDENCE OR DISCUSS ITS PROPOSED COURSE OF ACTION WITH THE AKRON-AAUP AS REQUIRED BY SECTION 12.**

The last sentence of Section 12 requires the University to discuss its proposed course of action with the Akron-AAUP. Although the University met with the Akron-AAUP, no aspects of its proposed course of action were disclosed other than the bare fact that the University was invoking the “force majeure clause” and that the University did not intend to comply with any of the provisions of Article 15.

The Administration did not discuss a proposed course of action with the AAUP as claimed in its Step 2 Response. The University simply advised the AAUP that it intended to layoff as many faculty as it unilaterally deemed necessary according to no guiding criteria. Such a *fait accompli* statement, with no opportunity to provide input or even obtain information about the ways faculty would be selected for layoff, does not amount to a “discussion.”

Section 12 also requires this discussion to be done “before taking any action that could be interpreted as bypassing the retrenchment procedures.” However, as early as April 24, and before informing the Akron-AAUP about its plans to utilize Section 12, the Administration directed chairs to identify positions to be eliminated without regard to the requirements of Article 15. This is a bypass of the retrenchment procedures.

Section 12 also requires the Administration to provide evidence that at least satisfies the requirements of Section 3(A). Section 3(A) requires evidence: (i) of the need for retrenchment based on the criteria listed in Section 1 (*e.g.*, financial exigency or program discontinuation); (ii) of efforts to implement retrenchment through attrition as required by Section 2 and that such efforts remain insufficient; and (iii) that clearly documents the *necessity* for releasing bargaining unit faculty.

Although the Administration did provide some financial information to the Akron-AAUP, as explained above, that information was based on overly pessimistic assumptions that were not realistic even when the Board acted on July 15. Furthermore, that information did not satisfy the requirements of Section 3. With respect to the first element, even if the evidence showed financial exigency, which the Akron-AAUP does not concede, the evidence did not show that programs were being discontinued. It was only after the faculty for the reduction in force were selected that the Akron-AAUP was informed that Developmental Programs and PAUS were being discontinued.

Second, the Administration did not provide sufficient evidence that retirement incentives remained insufficient. As explained above, the Akron-AAUP repeatedly attempted to work with the Administration to obtain voluntary retirements before the Administration moved to eliminate positions, and the Administration rejected these efforts. While significant voluntary retirement incentives were offered in recent years, only faculty in certain academic units were eligible for

the most recent program, the Voluntary Separation or Retirement Plan (“VSRP”), which had to be elected by May 31, 2019 for a separation date of May 31, 2020. Faculty in many units were not eligible for those programs, and those unit had numerous faculty on the July 15 RIF list. Ex. 57 (list of units excluded from VSRP). For example, Nursing was not eligible for VSRP and had five faculty on the list. Also excluded, among others, were: Accountancy (3 on RIF list), Business & Info Technology (3 on RIF List), Communication (2 on RIF List), Dance, Theatre & Arts Administration (2 on RIF List), Civil Engineering (3 on RIF List), and Mechanical Engineering (3 on RIF List). Such units could have obtained significant reductions through small incentives for voluntary separations if given the chance before the Administration’s blunt action.

Finally, as explained above, the evidence provided by the Administration failed to show that releasing bargaining unit faculty – especially without any notice – was *necessary*. There were other ways to cut expenditures that did not threaten the primary mission and revenue-generating activity of the University. In fact, the Akron-AAUP offered to agree to higher salary reductions this year in order to save positions. Such an offer made the reductions optional to the extent the salary reductions could cover some of the positions.

## **VIII. CONCLUSION.**

The Collective Bargaining Agreement provides certain levels of job security to bargaining unit faculty. Outside of just cause, the Administration can terminate tenured faculty only through retrenchment, which requires 18 months’ notice for tenured faculty. If the Administration does not want to continue the appointments of probationary tenure-track faculty for non-performance related reasons, it must follow the procedures for retrenchment. If the Administration does not want to continue the appointments of non-tenure track faculty approaching the end of their current term appointment, the Administration must either meet the notification deadlines in Article 29 or follow the procedures for retrenchment. The Administration may employ or not renew non-bargaining unit faculty (adjuncts and visiting professors) to more quickly adjust to changed circumstances. These negotiated provisions strike a balance among the University’s need to adjust to changed circumstances, the faculty’s need for job security, and the students’ needs for an engaged and committed faculty.

Instead of using the adequate tools available under the contract, the Administration has chosen to act with flagrant disregard for the wellbeing of its employees, students, and the wider University of Akron community. Although the pandemic has certainly affected the University's operations, as it has affected most areas of American life this year, it has not created catastrophic circumstances that justify the Administration's callous and self-defeating actions.

In sum, the Arbitrator should find that there are not catastrophic, unforeseen, and uncontrolled circumstances which render compliance with Article 15's procedures "impossible or unfeasible." The projected \$65 million deficit for FY 21 used to justify the Administration's actions is now only a \$7.8 million deficit in the proposed budget, and this projected deficit still relies on an overly pessimistic enrollment assumption. Ex. 19.

Even if the Arbitrator should find that there are catastrophic circumstances which permit the Administration to act under Article 15, Section 12, such circumstances can only excuse compliance with the procedures in Sections 2 through 4 of Article 15. The contract does not permit the Administration to claim that circumstances are so catastrophic that it cannot follow the order-of-release provisions in Section 6, the notice requirements of Section 7, the reinstatement rights of Section 9, and the other rights granted by Sections 6-11. Moreover, even if the contract did permit such a claim, the Administration has not proved that compliance with these provisions is impossible or unfeasible.

Therefore, the Akron-AAUP requests that the Arbitrator issue an award providing that:

1. The Collective Bargaining Agreement does not permit the reduction in force adopted by the Board of Trustees on July 15, 2020 because:
  - The Administration has not proven catastrophic, unforeseen, and uncontrolled circumstances that render compliance with Article 15 impossible or unfeasible.
  - Or, in the alternative, Article 15, Section 12 does not excuse the Administration from adhering to Sections 6 through 11 of Article 15.

- Or, in the alternative, the Administration failed to discuss its proposed course of action with the Akron-AAUP and failed to show evidence that clearly documents the need to release bargaining unit faculty before taking action that bypassed the retrenchment procedures, as required by Article 15 Section 12.
2. All bargaining unit faculty subject to the July 15 reduction in force who have not voluntarily severed their employment since that date shall be reinstated and made whole with backpay and all benefits provided to bargaining unit faculty under the CBA.