

Step 2 Hearing Answer

Grievants: Dr. Tim Matney, CAGO
Bill Rich, Chapter Consultant

Grievance Number: 2020-01
Dated Filed: June 8, 2020

Date of Second Step Meeting: Based on agreement by the parties, the parties waived the Step 2 hearing as is otherwise provided for under Article 12, Section 5.

Background:

On May 22, 2020¹, the University of Akron (“University”), through its legal counsel, formally memorialized to Akron-AAUP its invocation of the Article 15 titled *Retrenchment*, Section 12, as a catastrophic circumstance such as *force majeure* existed (“Catastrophic Circumstances Letter”). The Catastrophic Circumstances Letter provided an evidence packet and detailed that since at least April 21, 2020 the University had regularly met with Akron-AAUP representatives regarding the University’s financial situation and the necessity for invoking Article 15, Section 12. Since May 22, 2020, the University has continued to supplement the evidence packet supporting its position. This Step 2 response incorporates the entirety of the May 22, 2020 Catastrophic Circumstances Letter as well as all supplementary information and documentation the University has provided to Akron-AAUP since that date. This includes the items listed in Tab A hereto.

On June 8, 2020, Akron-AAUP filed its grievance citing three areas of dispute: (1) use of Article 15, Section 12 in the present circumstances; (2) the impact of Article 15, Section 12 on Article 15, Sections 6 through 11; and (3) compliance with Article 15, Section 12 in regard to discussing the “proposed course of action” (“Areas of Dispute”). For remedy, the grievance effectively seeks to stay implementation of Article 15, Section 12 unless and until: (a) circumstances out of the University’s control exists to justify invocation of catastrophic circumstances; (b) the University complies with Article 15, Sections 6 through 11; and (c) the University meets with Akron-AAUP to discuss its proposed course of action. There are no issues of timeliness in this grievance.

¹ The University initially provided Akron-AAUP its Catastrophic Circumstances Letter on May 19, 2020. Based on Akron-AAUP’s request, the University agreed to make certain revisions to the notice and then reissued the letter on May 22, 2020. This Step 2 response incorporates the entirety of the May 19, 2020 notification and evidence packet.

Argument:

Akron-AAUP has had ample opportunity to present evidence to substantiate its position on the Areas of Dispute. The entirety of Akron-AAUP’s grievance is based on 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.

Area of Dispute #1

Grievance States Dispute #1 as:

1. The University has not demonstrated that the present circumstances are sufficient to justify the use of the force majeure clause.

Analysis:

Article 15, Section 12 unambiguously states “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.” Section 12 further describes this basis for its application, stating in pertinent part “[i]f such unforeseen, uncontrolled and catastrophic circumstances should occur, then...” To the extent the grievance mischaracterizes the unambiguous basis for Article 15, Section 12’s application, the University denies that interpretation.

The University’s Catastrophic Circumstances Letter memorialized catastrophic circumstances existed, based on the global COVID-19 pandemic, which was beyond the control of the University and would render impossible or unfeasible the implementation of the procedures set forth in Article 15. The University regularly met with Akron-AAUP since at least April 21, 2020 to discuss and show evidence of the catastrophic circumstances and discussed a proposed course of action(s). These discussions led to an actual course of action

that was implemented on July 15, 2020² – the layoff of faculty outside of the retrenchment procedures and a mutual agreement³ between the parties to utilize other measures in an attempt to both decrease the number of layoffs and to support transitioning those affected through enhanced severance benefits.

Akron-AAUP presented no documentary evidence to rebut the University’s position and did not point to documents provided to it from April 21, 2020 through the date of the grievance, June 8, 2020, to support its contentions. Rather, Akron-AAUP made general statements as the basis for its position as to Area of Dispute #1, while continually papering the University with “Information Requests.” None of these statements are persuasive, and all lack merit.

COVID-19 is the worst global pandemic in 102 years. No one could have foreseen a pandemic reaching the United States and the governmental mishandling of a response at federal and state levels. Certainly, the existence and consequences of this devastating global pandemic and the response to same are not circumstances that are foreseeable or within the control of this University.

COVID-19 caused the State of Ohio temporarily to shutter. Our University was forced to effectively close its campus. Consequently, new and unforeseen impacts to both revenue and expense existed. None of this was in the University’s control. This circumstance was not foreseeable. To suggest that the circumstance to this institution created by the arrival of COVID-19 is not catastrophic, or that it was foreseeable or controllable, is preposterous.

Akron-AAUP’s general statements regarding alleged financial imprudence lack any specificity or merit. Its assertion that the looming budget shortfall “would be manageable” by reining in non-academic spending also lacks specificity and merit. Such self-serving generalities do not impact the existence of the catastrophic circumstance that exists, a \$65 million projected deficit for Fiscal Year 2021 at the time the University invoked Article 15, Section 12. While the University had already identified a course of action, through its strategic planning process, to address some of the financial and other challenges it faced over the course of several years, the unforeseen impact of COVID-19 both intensified and increased those financial difficulties and significantly compressed the time horizon in which to address the situation without running out of financial reserves. Article 15, Section 12 was invoked only after taking other measures to reduce expenditures. The University simply had no other option to achieve the financial savings necessary.

Akron-AAUP conveniently ignores that the University does not control financial resources (e.g. state and federal funding or number of students enrolling). The choices of government to fund the University are not within the control of the University. While federal and state

² Article 15, Section 12 only requires discussing a proposed course of action. It does not require an actual course of action be achieved. The fact the proposed course of action that was discussed in this case developed into an actual course of action is best evidence and conclusively establishes the University met its obligation under Section 12.

³ It should be noted that certain of these other measures are contingent upon ratification of the July 13, 2020 tentative agreement by the Akron-AAUP membership. At the time of this submission, the ratification vote has not yet been completed. Astonishingly, AAUP leadership recommended rejection of the tentative agreement.

governments communicate intent to fund at certain levels, nothing mandates providing a specific funding level. Any funding from the government, of course, is necessarily contingent on revenue sources available to the government.

When the COVID-19 pandemic hit Ohio, the state initially communicated an intended reduction of 20% in State Share of Instruction (“SSI”) funding. The University had to modify its Fiscal Year 2021 budget accordingly. On July 6, 2020, Chancellor Randy Gardner sent a FY21 State Budget Update to the University, providing the intended SSI funding for FY21 with the caveat:

Please note that, as with all line items in this challenging budget environment, I must place a “*warning label*” on this positive news. This new FY21 SSI amount is subject to change if the overall budget and supporting state revenue sources were to significantly worsen during the fiscal year compared to current projections.

Once received, the University adjusted its budget deficit for Fiscal Year 2021 to \$56-million. While certainly welcome, this easing of the revenue reductions fails to impact materially the University’s need to invoke Article 15, Section 12. The current \$56-million budget deficit still satisfies the elements for invoking Article 15, Section 12. Also, there is no way to predict whether the revenue reductions could change for the worse, resulting in a future deficit approaching the initial \$65-million deficit, or even worse, as Chancellor Gardner’s “warning label” explains.

The oscillating unemployment rates contribute significantly to the revenue reductions, improvements and possible future deterioration. In February 2020, the unemployment rate in Ohio was 4.1%. That jumped to 5.8% in March, to 17.6% in April, to 13.9% in May, to 10.9% in June. During the same time period, the unemployment rate in the United States rose from 3.5% in February, to 4.4% in March, to 14.7% in April, to 13.3% in May, to 11.1% in June. The more recent figures show improvement, but a future shutdown (full or partial) because of increasing COVID-19 cases likely will change those levels for the worse. These levels of unemployment directly impact federal and state revenue streams which indirectly impacts revenue distributed to the University.

The University also does not control the choices of its students, and potential students, to return to campus during Fiscal Year 2021. We are in a global pandemic. The Fall term begins August 24, 2020. Many students remain concerned about the possible health hazards of a campus-based education, but many still could opt-out of an online experience. Ohio’s upward trend of COVID-19 cases only fuels those concerns. On July 29, 2020, Dr. Anthony Fauci commented:

...We’re starting to see in Ohio, Kentucky, Tennessee, Indiana that inkling of a percent increase of cases that are positive... we’re talking about the states that are starting to see a little bit curve upward, they’ve really gotta jump all over that because if they don’t then you might see the surge that we saw in some of the other southern states...

Microsoft News by Associated Press 7/29/20 –
<https://www.bing.com/videos/search?q=fauci+ohio&docid=13894955704081&mid=CE994AC01EFCA369BB30CE994AC01EFCA369BB30&view=detail&FORM=VIRE>

The University's enrollment is significantly lower than last year at this time. As compared to 2019, the enrollment data for 2020 as of July 29, 2020⁴:

- New freshman enrollments are down 14.7%
- New freshman confirmations are down 8.4%
- New freshman admits are down 5.8%
- Fall course enrollments are down 8.0%
- Summer course enrollments were down 7.5%

How exactly enrollment will continue to be impacted by COVID-19 over the next month and during the 2020-2021 academic year cannot be foreseen in this moment. What we do know is the enrollment is down already, the pandemic is getting worse in Ohio, and societal restrictions have been in place and are expected to become more restrictive in the future. For the first time in the history of the University, the choice of new and current students vis-à-vis enrollment cannot be treated as automatic. The same is true with every college and university in our state.

The instances in which COVID-19 directly and indirectly impacts the University's revenue streams and expenses are too many to enumerate in specificity within this document. The University's catastrophic circumstances are real as is the likelihood they will continue to change as the virulence of COVID-19 waxes and wanes until a vaccine or other effective treatment is found and distributed.

Akron-AAUP improperly focuses upon how the University is choosing to address the Fiscal Year 2021 deficit. Disagreement with how the University exercises its discretion in addressing the projected deficit has absolutely no relevance to whether a catastrophic circumstance exists. Indeed, *the mere act of wrangling with managerial discretion inherently assumes a severe emergency situation exists that needs immediate attention*. In this case, the situation that exists is the catastrophic circumstance occasioned upon our University by the COVID-19 pandemic. So, Akron-AAUP has conceded in its grievance rationale that a catastrophic circumstance exists by taking issue with how the University is exercising its discretion in addressing the consequential Fiscal Year 2021 deficit.

As an aside, Akron-AAUP's statement that the University "wants to use the pandemic to further cut spending on its core academic mission" is pure hyperbolic posturing that has no place during these troubling times. The University and its leadership did not ask for a global pandemic and did not ask for the financial consequences of COVID-19 that continue to unfold. The University's decision-making remains centered on its mission.

⁴ The enrollment figures were different when the University invoked Article 15, Section 12.

In its grievance rationale, Akron-AAUP states “[t]he University was aware of the likely effect of the coronavirus on the University’s budget at least by April 15, 2020” and “if the procedures of Article 15 had begun on that date, retrenchment could have been completed by May 25.” Here, the Akron-AAUP concedes that unforeseen circumstances existed, allowing the University to invoke Article 15, Section 12; they just allege that the University didn’t invoke it fast enough.⁵ Section 12 contains no timeliness requirement or deadline for the University to invoke this provision. Akron-AAUP’s statements also falsely assume that at one moment in time (i.e. by April 15, 2020) the full financial impact of COVID-19 was known (or could have been reasonably known) with complete certainty.

By April 15, 2020, what was known was the COVID-19 pandemic had shuttered the State of Ohio and created a wave of financial impact upon every entity in our State and nation. The full extent of that wave is a function of numerous variables including but are not limited to:

- length of the State shuttering (in whole or in part);
- extent of individuals within the University’s community impacted by the virus;
- impacts on financial resources (e.g. state and federal funding; tuition revenue);
- expense associated with PPE and costs related to complying with guidelines in opening the campus in whole or in part;
- expense and costs related to transitioning from traditional to remote learning modes;
- the closure of the residence and dining halls, etc...

While the University could project financial impact, it could not (and still cannot) identify the entirety of the financial consequence of COVID-19 on Fiscal Year 2021. By April 15, 2020, the University knew that the impact is, and would be, disastrous. So, the University had to act promptly with full knowledge the COVID-19 world would continue to wreak havoc on the University’s finances and budgeting. The University accepted it had to remain flexible in moving through Fiscal Year 2021. Akron-AAUP’s Monday morning arm-chair quarterbacking is unreasonable, inappropriate, and stands to devastate the University as an institution.

Akron-AAUP’s allegations as to how it believes the University *could* have initiated retrenchment procedures on April 15, 2020 and completed them by May 25, 2020 fails to consider the full context of this situation or the length of time required to realize the financial savings associated with retrenchment. AAUP’s timetable is woefully inaccurate. It would take many months or longer to complete Article 15 retrenchment. Had the University been in a position where it had definiteness on the entirety of the nature and scope of the catastrophic circumstance it faces, it still would have needed time to analyze how it was going to address the projected Fiscal Year 2021 deficit before engaging in a retrenchment procedure. By April 15, 2021, the University was still analyzing and assessing the situation. Akron-AAUP’s position is not tenable given the nature of this catastrophic circumstance, one borne with continued uncertainty and one not faced in modern history. By the time the

⁵ Akron-AAUP is foreclosed from arguing that subsequent circumstances nullify the University’s invocation of Article 15, Section 12.

University could identify the budgetary reduction to be realized through layoffs, there was no time to initiate and complete the retrenchment procedure to capture actual savings in Fiscal Year 2021.

Notably, had Article 15 allowed the University to fully implement retrenchment in Fiscal Year 2021⁶ the number of faculty projected to be laid off to achieve similar savings would have been approximately 190 faculty positions. Implementing Section 12 resulted in an estimated 110 reductions. It is incomprehensible why Akron-AAUP is pursuing a case that, if successful for the union, would result in elimination of positions of many more of its members. Note that these numbers were estimated and shared at the bargaining table using the Akron-AAUP's interpretation that non-tenure-track faculty would be the first category of employees retrenched. The University disagrees with this interpretation, as the collective bargaining agreement clearly indicates that retrenchment is only applicable to only probationary faculty and tenured faculty – non-tenure-track faculty are clearly in neither category. Applying retrenchment (as Akron-AAUP proposes as a remedy) has even more potential adverse consequence than loss of additional faculty members. Requiring retrenchment would result in abolishment of faculty positions in a manner that does not allow for program considerations and would be devastating for the University's academic programs. On the contrary, the use of Article 15, Section 12 was driven by programmatic considerations.

Akron-AAUP did not dispute the University's contention in the Catastrophic Circumstances Letter that "Akron-AAUP's recognition that the COVID-19 pandemic has triggered the "exigent circumstances" of Article 33, Section 3 evidences a concession that the "catastrophic circumstances" of Article 15, Section 12 exists."

In reviewing this matter, the administration finds that the record does not support the Grievants' claim in regard to Area of Dispute #1.

⁶ Article 15, Section 7 requires specific notification dates be met in implementing retrenchment. These are: (a) not later than March 15 in the case of a faculty member holding a first or second one-year contract or three months in advance of the end of a one-year appointment; or (b) not later than December 15 for faculty members holding more than a second one-year contract expiring at the end of that academic year or at least six months in advance of the end of the appointment; (c) for untenured faculty under tenure consideration at least 12 months; and (d) at least 18 months for tenured faculty. Akron-AAUP's contention retrenchment could have been implemented to achieve the cost savings needed in Fiscal Year 2021 is pure unadulterated fiction.

Area of Dispute #2

Grievance States Dispute #2 as:

2. Article 15, Section 12 does not excuse the University from complying with Sections 6 through 11 of Article 15.

Analysis:

Article 15, Section 12 unambiguously states:

- (1) “[t]he 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.”
- (2) “[t]he 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.”
- (3) “[t]herefore, this Section 12 shall not be used to accomplish retrenchment as set forth in this Article.”
- (4) “[i]f 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
 - a. representatives of the University will meet with representatives of the Akron-AAUP to discuss and show evidence of the circumstances described above; and
 - b. 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.”

In more simple terms, the entirety of Section 12 either clearly identifies all of Article 15’s sections as “procedures,” or it refutes the “substantive rights vs. procedures” distinction entirely by declaring that all of Article 15 can be bypassed under Article 15, Section 12. The first sentence indicates that the entire Article is a “procedure for retrenchment.” The second sentence states the grounds for bypassing the Article 15 retrenchment procedures: Section 12 applies when there are: (a) catastrophic circumstances; (b) beyond the control of the University; (c) rendering impossible⁷ or unfeasible the implementation of procedures set

⁷ Impossibility is not entirely related to the timing of retrenchment. As discussed elsewhere, the number of faculty who would need to be laid off under Article 15 to achieve the same cost savings, which faculty would be impacted by Article 15 retrenchment, and the inability of the remaining faculty to teach all of the courses needed to maintain an academic program all make the adherence to Article 15 retrenchment impossible.

forth in Article 15.⁸ The third sentence is critical, as it takes out the entire Article (regardless of any substantive/procedural distinction), and not just Sections 1-4 as Akron-AAUP posits. The fourth sentence states the conditions for meeting with AAUP.

To the extent the grievance mischaracterizes the unambiguous basis for Article 15, Section 12's application, the University denies that interpretation.

Akron-AAUP focuses Area of Dispute #2 on Sections 6 through 11 of Article 15.

The Akron-AAUP does not get to "cherry pick" which Sections of the retrenchment Article it wants the University to follow and which ones that it does not. Several provisions in Article 15 flatly refute the substantive vs. procedural distinction that AAUP attempts to make.

To start, the language in Article 15, Section 12, could not be more clear. As the third sentence of Section 12 states:

"[t]herefore, this Section 12 shall not be used to accomplish retrenchment as set forth in this Article."

This unambiguously confirms Section 12 replaces the entirety of Article 15 without any need for a substantive vs. procedural analysis.

Article 15, Section 2 is titled *Bargaining Unit Reductions through Attrition First*. Section (C) therein states "[i]f, 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." [Emphasis added] This language obviously encompasses Sections 3-11, and it makes no mention of restricting any "following procedures" to Sections 3 and 4 as AAUP contends. Nothing within Section 12 or Section 2(C) suggests a different interpretation.

Article 15, Section 6 is titled *Retrenchment Process* and states "[o]nce the final determination has been made that retrenchment is necessary, the following factors shall determine which bargaining unit faculty within the affected unit(s) will be released..." ... Thus, the very title denotes that Section 6 is procedural.

Article 15, Section 7 is titled *Notice of Release* and states, "[t]he University will provide notice of release to affected members of the bargaining unit in accordance with the following..." This section details the process and timing for issuing such a notice.

⁸ Unforeseen character of a catastrophic circumstance is not required by the second sentence as a condition.

Article 15, Section 8 is untitled and contains two subsections, only one of which is pertinent. Section A addresses the process for placing of released faculty into other available teaching positions.⁹

Article 15, Section 9 details the process for offering reinstatement to released bargaining unit faculty.

Article 15, Section 10 details the process for offering part-time teaching positions in the program of a released bargaining unit faculty member.¹⁰

Finally, Article 15, Section 12 clearly identifies that the University must at least satisfy the requirements of Section 3(A) should Section 12 apply. Section 3(A) incorporates the criteria in Article 15, Sections 2(A) and 2(B), which require normal attrition and voluntary early retirement effort be made.¹¹

Akron-AAUP concedes Article 12, Section 2 through Section 4 are in fact procedures. Then, Akron-AAUP argues Article 15, Section 6 through Section 11 are not “procedures” because they are not required to occur within a specific time period. Procedures regard process, not timing. Akron-AAUP concedes this point in noting Section 6 does not take time and that the Section 7 notice requirement could be modified through mid-term Article 33, Section 3 modification. Akron-AAUP also notes no time burden on the University as to part-time teaching in Section 10. Notably, Akron-AAUP does not provide specific argument for Section 8, Section 9, or Section 11.

Akron-AAUP presented no bargaining history to support its position. The bargaining history supports the plain and unambiguous language in Article 15, Section 12 and Article 15, Section 2(C) – the word “procedures” in Section 12 refers to **ALL** sections of Article 15, except Section 3(A) and by reference the requirements in Sections 2(A) and 2(B). There is no bargaining history suggesting otherwise.

Akron-AAUP presented no basis for its argument that substantive rights exist in Article 15. By the clear and unambiguous language of the third sentence of Section 12, Article 15 is wholly displaced once Section 12 applies. Section 12 recognizes no rights – procedural or substantive as existing once Section 12 applies. Moreover, all of the pertinent sections that AAUP invokes are procedural in nature. The University relied upon this unambiguous language in fashioning its proposed course of action under Section 12.

⁹ Section B, which is inapplicable in this instance, pertains to the narrow circumstance of “consolidation of programs or departments or colleges among any of the public institutions of higher education within Northeast Ohio.”

¹⁰ Article 15, Section 11, which addresses faculty who accept reinstatement and health benefits (paid or COBRA) for released faculty is irrelevant to this grievance. The reinstatement portion arises only when faculty have been reinstated, which has not occurred. AAUP’s grievance does not allege that affected faculty have been denied health benefits provided for in Section 11.

¹¹ The University provided its evidence of compliance with Section 3(A) in its Catastrophic Circumstances Notification.

The University met its obligation to meet with Akron-AAUP and discuss and show evidence as to catastrophic circumstance, such as *force majeure*, and its proposed course of action. During these meetings, the University and Akron-AAUP worked collaboratively to lower the layoff numbers by securing voluntary retirements pursuant to Article 16, Section 11 and other arrangements¹² to generate savings that could offset the original proposed layoff number. These meetings resulted in the University adopting an actual course of action that the Board of Trustees adopted on July 15, 2020. *See, Board Resolution No. 7-7-20*. This action identified 96 bargaining unit faculty who are laid off, including non-tenure track, probationary, and tenured faculty. The percentage of faculty laid off is in approximately the same percentage of the current complement of faculty. Specifically, the University faculty was comprised of about 75% non-tenured and probationary faculty versus 25% tenured faculty. Of the 96 bargaining unit faculty positions reduced on July 15, 2020, about 75% were non-tenured and probationary and the remaining 25% were tenured.

Since July 15, 2020, the University has notified those affected by the layoffs. Notably, the Section 7 procedures regard notification to affected members with deadlines that could not have been met in this circumstance. Here, the University simply does not have the luxury of time, as the Akron-AAUP contends. To require it to follow Section 7, it would take nearly two (2) years to realize the associated savings through the retrenchment process. At the Akron-AAUP's request, Dr. Steve Storck, Interim CFO, presented information to the Akron-AAUP that the University would not be financially viable if it had to wait this long to realize the savings through the retrenchment process. For the Akron-AAUP to argue that the University had the time to follow Section 7 of the retrenchment Article is disingenuous, particularly after they have been presented with the University's financial information and with Dr. Storck's assessment. As mentioned earlier, Akron-AAUP conceded on this point by arguing in its grievance response that a mid-term modification would be required if Section 12 did not eliminate Section 7 procedures. This further supports the University's position.

In terms of Section 8, allowing its application as Akron-AAUP suggests would undo a portion of the financial savings the University secured by invoking Section 12 to address the catastrophic circumstances. In addition, it would require the University to layoff many more faculty and result in significant work load and instructional adjustment. Some academic programs would necessarily be adversely impacted. Similarly (ignoring momentarily that Akron-AAUP fails to allege violations of these sections), Section 9, Section 10, and Section 11 could each also potentially undo a portion of the financial savings, work load, require instructional adjustment impacting academic programs if the reinstatement, first refusal, or reappointment occurred in Fiscal Year 2021. This would place the University in the position of being forced to again invoke Section 12 to deal with the financial impacts of the same catastrophic circumstances not based on what triggered Section 12, but on how Section 12 was implemented. Such a result makes no sense and is unreasonable.

¹² Some of these arrangements are contingent upon Akron-AAUP's adoption of the tentative agreement arrived at by the parties on July 13, 2020, which the Akron-AAUP leadership is on record as opposing.

In reviewing this matter, the administration finds that the record does not support the Grievants' claim in regard to Area of Dispute #2.

Area of Dispute #3

Grievance States Dispute #3 as:

3. The University has not discussed its "proposed course of action" with the Akron-AAUP as required by Article 15, Section 12.

Analysis:

Akron-AAUP contradicts itself by raising this contention. It alleges earlier that the University should have acted sooner – no later than April 15, 2020 – to invoke Article 15, Section 12. Yet, the University had not yet satisfied its obligation to meet with the Akron-AAUP. Akron-AAUP cannot have it both ways. It cannot claim that the University should have acted before it had even met with Akron-AAUP.

Article 15, Section 12 unambiguously states "[i]f 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." To the extent the grievance mischaracterizes the unambiguous basis for Article 15, Section 12's application, the University denies that interpretation. [Emphasis added]

Akron-AAUP concedes the University has met with it since at least April 21, 2020. Akron-AAUP, however, alleges "no aspects of [the University's] proposed course of action have been disclosed." Then, Akron-AAUP claims, rather disingenuously, that the University only disclosed "the bare fact that [it] is invoking the force majeure clause and that [it] does not intend to comply with any other provision of Article 15."

Rather than wait until the University had significant detail around its proposed course of action, the University chose to meet with Akron-AAUP, as is required by Article 15, Section 12. In so doing, beginning in late April 2020, the University sought ideas from Akron-AAUP and input in how to deal with the catastrophic circumstances created by the COVID-19 pandemic.

Akron-AAUP wasted that opportunity. Rather, Akron-AAUP suggested not seeking cost savings from the Akron-AAUP unit and focused itself on arguing that every portion of the University *other than faculty* be cut, reduced, or financially impacted before any reduction or cost savings measures be taken with respect to Akron-AAUP faculty. The Akron-AAUP also focused on "papering" the University with voluminous and burdensome Information Requests when it should have been spending time working with the University to reach solutions on cost savings.

The University already had some of “tools” in place to “cut, reduce or financially impact” the budget outside of the Akron-AAUP unit. And, the University promptly used them while also initiating other actions for it to be positioned to implement other long-term and short-term cost savings measures during Fiscal Year 2021. For example, the University Board of Trustees adopted:

- (a) a series of new rules for its classified employees, including the elimination of bumping rights and the ability to implement furloughs;
- (b) a revised rule, significantly reducing the layoff notice period for administrative professional employees;
- (c) resolutions implementing salary reductions, increased health care premiums, and elimination of retiree health care coverage for non-Akron-AAUP employees.

On July 15, 2020, the Board acted to abolish positions across every sector of the campus. The shared sacrifice of every single employee at the University seemingly is of no consequence to Akron-AAUP. The actions of Akron-AAUP demonstrate its lack of awareness and indifference to its responsibility as an employee 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. Akron-AAUP is not an island and should not be treated as such.

To their credit, the other bargaining units on campus ratified agreements “sharing in the sacrifice” by agreeing to concessions including temporary wage reductions and increases to health care contributions, etc. Some units agreed to new furlough policies, recognizing the need to allow the University flexibility should the need arise this fall, or beyond as well as the elimination of retiree dependent’s health coverage. No area of campus was held harmless. Akron-AAUP wishes to be the exception, to not accept the reality of our catastrophic circumstances.

Eventually, the University and Akron-AAUP explored potential cost-savings measures under Article 33, Section 3 and not Article 15, Section 12. These potential savings helped reduce the amount the University needed through reductions of Akron-AAUP faculty, but they could not come close to realizing the savings necessary for FY21.

On June 24, 2020, when the University had clarity on its proposed course of action, it provided the proposed draft reduction list to Akron-AAUP. At that point, the University and Akron-AAUP worked collaboratively and discussed the proposed course of action, ultimately agreeing upon ways to try to further reduce the number of Akron-AAUP faculty to be impacted by trying to secure additional voluntary retirements and negotiating Article 16, Section 11 incentive retirements.

Akron-AAUP’s contention that the University failed to discuss its proposed course of action lacks merit.

The University and Akron-AAUP representatives met from April 21, 2020 through July 13, 2020 – approximately a dozen times – to discuss and show evidence of: (1) catastrophic

circumstances; (2) the need to bypass Article 15's retrenchment procedures; (3) potential proposed courses of action; (4) the actual proposed draft course of action; and, (5) modifying the actual proposed draft course of action until the actual course of action was identified and implemented.

In reviewing this matter, the administration finds that the record does not support the Grievants' claim in regard to Area of Dispute #3.

For the above reasons, the grievance is **denied** in its entirety, consistent with this decision.

While the parties likely never contemplated utilizing the language they negotiated in Article 15, Section 12, the current catastrophic circumstances, that neither party could have foreseen, have made implementation of retrenchment procedures impossible or unfeasible. The utilization of Article 15, Section 12 was unavoidable.

Finally, the University notes that the remedy requested by Akron-AAUP appears to be declaratory in nature as it seeks to restrict the University "from utilizing the *force majeure* clause" "unless and until" three conditions are met. Two of these conditions have been met – a catastrophic circumstance, such as *force majeure*, exists and the University met with Akron-AAUP and discussed its proposed course of action. The last condition requires the University to do something that Article 15, Section 12 does not require (i.e. comply with Sections 6 through 11). Akron-AAUP has no basis to restrain or otherwise restrict the University's prompt implementation of its Article 15, Section 12 course of action.

The University also notes the grievance only cites Article 15 under "Contract Violations."

A handwritten signature in blue ink that reads "Sidney C. Foster Jr." with a stylized flourish at the end.

Sidney C. Foster Jr.

July 31, 2020

TAB A: ITEMIZATION OF INFORMATION AND DOCUMENTS PROVIDED AND/OR AVAILABLE TO AKRON-AAUP SINCE MAY 22, 2020

- Information and documents covered by a Non-Disclosure Agreement dated May 22, 2020 Catastrophic Circumstances Letter
- Pdf. titled “10 year Comp & Benefits”
- Word document titled “Hypothetical staffing reductions due to COVID”
- Enrollment update as of May 27, 2020; July 1, 2020.
- Beginning on or about May 30, 2020, the University provided Akron-AAUP information regarding consolidation of academic units; temporary reductions of non-bargaining staff and professional employees annual compensation; increasing employee contributions to health plan premiums; eliminating retiree dependent health insurance benefits for non-bargaining unit employees; 3359-26-05.1; 3359-22-01; and 3359-11-02.1; .
- General Fund Compensation and Benefits/FT General Fund Employee Head Counts for FY 2009-2019 (Budget) – provided June 1, 2020.
- Beginning on or about June 3, 2020, the University provided Akron-AAUP information and documents in regard to potential salary reductions and increased health care contributions as well as chair and dean budget planning for 25% reductions in Fiscal Year 2021.
- Information and documents provided by the University in response to Akron-AAUP’s informational requests dated: June 1, 2020; June 13, 2020; July 1, 2020;
- Information and documents provided by the University in response to email informational requests: June 5, 2020 from Jessica Monroe to Steve Nobil; June 25, 2020 from Sandy McNair to Steve Nobil; June 26, 2020 from Sandy McNair to Steve Nobil;
- Beginning on or about June 10, 2020, the University provided Akron-AAUP with information and documents in regard to salary reductions and increases to healthcare premiums for non-bargaining unit faculty and for academic administrators with faculty rank.
- Beginning on or about June 18, 2020, the University provided Akron-AAUP with information and documents in response to *Issues and Questions to Review with the Provost dated June 18, 2020* sent by the Akron-AAUP to the University June 16, 2020.
- Beginning on or about June 18, 2020, the University provided Akron-AAUP with information and documents in regard to a 10-year comparison with non-Akron-AAUP employee groups in regard to RIFs, reductions, and compensation.
- Beginning on or about June 24, 2020, the University provided Akron-AAUP with information and documents regarding the layoff list, layoff methodology, individuals who severed their employment during Fiscal Year 2020 or in Fiscal Year 2021.
- Beginning June 24, 2020, the University provided Akron-AAUP with information and documents regarding 6.18 Athletic reduction Analysis as of June 1, 2020.
- *Hypothetical Number of BUF in Each Unit in Fall 2020 after Retrenchment or Anti-Retrenchment to reach 25% Salary Reduction Scenario* – June 30, 2020
- Documents produced June 24, 2020 by the University to Akron-AAUP.
- Information and documents on the temporary spending authority for the General Fund, Combined Auxiliary Funds, and Combined Sales Funds Budgets for the nine months ended March 31, 2020 (from June 10, 2020 Board meeting).

- June 29, 2020 University response with information and documents – *Response and Context to Akron-AAUP; FY10 FY19 Financial Statement Comparison.*
- July 2, 2020 document regarding number of faculty returning Fall 2020 as of June 16, 2020.
- July 27, 2020 Individual RIF rationale forms.
- Any and all documents, proposals, spreadsheets, or information shared during the course of all University and Akron-AAUP meetings from April 21, 2020 through July 13, 2020, including but not limited to email correspondence between legal representatives of the University and Akron-AAUP.
- Provost Wiencek – *Proposed Plan for Redesigning UA* 5/6/20
- Provost Wiencek – *Final Report: Redesign of the academic structure* 5/28/20
- President Gary Miller – *Redesigning The University of Akron – Update #3* 5/27/20
- President Gary Miller – *Special: Background information on the University’s financial information* 7/10/20
- President Gary Miller – *Video: President Gary L. Miller on UA’s sustainability* 7/17/20
- July 6, 2020 FY State Budget Update from Chancellor Randy Gardner