

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

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

UNIVERSITY OF AKRON CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS	SCHWARZWALD McNAIR & FUSCO LLP Eben O. (Sandy) McNair, IV Jessica S. Monroe 1215 Superior Ave. East, Suite 225 Cleveland, OH 44114-3257 (216) 566-1600 emcnair@smcnlaw.com jmonroe@smcnlaw.com Counsel for the University of Akron Chapter of the American Association of University Professors
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The Administration admits that on April 15, it was “too early to predict the full impact of the COVID-19 pandemic.” *Univ. Br. 96*. But pandemic-related predictions made on April 15 are exactly what the Administration relied on to conjure a projected \$65 million deficit for the 2020-21 fiscal year and abruptly terminate 96 full-time faculty – nearly one-fifth of the bargaining unit. Those “predictions” have promptly proved to be more fear-mongering than realistic projections.

The Administration’s Opening Brief attempts to obfuscate the fact that the projected \$65 million deficit, which was relied upon to terminate the faculty at issue in this case, is now only a \$7.8 million projected deficit according to the budget adopted by the Board of Trustees on August 12, 2020. *See Univ. Ex. 74*. As explained below, this projected deficit is less than the Administration planned to incur this year *before* COVID came to Ohio. Therefore, the Administration cannot establish the “catastrophic circumstances” that its action under Article 15, Section 12 requires.

The pandemic is nationwide, and no other university or college, so far as we are aware, has taken the radical action this Administration is seeking to justify. Its conduct is a frontal assault on academic freedom, collective bargaining, and the faculty who provide the core product of the University.

I. ISSUES TO BE DECIDED

As stated more fully in our initial brief, the issues for the Arbitrator to decide are:

1. Are catastrophic circumstances present such that the Administration may act under Article 15, Section 12?
2. If yes, what procedures of Article 15 are “impossible or unfeasible” due to the catastrophic circumstances?
3. Does Section 12 permit the Administration to disregard Sections 6 through 11 of Article 15?
4. Did the Administration show evidence that clearly documents the need to release bargaining unit faculty and discuss its proposed course of action before taking action that bypassed the retrenchment procedures, as required by Article 15, Section 12?
5. Are non-tenure track faculty within the scope of Article 15?¹

¹ As discussed below, a few days after initial briefs were submitted to the Arbitrator, the Administration adopted yet a different interpretation with respect to NTT faculty under Article 15. It now claims that NTT are covered by

II. BURDEN OF PROOF

The Administration is correct that the union generally has the burden of proof in a contract interpretation case. *Univ. Brief (“Br.”) at 79*. The Akron-AAUP acknowledges that it has the burden of proof regarding its claim that Section 12 does not excuse the Administration from complying with Sections 6-11 of Article 15.

However, the Akron-AAUP contends that the Administration bears the burden of proof regarding the threshold issue in this case – whether or not catastrophic circumstances exist such that the Administration may act under Section 12. With respect to this issue, the posture of the parties is more like a discharge case. Like a just cause provision, the catastrophic circumstances clause permits the Administration to sever employment when certain conditions are met. If just cause does not exist, the discharge violates the contract. Here, if catastrophic circumstances are not found, the Administration’s actions violate the contract.

Elkouri notes that “the party asserting the claim has the burden of proving it.” *Elkouri & Elkouri, HOW ARBITRATION WORKS, 8.9.E*. Here, the Administration is claiming the existence of catastrophic circumstances that threaten its viability as an ongoing concern. The Administration must prove this extraordinary claim.

Elkouri’s treatise also observes that “the burden of proof may depend on the nature of the issue [or] the specific contract provision...”. *Id.* Here, the Administration’s reduction-in-force action clearly violates the contract unless it is permitted by Article 15, Section 12. That section itself requires the Administration to prove the existence of catastrophic circumstances. In fact, Section 12 explicitly requires the Administration to “show evidence of the circumstances described above” – that is, circumstances that are catastrophic, unforeseen, uncontrolled, and which render impossible or unfeasible the implementation of the procedures in Article 15. Therefore, the Administration bears the burden of proving the circumstances justifying its conduct.²

Article 15, Section 12, but not any of the other sections of Article 15. *AAUP Ex. 59 at 3*. Therefore, if the Arbitrator reaches this issue, we ask that the Arbitrator explicitly decide whether NTT are included within the scope of Sections 1-11 of Article 15.

² While the Administration cites nine cases to support its claim that the Akron-AAUP bears the burden of proof (*Univ. Br. 79-81*), none of those cases involve a situation like the one before the Arbitrator here, where the contract requires the employer to demonstrate the existence of circumstances justifying its action. *Franklin Electric Co.*, 122 BNA LA 1421 (Neas 2006) is a straightforward layoff case which did not involve a contract provision where the

Finally, with respect to the burden of proof, it should be noted that the Administration possesses and controls all evidence relating to its financial condition. Given the

employer needed to make an evidentiary showing to justify its action. *Florida Gulf Coast University Board of Trustees*, 2019 BNA LA 46 (Whelan, 2019) is inapposite because it only addresses issues of arbitrability. In addition, this case involved a collective bargaining agreement containing a provision explicitly stating that the grieving party had the burden of proof in all grievances except disciplinary grievances. Further, the arbitrator had this to say about the burden of proof issue: “As a practical matter, which party bears the burden of proof is not of great significance because determinations on the issues presented here will be made in favor of the party with the most persuasive arguments based on the facts, the CBA, and guiding legal principles. R. Abrams, *Inside Arbitration* 302 (2013).” 2019 BNA LA at fn.4. It is respectfully submitted that the Akron-AAUP makes the most persuasive arguments here. In *University of Washington*, 106 BNA LA 390 (Stuteville 1996)(*Univ. Br. at 79-80*), the arbitrator quotes a treatise, stating that the general rule “in non-disciplinary proceedings is that the grieving party – typically the union – bears the **initial** burdens of proceeding and proof. It is therefore usually up to the union to demonstrate that the action taken by management is inconsistent with some limitation, contractual or otherwise.” 106 BNA LA at 393 (emphasis added). Here, the Akron-AAUP has met any initial burden of proof it may have and the burden has shifted to the University to demonstrate that the requisite catastrophic circumstances are present. It is also worth noting that in *Washington*, the union actually argued that the employer used the contract’s layoff provisions as a pretext for justifying what was actually a disciplinary discharge. *Id.* at 393, 398. *Vickers, Inc.*, 43 LA 1256 (Bothwell 1964)(*Univ. Br. 80*) is a subcontracting case which supports the Akron-AAUP’s position given the following statement made by the arbitrator on the burden of proof issue: “Where both the Union and the Company have presented evidence supporting their respective contentions, then the arbitrator must decide which party has presented the more credible evidence. If he rules the credibility issues in favor of the Union, he will decide that it has met its substantive burden of proof and it will win.” *Id.* at 1262-63. Notably, the University, while quoting from portions of the decision both before and after the immediately above quotation conveniently omits this statement. For the reasons detailed herein and in its Opening Brief, the Akron-AAUP has presented the most credible evidence, should be found to have met any burden of proof it bears, and should have its grievance sustained. Further, while the University quotes the arbitrator in *Washington* stating that the substantive burden of proof never shifts (Br. at 80), it again conveniently omits the arbitrator’s further statement that “once the Union as the complaining party has made out a prima facie case, the burden of going forward with the evidence **shifts** to the Company as the responding party.” *Id.* at 1262 (emphasis added). In 2015 BNA LA Supp. 199064 (Weisblatt 2015)(*Univ. Br. 80*), Arbitrator Weisblatt explicitly noted that an issue on point with the one before this Arbitrator was not before him. Specifically, Arbitrator Weisblatt stated that the contract provision “tying management’s right to layoff employees to a justification by legitimate business purposes” was actually before another arbitrator. Therefore, his “Decision makes **no finding or any determination** relating to that separate claim .”(emphasis added). Accordingly, anything Arbitrator Weisblatt states regarding the burden of proof has no bearing on the instant grievance. The decision in 2014 BNA LA Supp. 151640 (Gordon 2014)(Br. at 80) contains no substantive discussion at all on the burden of proof issue and is simply a run of the mill layoff case where the union challenged the layoff order used by the employer. Likewise, *Metropolitan Pier And Exposition Authority*, 2011 BNA LA Supp. 147483 (Bierig, 2010)(*Univ. Br. 80*) contains no substantive discussion of the burden of proof issue whatsoever and only mentions the issue in two sentences. *City of Mattoon*, 128 BNA LA 1753 1757 (Szuter 2011)(Br. at 80-81) is another straightforward layoff case that has no significance to the instant case which is based on the particular contract provisions in dispute. Finally, in 2017 BNA LA Supp. 200727 (Ahearn 2017)(*Univ. Br. 81*), while the arbitrator did write that the union bore the burden of proof in that layoff grievance, he also specifically stated the following: “[t]he question I must ultimately resolve: [is] **[d]id the College exercise its discretion** in a reasonable, good faith reliance on at least one of the reasons expressed in Article 36.2 [the basis for layoff provision]” and that he was “unable to conclude that the layoff was consistent **with the College’s obligation to exercise its discretionary authority reasonably** as I find unpersuasive the evidence offered by the College in support of the reasons expressed in Article 36.2” (emphasis added). The Akron-AAUP submits that the arbitrator’s references to the employer’s need to exercise its discretion in a reasonable, good faith manner and the employer’s obligation to exercise its discretion reasonably, actually support a finding that the employer bore the burden. In sum, the burden of proof cases cited by the University fail to overcome the Akron-AAUP’s demonstration that the University bears the burden of proving existence of “catastrophic circumstances” enabling it to take action under Article 15, Section 12.

Administration's creation, possession, and control of its financial information, it is only logical that it bears the burden of proving its claim of catastrophic circumstances. This is all the more true given the extreme action it has undertaken in eliminating tenured faculty and non-tenured faculty with valid appointments for this academic year. If discharge is the death penalty of disciplinary cases, termination of tenured faculty without notice or regard for tenure, rank, and seniority is a firing squad.

Because the Administration's radical action is only permissible if it establishes the existence of catastrophic circumstances, the Administration bears the ultimate burden of persuasion as to whether catastrophic circumstances exist. For the reasons set forth in the Akron-AAUP's Opening Brief and this Reply, the Administration has failed to do so.

III. THE CURRENT CIRCUMSTANCES ARE NOT CATASTROPHIC AND DO NOT JUSTIFY THE INVOCATION OF SECTION 12.

The Administration claims that catastrophic circumstances exist because there was a pandemic and concludes it is illogical to distinguish between the pandemic and its impact on the University. *Univ. Br. 82*. This is nonsensical. The pandemic presents many hardships for many institutions. However, the unforeseen and uncontrollable nature of the pandemic does not mean that the University is facing "catastrophic circumstances" that render compliance with Article 15 impossible or unfeasible. The record shows that the pandemic has not had the devastating effect on the University's finances that the Administration claims.

A. The University Has Fared Better Than Its Pre-COVID Projections.

The Administration claims that the pandemic has created a financial crisis of catastrophic proportions. However, despite the pandemic, the Administration's most recent projections for FY20 and FY21 are better than anticipated before the pandemic hit Ohio. This is so even though the Administration continues to use an overly pessimistic enrollment assumption for FY21, as discussed in section B.

1. Fiscal Year 2021 (July 1, 2020 to June 30, 2021).

The budget adopted by the Board of Trustees for FY21 calls for a \$7.8M draw on reserves. *Univ. Ex. 74*. This draw is less than the \$9 to 13M draw on reserves that the Administration was planning for FY21 before COVID-19 hit Ohio. The Administration

acknowledges in its own brief that, before COVID, the Administration planned to draw more from reserves than its current budget when it quotes this May 6 communication from the Provost:

When I interviewed in early March [2020], the draw on our reserves was moderate, allowing several years for planning and targeted growth which could bring expenses into alignment with revenue from enrollment and state subsidy. COVID-19 has dramatically changed the situation for all universities in the nation. **Our draw on reserves for the next fiscal year is estimated to be 5-7 times what it would have been if COVID-19 had not happened.**

AAUP Ex. 41, Univ. Ex. 32, Univ. Br. 29 (emphasis supplied).

At the time of this communication, the Administration projected a \$65M deficit for FY21. *Univ. Br. 29*. Sixty-five divided by five is thirteen; sixty-five divided by seven is approximately 9.3. Therefore, before COVID, the Administration was expecting a draw on reserves in FY21 between \$9 million and \$13 million. Again, the budget approved for this year only calls for a \$7.8M draw from reserves. Such a draw on reserves cannot present catastrophic circumstances that render compliance with Article 15 impossible or unfeasible, as, when a larger draw was expected, the Administration had, in the Provost's words, "several years for planning."³ That also means it is possible for the Administration to comply with Article 15.

The 67 positions remaining on the reduction in force ("RIF") list have total salaries of \$5.35 million. *AAUP Ex. 60*.⁴ With a 29% increase for benefits, the cost of the RIF positions for

³ Notably, at the time the Administration was expecting to draw between \$9 to \$13 million from reserves, it had tentatively agreed to 2% raises with the Akron-AAUP for FY21 and FY22. *AAUP Ex. 61*. The Administration had not indicated that it was planning any reduction-in-force or that the attrition attained through voluntary incentive programs had been insufficient. These raises represented increased expenditures of approximately \$1M in FY21, based on the BUF salaries as of FY2020, and additional \$2M in FY22. *See AAUP Ex. 34*.

⁴ At the time of the opening brief, the faculty remaining on the RIF list cost approximately \$7.6M. As noted in footnote 21 of the Akron-AAUP's opening brief, additional separations were expected. In fact, that occurred, lowering the final cost of reinstating faculty remaining on the RIF list to \$6.9 million. *AAUP Ex. 60*.

FY21 would be \$6.9M.⁵ This assumes there would be no temporary salary reductions or increases in health insurance contributions in the new collective bargaining agreement.⁶

Adding this \$6.9M to the Administration’s projected \$7.8M draw on reserves yields a draw of \$14.7M – not substantially more than the \$13M draw that was within the range of expectation pre-COVID. Even when a \$9-\$13M draw on reserves was expected for FY21, the Administration states that the University was in a “relatively positive financial condition” prior to COVID. *Univ. Br. 15*. A difference of less than \$2M cannot move an institution the size of the University of Akron from a “relatively positive” condition to a catastrophic one.⁷

The Administration makes much of the Chancellor’s “warning label” that accompanied the announcement that there would not be the 20% cut in SSI for which institutions had been bracing. *Univ. Ex. 83D*. However, this warning about possible future reductions in SSI is not as dire as the Administration paints it to be.⁸ The Chancellor’s own words are that SSI 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.” *Univ. Ex. 83D*. The Administration does not identify the current projections referenced by the Chancellor or explain whether those projections already account for expected reductions due to the pandemic. The reduction in SSI is a double contingency – if state revenues are significantly worse than unspecific projections, then SSI *may* be reduced. This does not constitute a present catastrophe.

⁵ The Administration claims that this case represents “an \$11 million-dollar expenditure contingency.” *Univ. Br. 56*. This is an affirmative misrepresentation. The President reported to the Trustees on August 12 that this case represents an \$8M contingency. *Univ. Ex. 71 at 8*. The budget adopted for FY21 on August 12 also shows this case as an \$8M contingency. *Univ. Ex. 74 (“No AAUP RIFs (8,163,120)”)*. However, the faculty remaining on the RIF list, provided by the Administration on August 26, shows 67 faculty with salaries totaling \$5.35M, \$6.9M including benefits. *AAUP Ex. 60*.

⁶ The concessions tentatively agreed to by the Akron-AAUP would have saved approximately \$2.8M from the pre-RIF bargaining unit. *AAUP Br. at 17, fn.21; AAUP Ex. 58*.

⁷ President Miller explained to the Board at its August 12 meeting that “the FY21 proposed budget includes a special Coronavirus Relief Fund revenue item (under Miscellaneous Revenues) of \$9.5M.” *Univ. Ex. 71 at 5*. However, the budget reviewed and adopted at this meeting shows miscellaneous revenues of only \$4.1M. *Univ. Ex. 74*. Therefore, it is unclear how (or whether) this revenue is accounted for in the FY21 budget.

⁸ The Chancellor characterizes the favorable change in SSI funding as obviously “substantial.” *Univ. Ex. 83D*.

2. Fiscal Year 2020 (July 1, 2019 to June 30, 2020).

The budget for FY20 (approved in June 2019, long before COVID existed) planned for a draw from operating reserves of \$11.5M. *See Univ. Ex. 43 at 149; AAUP Ex. 15 at 4 (highlighted)*. In the 11-month report for FY20, which included 2.5 months of experience under COVID, the Administration projected it would draw only \$2.6M from reserves for FY20. *Id.* This is the most recent financial information that the Administration has made available for fiscal year 2020 and it shows that the Administration plans to end the year **drawing only 25%** of the amount it had planned to draw from reserves.

Significantly, the 11-month report shows that net tuition and fee revenue was expected to equal 104% of the budgeted amount. *AAUP Ex. 15 at 4*. This is in direct contradiction with the Administration’s claim that the University had a “predicament” with its tuition and fee revenue that had worsened in FY20. *Univ. Br. 90.*⁹

Based on this 11-month report, the University fared substantially better in FY20 than it had planned, despite the sudden occurrence of the pandemic. This occurred without any furloughs, salary reductions, or increases in health care contributions.

Moreover, according to the financial statements, the *budgeted* draw on reserves in recent years was significantly greater than the budgeted draw for FY21, yet, those projections did not cause the Administration to proclaim catastrophe:

FYE ¹⁰	Original Budget Projection – Draw on Reserves (in millions)	Actual Draw on Reserves (in millions)
2019	\$16.2	\$3.8
2018	\$29	\$4.2
2017	\$18	\$0

This summary also shows that the Administration has a habit of projecting significantly more draws from reserves than actually happens – the budgeted draws on reserves for these three

⁹ At the bottom of page 90, there is a table that appears to compare actual tuition and fee revenue for FY20 to the budgeted amount. However, the amount shown for “Actual TGO Revenue” (\$189M) is only for eleven months of the fiscal year. *Univ. Ex. 73 at 149*. In this report, with one month remaining in FY20, the Administration projected \$196.9M in tuition and fee revenue (\$175.612M [Tuition and General Service Fees] + \$21.276M [Other Fees]) – only \$3.3M less than the budgeted amount. This amount is only 2% off from the \$200M projection in the FY20 budget. Here, the Administration is not only cherry-picking numbers, it is misrepresenting the numbers it is presenting.

¹⁰ Data obtained from *Univ. Ex. 1A-1C*.

years total \$63M, but the actual draw from reserves was \$8M. While the Administration may use whatever conservative projections it finds prudent for budgeting, it cannot use unduly pessimistic assumptions to manufacture catastrophic circumstances.

In sum, the fact that the Administration outperformed its projection for FY20 and has a rosier picture for FY21 than it expected before COVID categorically refutes the Administration's claim of catastrophic circumstances due to the pandemic.

B. There Is No \$56 Million Deficit For Fiscal Year 2021.

The Administration's brief repeatedly claims the University is "now" facing a projected deficit of \$56 million for FY2021, reduced from the \$65 million it projected in April. *Univ. Br. fn.38, p.108, 109, 111*. Each time it references this \$56M deficit, the Administration does not cite to any supporting document. The only citations are to the Chancellor's update regarding SSI for 2021, which does not say anything about the University's budget deficit.

The Administration claims that on July 6, the "\$65 million-projected deficit was reduced to a \$56 million projected deficit in response to a FY21 State Budget Update received that day by the University." *Univ. Br. fn. 38.*¹¹ The Administration further claims that it adjusted its budget deficit for FY21 to \$56M after receiving the Chancellor's update on July 6. *Univ. Br. 108*. However, this updated projected deficit was never shared with the Akron-AAUP or otherwise publicized before the submission of briefs on August 21. In fact, Dr. Storck's video, posted on July 10, still refers to a \$65M deficit. The Board resolution abolishing the BUF positions on July 15 cites a \$65M deficit. *Univ. Ex. 68*. Now, even after a budget for FY21 has been adopted which provides for only a \$7.8M draw on reserves, the Administration is still referring to the deficit as "now \$56 million." *Univ. Br. 109*.

As explained in the Akron-AAUP's opening brief, the budget adopted for FY21 ignores current enrollment information. When the enrollment projections as of August 12 are used, there is a projected surplus of \$2.7M. *AAUP Br. at 17*. Subtracting the \$6.9M cost of reinstating the severed faculty from this \$2.7M surplus results in a deficit of only \$4.2M. But even this number

¹¹ Note that this statement is inconsistent with the Administration's claim that the \$65M deficit "became reality" on May 6. *Univ. Br. fn. 48*. A projection becomes reality when it happens – the projection could not become reality months before FY21 even began. The Administration also claims that the catastrophic circumstances "arose" on May 6 when the \$65M deficit was projected. *Univ. Br. 29-30*. Again, this projection existed as early as April 15. *See AAUP Ex. 8, p.8*.

overstates the issue, because the Akron-AAUP had agreed to temporary salary reductions of approximately \$2.4M and health care savings for the second half of FY21 of approximately \$0.4M. *AAUP Br. at 17, fn.21; AAUP Ex. 58*. Without the faculty on the reduction-in-force list, the savings from these concessions for FY21 would be approximately \$2M.¹² When this \$2M is added in, the projected deficit would be only \$2.2M.

Moreover, we now have the final enrollment numbers for the Fall 2020 semester, and there has been a further improvement of 1% from the August 12 projections relied on in the Akron-AAUP's opening brief. That is, the Fall 2020 enrollment headcount is down 7.1% from 2019, versus the August 12 update showing an 8.1% decrease. *AAUP Exs. 70, 13*. As estimated in the Akron-AAUP's opening brief, each 1% improvement in enrollment represents approximately \$1.5M in additional revenue. *AAUP Br. 13*. Therefore, this additional 1% improvement in enrollment nearly wipes out the \$2.2M deficit that would result from reinstating the laid-off faculty. The budget would be nearly balanced, with a draw on reserves of less than \$1M – a far cry from catastrophic circumstances.

The Administration fails to justify assuming a 15% decline in enrollment for its proposed budget. In fact, the Administration's refusal to acknowledge the actual enrollment numbers is startling. In its brief, it states that the August 12 enrollment numbers were "only slightly better" than the May 6 projections. *Univ. Br. 50*. This is an incredible claim. The May 6 enrollment update shows an 18.7% decline in fall course registrations. *Univ. Ex. 26 at 11*. On August 12, it was an 8.1% decline. This is less than half of the decline projected on May 6. It is not accurate to characterize a reduction of more than 50% as "only slightly better."

Interim CFO Dr. Storck created a memorandum dated August 18, which was submitted with the administration's brief on August 21. *Univ. Ex. 83*. This memorandum will be discussed more fully below. Here, we want to point out Dr. Storck's refusal to acknowledge the improved enrollment numbers when he states:

[T]he University saw such signs as summer term enrollment course registrations down 16.9% (April 7, 2020), fall course registrations down

¹² See *AAUP Ex. 62* – savings modeling without RIF list faculty. This shows salary reduction savings of approximately \$1.66M and health care savings of \$600,547. Only half of the health care savings would be recognized in FY21, so $\$1.66M + \$300,000 = \text{approx. } \$2M$. This model is not exact because it does not include all new hires or faculty who have already been removed from the RIF list for continued employment – if anything, it underestimates savings because it only includes 376 BUF when, without the RIF list faculty, there are 420 BUF this Fall 2020 semester. *AAUP Ex. 35*.

by 16.7% (May 12, 2020) and new freshmen confirmations down 19.1% (May 13, 2020).

Since that time, the anticipated drop in overall enrollment has **improved somewhat** and the University tempered its budget reduction efforts accordingly.

Univ. Ex. 83 at 7 (emphasis supplied).

Dr. Storck does not identify the extent of this “somewhat” improved enrollment, when in fact, the decline in overall fall enrollment as of August 12 (8.1%) was less than half of what the Administration projected (20%) to come up with a \$65M deficit. The “tempering” of the budget reduction to which Dr. Stork refers is an adjustment of the enrollment projection from -20% to -15%. Ignoring the additional 6.9% improvement that was known as of August 12 is to ignore an increase of projected revenue of approximately \$10 million (*see AAUP Br. at 13*). This amount would entirely cover the salary and benefits of the faculty on the layoff list (\$6.9M).

In this memorandum, Dr. Storck is precise when discussing problems, quoting specific reports and percentages. But when there are improvements, he is vague (e.g., enrollment “improved somewhat”). There are people’s livelihoods on the line in this case, many of whom will effectively have their academic careers ended if they are not reinstated. For the University’s senior administration to be anything but transparent and honest about how their worst fears have not materialized is not only a violation of the collective bargaining agreement, it is also morally reprehensible.

The Administration’s brief does not dispel the conclusion that an overly pessimistic assumption for enrollment (-20%) was used to project the \$65M deficit, which in turn was relied upon to lay off 96 bargaining unit faculty. Nor does the Administration justify its continued use of an overly pessimistic enrollment assumption (-15%) for the FY21 budget.

As of August 19 – one week before classes began – overall course enrollments for the semester were down only **7.4%**. *Univ. Ex. 26*. As of the first day of the Fall semester, total enrollments were down 7.1% from 2019. The 15% decline used by the Administration for the FY21 budget is more than **double** the actual decline. *Univ. Ex. 74*.¹³

¹³ This 15% decline translates into approximately \$20M less in net tuition and fee revenue on the proposed budget. *Univ. Ex. 74*. Therefore, in line with our estimations above, the 7.5 percentage-point difference between actual enrollment and the Administration’s projections represents approximately \$10M in net tuition and fee revenue. This is significantly more than the \$6.9M cost of the faculty positions remaining on the RIF list.

Finally, it must be pointed out that before the pandemic, the Administration expected a 4% to 6% decline in enrollment for FY 20. *Univ. Br. 25*. This expected decline was not considered “catastrophic.” A decline of 7.1% for FY21 is only 1.1% worse than what the Administration expected pre-COVID for FY20. Rather than a sudden and unforeseen event, a 7% decrease in enrollment is consistent with the trend noted by the Administration in the table on pages 109-110, showing enrollment declines of 8%, 5%, 7%, and 6% from 2016 to 2019.

C. Historic Analysis of University Revenue Sources Affirms There Is No “Catastrophe.”

Overall, the Administration is inconsistent in its assessment of the University’s finances. Prior to COVID, the University’s finances were “being managed effectively” (p.9), but there have been significant draws from reserves in recent years (p.10). The Administration asserts that since 2011, its financial reports have demonstrated “fiscal method and rigor.” *Univ. Br. 9*. This is a different story than the one told at the April 15 Board meeting, where it was noted that the “University of Akron was operating within an unsustainable financial model prior to the COVID crisis.” *AAUP Ex. 8 at 11*.

The Administration explains that prior to COVID, everything was manageable, but then fills pages detailing declines in tuition, enrollment, and SSI over recent years. Perhaps recognizing that COVID has not presented the sudden financial catastrophe it claims, the Administration is building a case for a non-catastrophic financial exigency or other bases for retrenchment under Article 15, Section 1(A). Such a case is irrelevant to this arbitration, because the Administration elected to proceed only under Section 12 when it terminated these faculty, and Section 12 requires proof of catastrophic circumstances.

A further analysis of the enrollment and SSI data cited by the Administration shows there is no sudden and disastrous effect on these revenue sources. Rather, the declines this year are not significantly different from the trajectory established in recent years, which the Administration has had time (and continues to have time) to address.

1. SSI

The Administration characterizes a 3.65% decline in SSI funding from FY18 to FY19 as “arguably catastrophic” but “more abrupt than catastrophic.” *Univ. Br. 84*. The Administration then claims that COVID moved the University’s financial circumstances squarely into

catastrophic. *Id.* However, before COVID, the Administration was not planning any reduction-in-force of BUF and had agreed to 2% raises for FY21 and FY22. *AAUP Ex. 61.* This was so even though the budgeted SSI for FY20 was approximately 4% (or \$4M) less than the budgeted SSI for 2019. *See Univ. Br. 85, table at bottom.*

The Administration claims that the 4% reduction in its SSI funding for FY20 (a loss of approximately \$3.9M) as a result of COVID “severely impacted the University’s financial standing” and “forced the University in the position of needing to close the resulting deficit created by this single revenue line reduction within 39 days...”. *Univ. Br. 32, fn.13.*¹⁴ The Administration does not identify what FY20 expenditures it reduced to accomplish this feat and end up drawing less on reserves than had been planned before the sudden reduction in SSI for FY20.¹⁵ Obviously, this reduction in SSI was not so significant that it prevented the University from emerging with a better outcome than it had budgeted for.

The Administration notes that it has budgeted \$90.4M in SSI revenue for FY21. *Univ. Br. 87.* It then shows this as an 8.7% decline from the SSI budgeted for FY20. However, it is only a 5% decline from the actual SSI revenue for FY20 (\$95.2M). The Administration is cherry-picking numbers to try to paint a more negative situation what actually exists. This cherry-picking is apparent when one looks at the SSI allocations for years that the Administration conveniently excludes from its tables, which start with FY17:

¹⁴ On page 86, the Administration claims that the actual SSI received for FY20 (\$95,193,364) was 8.35% less than the SSI received in FY19 (\$101,851,513). It is unclear how the Administration arrives at this number; \$95.2M is 93.4% of \$101.9M, which means the reduction was approximately 6.6%.

¹⁵ On page 52, the Administration summarizes the actions it took to reduce expenditures. None of the items listed affected FY20. Furthermore, the amounts listed in the “Estimated savings” column add up to \$20,909,000 for FY21. Significantly, more than half of this amount is attributed to the Akron-AAUP reduction in force (\$11M). It is unclear how the actions taken add up to the claimed \$44M in savings cited after the table ends. *Univ. Br. 53.*

FY Ended ¹⁶	Actual SSI Revenue (rounded, in millions)	Change from Prior Year
2011	108.7	
2012	94.2	-13.3%
2013	94.7	0.5%
2014	96	1.4%
2015	98.9	3%
2016	106.3	7.5%
2017	108.6	2.2%
2018	105.7	-2.7%
2019	101.9	-3.6%
2020	95.2	-6.6%
2021 (budgeted) ¹⁷	90.4	-5%

As this table shows, the decrease in SSI for FY20 that the Administration claims is catastrophic merely returns the University to the level of support it received 7-8 years ago. Significantly, in 2012, the University encountered in a single year a larger decrease than it now expects over two years. Such a sharp decrease did not require mass layoffs of faculty with no notice.

The average SSI amount for this ten-year period (2011-2020) is \$101 million. The amount of support that the University received in 2016 and 2017 was significantly higher than average after a 7.5% increase in support in 2016. The Administration selectively starts its SSI tables from 2016 or 2017. *See Univ. Br. at 10, 84-86.*

In contrast with the increase and decrease in SSI over this period, the number of total full-time faculty as of Fall 2019 (650) was lower than it had been at any point since 2000. *See AAUP Ex. 54.*

¹⁶ Sources: Univ. Exs. 1A-1I, *Univ. Br. 86.*

¹⁷ *Univ. 74.*

At the time of peak SSI in FY17, the bargaining unit had approximately 669 faculty members.¹⁸ By Fall 2019, the number of BUF was only 567 – a reduction of 102.¹⁹ Thus, the number of BUF was cut by approximately 15% in only three years (from FY17 to FY20) – a greater decrease than the reduction of SSI, which fell by 12.9% (FY17 to FY20).

If the 67 faculty at issue in this case are restored, the bargaining unit will stand at 487 for Fall 2020. This is a reduction of 182 – or more than **27%** – from the number of BUF at peak SSI in FY17 (669). In contrast, the decline in SSI from FY2017 to FY21 (budgeted) is \$18.2M, a decline of about **16.8%** in SSI from its peak in FY2017. Meanwhile, salaries for 12-month Athletics employees *increased* by 19% from FY17 to FY20. *AAUP Ex. 34C.*²⁰

The University is projected to receive 5% less in SSI in FY21 than it received in FY20. Such a shortage could be addressed through temporary salary reductions while the Administration assesses its needs for faculty in the coming years and provides appropriate notice to those it must release, if any. Pointing out these facts is not to question the Administration’s “discretion.” *Univ. Br. 93-94.*²¹ The Administration can choose to spend money unwisely if it wishes, as it has been doing for years. However, the Administration cannot claim it has no choice but to further gut the faculty, let alone that it must do so without following the provisions of Article 15.

¹⁸ *AAUP Ex. 34A, Tab FY17; see also AAUP Ex. 74 (showing 664 BUF as of 12/1/16).* AAUP Exhibit 74 is a summary of information contained in Records of Compensation routinely provided by Human Resources to University Archival Services. The backup lists for this summary are provided electronically. The Record of Compensation dated December 1, 2016, shows 664 AAUP bargaining unit members, while the salary list provided by the Administration for the 2016-17 fiscal year shows 669. *See Ex. 34A, also provided electronically.* We do not consider this discrepancy significant, especially because faculty may move in and out of the bargaining unit during the year. We obtained the Records of Compensation data summarized in Exhibit 74 because the faculty numbers provided by the Administration in University Exhibits 3 and 4 are not limited to bargaining unit faculty.

¹⁹ *AAUP Ex. 34A, Tab FY20; see also AAUP Ex. 74 (showing 556 BUF as of 8/2/19).*

²⁰ Note that the salary pool for athletics is only slightly less in FY21 than it was for FY17, and the FY21 includes temporary one-year pay reductions, without which, the salary cost for athletics would actually be higher than it was in FY17. *AAUP Ex. 34.* The salary data provided by the University in August 2020, which this information summarizes, is being provided electronically with this Reply Brief and labelled Exs. 34A-C.

²¹ The Administration’s claim that the Akron-AAUP concedes there is a catastrophic circumstance by questioning the Administration’s budgetary priorities is preposterous. *See Univ. Br. 93-94.* The Administration’s claim that the Akron-AAUP is foreclosed from arguing that subsequent circumstances nullify the Administration’s invocation of Section 12 is equally baseless. *Univ. Br. fn. 39.* The “subsequent circumstances” since April 15 have proven the Akron-AAUP’s contention that the Administration was exaggerating its financial woes, particularly the extent to which its financial troubles are due to COVID. Moreover, the Administration cannot be permitted to rely on its mere fears of catastrophe to show catastrophic circumstances under Section 12.

In its brief, the Administration glosses over the fact that its projected 20% decline in SSI is now only an 8.8% decline from the amount budgeted for FY20. *Compare AAUP Ex. 8 at 10 with Univ. Ex. 74.* The \$65M deficit projection assumed SSI of only \$79.2M. The 8.8% decline now projected is *less than half* of the projected 20% decrease the Administration relied on to manufacture the \$65M deficit, which in turn was relied upon to justify the reduction in force.

2. Enrollment.

The Administration's touted 24% decline in enrollment over 11 years is not evidence of catastrophic circumstances – it is not even abrupt. *Univ. Br. 88.* Rather, it is a gradual change over time.

Moreover, similar to its selective start date for SSI comparisons, the Administration starts its enrollment comparisons at a high-point. In 2000, the undergraduate headcount was 18,905. The undergraduate headcount bounced between 18,723 and 20,668 from 2000 to 2007. The high undergraduate enrollment from 2009 to 2012 – ranging from 23,277 to 25,190 – was an anomaly fueled by the 2007-2009 Great Recession.²² The University conveniently begins looking at enrollment numbers from 2008 or 2010. *Compare Univ. Exs. 2 & 3 with AAUP Ex. 54.*

During the recessionary enrollment bump, the University did not run out and hire a lot of full-time bargaining unit faculty. The Administration is misguided in its assessment of the bargaining unit size relative to enrollment levels. *See Univ. Ex. 3.*²³ While undergraduate enrollment increased by 34% from 2005 to 2011,²⁴ the number of full-time faculty increased by only 11%.²⁵ Meanwhile, the number of (non-bargaining unit) part-time teaching faculty

²² Total postsecondary enrollment in the United States increased from 17.2 million in 2006 to 20.4 million in 2011. It subsequently decreased to 19.1 million in 2015. *AAUP Ex. 63(U.S. Census Bureau Report).* Since the mid-twentieth century, postsecondary enrollment has increased during recessionary periods. *Id.*

²³ Exhibit 3 appears to include non-bargaining unit faculty in its "Faculty" line. There were only 695 BUF as of October 2010. *AAUP Ex. 74.* Exhibit 4, which shows 820 faculty for 2010, also includes non-bargaining unit faculty. Full-time faculty members in the School of Law and full-time Visiting faculty are not in the bargaining unit. Note the Administration's inclusion of Law enrollment and faculty on page 88 is irrelevant – Law faculty are not part of the bargaining unit.

²⁴ From 18,723 to 25,190. *AAUP Ex. 54.* Note Exhibit 54 was obtained from the University's Institutional Research website: <https://www.uakron.edu/ir/other-university-data.dot>.

²⁵ From 725 to 803. *AAUP Ex. 54.*

increased by 22%.²⁶ *AAUP Ex. 64*. Thus, the enrollment bump was mostly covered by part-time faculty. The subsequent decrease in enrollment cannot be used to justify further elimination of full-time faculty through the reduction-in-force at issue here. As noted above, even if the 67 laid-off faculty are restored in this arbitration, the bargaining unit will stand at 487 for Fall 2020. This is a reduction of 182 – or more than **27%** – from the number of BUF in Fall 2016 (669), which was already lower than the 685 members in Fall 2011 at the peak of undergraduate enrollment. *See AAUP Ex. 74*.

In short, the bargaining unit has already been over-reduced in proportion to enrollment declines, even though it had not increased in proportion to enrollment increases.

D. Unknown COVID Risks Do Not Constitute Present Catastrophic Circumstances.

The Administration’s brief frets about what unknown potential effects the pandemic could have on the University. *See Univ. Br. 21-22, 55-56, 92-93*. These fears – based solely on speculation – cannot be used to establish catastrophic circumstances. The Administration claims the migration to online instruction in the spring was at “great cost” but fails to identify this cost. *Univ. Br. 53*. It certainly was a great cost for bargaining unit faculty who had to quickly adapt their course materials to a different format with no additional compensation. And again, the year ended better than the Administration had anticipated.

The Administration also frets about high unemployment and the potential negative impact on enrollment in the future. The Administration ignores that postsecondary enrollment tends to be counter-cyclical and actually increases in recessionary periods. *See AAUP Ex. 63*.

Whatever boogeymen the Administration conjures are not a present reality, and cannot be used to justify the summary elimination of bargaining unit faculty under Article 15, Section 12.

E. Dr. Storck’s Critique of Dr. Fichtenbaum’s Report Does Not Prove Catastrophic Circumstances.

The Administration discusses Dr. Storck’s critique of Dr. Fichtenbaum’s analysis of the University’s finances. *Univ. Br. 64-67*.²⁷ This “critique” was created three days before the

²⁶ From 861 to 1,052. *AAUP Ex. 64*. This exhibit is also from the University’s website:

https://www.uakron.edu/ir/docs/Employee%20Summary_2019.pdf.

²⁷ Dr. Fichtenbaum’s original report, which University Exhibit 83 “critiques”, is included with this Reply as AAUP Ex. 66. Dr. Fichtenbaum’s Report analyzes the University’s finances through FY 2019 (ending June 30, 2019).

Administration filed its opening brief. *Univ. Ex. 83*. Dr. Storck's report cannot change the fact that the budget adopted for FY21 projects only a \$7.8M deficit (and, as explained above, this relies on an overly pessimistic enrollment assumption).

Dr. Storck's submission is an unpersuasive, last-minute attempt to rebut the analysis provided by Dr. Fichtenbaum. For the reasons set forth in Dr. Fichtenbaum's response (*AAUP Ex. 65*), Dr. Storck's "critique" should be dismissed. Dr. Storck does not accurately describe Dr. Fichtenbaum's prior statements, and where the two disagree, Dr. Fichtenbaum is correct.

The Administration's Brief lists 4 bullet points taken from Dr. Storck's critique, which it claims illustrate Dr. Fichtenbaum's errors. *Univ.Br. 65*. Rather than quoting from the Administration's brief, we will quote directly from Dr. Storck's submission (*Univ. Ex. 83*) and Dr. Fichtenbaum's response (*AAUP Ex. 65*).

Dr. Fichtenbaum's original report states:

"Total revenues for the University in 2019 **were \$394.5 million**. Compare that to General Fund revenues of \$265.3 million.

AAUP Ex. 66 at 62 (Emphasis added). Dr. Storck mischaracterizes this statement as follows:

The AAUP Report erroneously concluded that the University's **total** revenues for **General Fund budgetary** use were \$394 million and that there was \$129.2 million available to add to the General Fund to cover operation expenses. The University's operating budget consists of three funds: the General Fund, the Auxiliary Enterprises Fund, and the Sales and Services Fund.

Univ. Ex. 83 at 3. Dr. Fichtenbaum clearly stated that total revenues were \$394.5M and that General Fund revenue was \$265.3M. Dr. Storck plainly misrepresents Dr. Fichtenbaum's accurate statement. Dr. Fichtenbaum responds as follows:

My report stated: "Total revenues for the University in 2019 were \$394.5 million." Dr. Storck misrepresents my statement on page 3 of his Memorandum, claiming: "The AAUP Report erroneously concluded that the University's **total** revenues for **General Fund budgetary** use were \$394.5 million and that there was \$129.2 million available to add to the General Fund to cover operating expenses." I never used the terminology "for General Fund budgetary use" nor did I claim that there was \$129.2 million available to the General Fund for budgetary use.

AAUP Ex. 65 at 1.

Dr. Storck says:

The General fund budget is one of three components of the University's operating budget and thus represents only a portion of the total operating budget. However the AAUP Report erroneously states it represents the University's total operating budget.

Univ. Ex. 83 at 1. Dr. Fichtenbaum responds:

Dr. Storck's presentation regarding the need to cut expenditures by \$65 million was based solely on his analysis of the University's General Fund Budget. I was making the point that the General Fund Budget covers only a portion of the University's planned spending because I was well aware of the fact that there was also a Budget for Auxiliary Enterprises and a Budget for Sales and Services. First, for the record I will state that budgets are merely plans and ultimately what matters is what actually happens. The point I was making was Dr. Storck was looking only at a portion of the University's actual revenues by focusing on the General Fund and ignoring the other funds. This, in my view, is plain error; one needs to review all revenue sources and expenditures to have an accurate view of the University's finances.

AAUP Ex. 65 at 1.

Dr. Storck incorrectly asserts:

The AAUP Report appears to create its own statement or compilation of revenues. . .

Univ. Ex. 83 at 3. Dr. Fichtenbaum responds:

[Storck] claims that I have created my own definition of total revenue which is inconsistent with GAAP and GASB. This claim is clearly false because the Ohio Department of Higher Education ("ODHE") calculates total revenue in exactly the same way as do I when they calculate total revenue for the SB-6 scores.

Attached as Exhibit A is ODHE's financial ratio analysis for FY2019. In this document, ODHE shows total revenue for University of Akron at \$394,496,780. This number is obtained by adding operating revenues, non-operating revenues, state capital appropriations and other revenue, just as I did in my Report.

Dr. Storck in fact admits precisely the point that I made by comparing the General Fund to the total revenue from the financial statements when he

writes: “In short, the budget does not contain all of the revenues and expenses that are included in the audited financial statements.”

AAUP Ex. 65 at 1-2.

We could continue recounting Dr. Storck’s erroneous claims and Dr. Fichtenbaum’s rebuttal, but it would be perhaps be more efficient for the Arbitrator to simply read Dr. Fichtenbaum’s rebuttal from beginning to end. Much of what is addressed in Dr. Storck’s critique and Dr. Fichtenbaum’s response relates to the University’s financial condition as of June 30, 2019 and, as both experts acknowledge, that condition is not especially relevant to the current situation. Thus, we will end by emphasizing Dr. Fichtenbaum’s observations regarding where the University’s current financial condition:

Finally, let us look at the projected revenues and expenses for the first 11 months of FYE June 30, 2020, as set forth in the Administration’s own document and attached as Ex. 15 to the Akron-AAUP’s Opening Brief and discussed in detail on pages 15-17. The total revenues and expenditures for all three funds of the University (General Fund, Auxiliary Fund and Sales Fund) projected revenue is \$312.2 million and projected expenditures are \$296 million which is a surplus of \$16.2 million. So, to repeat my statement where is the deficit? If there is a deficit in the General Fund, it is because they are transferring \$19 million to cover the deficit in intercollegiate athletics. The only structural deficit at the University of Akron is the deficit for intercollegiate athletics.

AAUP Ex. 65 at 4-5. Clearly, the University is nowhere near being able to claim that the current situation is one that meets the stringent conditions for invoking Article 15, Section 12.

F. Shared Sacrifice.

The Administration’s brief reports that other bargaining units have agreed, and non-represented employees have had imposed on them, wage concessions, furloughs, benefit reductions and elimination of retiree healthcare dependent benefits. *Univ. Br. 47-48.* The Administration continues:

Akron-AAUP is the only employee unit at the University who [sic] has not contributed to the FY20 or FY21 budgetary shortfall though wage and benefit concessions.

Id. at 48 (Underlining in original.)

There are several misrepresentations in these claims. First, no employees have actually been furloughed; the Administration merely obtained rules or collective bargaining agreements permitting furloughs in the future. *See AAUP Ex. 27, #3*. Moreover, no employees “contributed” to FY20 savings through furloughs, pay reductions, or health care increases. Pay reductions were not effective until the start of FY21, and health care changes are not effective until January 1, 2021. *See AAUP Ex. 22, Univ. Exs. 43,45,56*.

The Administration continues:

But for the savings achieved through abolishment of positions through Resolution 7-7-20 *Approval to Abolish Bargaining Unit Faculty Positions (see UA Exhibit 68)*, Akron-AAUP has not contributed to the FY21 budget deficit striking against basic notions of fairness and equity. This is particularly significant given that Akron-AAUP historically experiences less position decline (-18.8%) as compared to others, and Akron-AAUP has also historically enjoyed higher salary increases as compared to others.

Univ. Br. 63.

The Administration paints a grossly distorted picture. The Administration is effectively claiming that because the number of bargaining unit faculty declined by the lowest percentage over the years, it is now their turn. *Univ. Br. 12*. The Administration claims that bargaining unit faculty have declined by 19.9% from 2010-19, less than any other employee group. *Univ. Br. 12, Univ. Ex. 3*.²⁸ First, it must be noted that the data the Administration is using is from Fall 2019 – over one-year ago. This data ignores the 48 bargaining unit faculty who departed at the end of the 2019-20 academic year.²⁹

²⁸ Note that some library faculty are included in the bargaining unit – it is unclear which “Library Faculty” the Administration includes in the library faculty category versus the bargaining unit category in its Brief and in University Exhibit 3. It is also unclear what numbers the Administration is using to determine a 19.9% decline as the data points in Exhibit 3 are not labeled. The data in AAUP Exhibit 74 is clearly limited to bargaining unit faculty and includes more recent numbers as well as the effect this Arbitration will have on the number of BUF.

²⁹ Attached as AAUP Exhibit 73 is a list of 48 bargaining unit faculty that separated from the University in May 2020.

The outdatedness of this data is very significant. The graph that is University Exhibit 3 appears to show approximately 600 faculty members for the Fall semester of 2019³⁰ – however, as of September 30, 2019, there were only 567 bargaining unit faculty. *AAUP Ex. 68*. Moreover, at the end of the 2019-20 academic year, there were only 518 bargaining unit faculty. *AAUP Ex. 69*.³¹ University Exhibit 3 is simply not an accurate picture of the bargaining unit at the time the layoffs were planned and implemented.

In fact, from Fall 2010 to June 2, 2020 – *before* the reduction in force at issue in this case – the bargaining unit faculty had been reduced from approximately 695 to 518. *AAUP Ex. 74 (showing 695 BUF as of October 2010); AAUP Ex. 69 (518 in bargaining unit as of June 2020)*. This is a reduction of 177, or approximately 25%. If the Arbitrator sustains the grievance, the bargaining unit will stand at 487 for FY21. *See AAUP Exs. 35, 60, and 74*. This is a reduction of 208 since Fall 2010, or approximately 30%. The Administration’s claim of a 19.9% reduction is inaccurate.

The Administration’s exhibit further undermines its point. University Exhibit 4 shows that full-time faculty as of Fall 2019 had decreased by 18% – not meaningfully less than the 20% decline shown for all general fund full-time employees. When the 48 faculty who separated at the end of the 2019-20 academic year are factored in, the decrease in full-time faculty is 23.5%. However, the number of full-time faculty overall is less relevant than the number of actual bargaining unit faculty. It appears that both University Exhibits 3 and 4 include non-bargaining unit faculty (e.g. law and/or visiting professors). *AAUP Exhibit 74* is limited to bargaining unit faculty.

With respect to other concessions, the Akron-AAUP agreed to the same salary reduction scale and equivalent health care increase as other University employees. *See AAUP Ex. 6*. Indeed, the Akron-AAUP proposed even deeper salary cuts if more faculty jobs could be saved. *See AAUP Ex. 29*. The Administration rejected the latter proposal and, as explained in our

³⁰ Not that this number does not match University Exhibit 4, which shows 660 faculty. It is unclear whether “faculty” in Exhibit 4 is limited to bargaining unit faculty. The numbers are also significantly different than the numbers in AAUP Exhibit 54, which comes from the University’s Institutional Research website.

³¹ AAUP Exhibits 68 and 69 are the bargaining unit lists that the Akron-AAUP uses to track membership, with irrelevant columns hidden. Bargaining unit lists are periodically provided by the Administration. The Administration also provides updates about changes to the bargaining unit, *see, e.g. AAUP Ex. 73*.

opening brief, has revoked its request for midterm modifications which would have permitted the Arbitrator to rule on these concessions.

No other employee group was being asked to have 20% of its workforce severed in one fell swoop, without any advance notice, without any consideration of objective criteria like rank and seniority. Other employee groups are not tenured and do not have multiple-year appointments as do long-serving NTT. Moreover, even if the Administration were correct that the bargaining unit needed to be reduced further, it could do so by following the procedures in Sections 1-11 of Article 15.

In short, the Akron-AAUP bargaining unit was willing to “contribute” to reduced expenditures, at least equal to others, but was not and is not willing to concede the draconian reduction-in-force which undermines the University’s academic mission.

G. Athletics Threaten The Viability Of The University.

The Administration makes the dramatic claim that “the institutional viability of the University is at stake in this case.” The amount of money at issue in this case is \$6.9M. If what the Administration claims is true, then it is jeopardizing the University’s institutional viability for football, which ran an \$8.5M deficit in FY2018 and has incurred no meaningful, permanent reductions for FY21. *AAUP Ex. 67*.³²

IV. SECTION 12 DOES NOT EXCUSE COMPLIANCE WITH SECTIONS 6 THROUGH 11.

The Administration’s arguments regarding the scope of Section 12 are unpersuasive.

A. Section 5 Is The Dividing Line.

The Administration claims that the Akron-AAUP’s “failure” to categorize Section 5 is “inexplicable.” *Univ. Br. 114, fn. 51*. Section 5 merely provides that the procedures in Sections 2 through 4 must be followed before the Board may act to retrench the faculty. Section 5 is the dividing line. Sections 2-4 precede the Board making a final determination to implement

³² Note that the FY2019 audit (*AAUP Ex. 31*) shows a deficit of \$4.7M for football. The substantial difference appears to be due to the debt service on the football stadium (\$3.76M in 2018) being moved from the football column to the “Non-Program Specific” column (which increased from \$1.7M in 2018 to \$4.96M in 2019). *AAUP Ex. 31, p.3; AAUP Ex. 67, p. 3*.

retrenchment. Sections 6-11 constrain the manner in which faculty may be retrenched. This clear distinction supports the conclusion that, after complying with the requirements of Section 12, the Administration is only excused from satisfying the procedures of Sections 2-4.

The statement in Section 12 that “this Section 12 shall not be used to accomplish retrenchment as set forth in this Article” means that Section 12 may not be used to *accomplish* retrenchment – retrenchment can only be accomplished by complying with Sections 6-11. However, under Section 12, the decision regarding whether to implement retrenchment can be reached without full compliance with the Article.

In addition, the exception listed in Section 12 – that the University must provide evidence and discuss its proposed course of action – indicates that the provisions excepted by Section 12 are the procedures intended to ensure shared governance and faculty participation in the decision to retrench faculty. Section 12 provides “consultation-light” for those situations that are too sudden and dire to make their way through a Joint Committee and all affected units’ faculty. This is no small matter – the inclusion of faculty in such decisions is a core component of AAUP negotiating goals, and, as the Administration details in pages 97-99, this can be a lengthy process.

The fact that Section 12 applies only to Sections 2-4 is buttressed by the fact that Section 12 still requires some aspects of Section 3 to be followed. If Section 12 nullified all of the provisions of Article 15, it would be absurd to infer that this is the one provision in the entire article that the Akron-AAUP would not let slide. Although shared governance is an important goal of the AAUP, it would not be prized over notice in advance of release or consideration of tenure status and rank.

In summary, Sections 2-4 provide procedures for faculty input before the Board makes a final determination to retrench faculty. Sections 6-11 provide protections for faculty when retrenchment occurs. Section 12 provides for an abbreviation of the procedures in Sections 2-4 when catastrophic circumstances are present. It does not nullify the carefully defined protections in Section 6-11.

B. Sections 6 Through 11 Provide Substantive Rights To Faculty.

The Administration contends that Article 15 consists entirely of procedures. *Univ. Br. 116*. The requirement in Section 11 to provide one year of health insurance in Section 11 is not a procedure. It is a substantive obligation of the University, and it is a substantive right promised to the faculty. The entitlement to notice before being released is a substantive right. The notice requirements of Section 7 are not merely “procedures” – they constrain the ability of the Administration to summarily dismiss faculty without just cause.

A “process” may provide the framework for substantive rights – but that does not make such provisions procedural. The Administration’s interpretation requires it to make the tortured statement that Section 9 “details the process for offering reinstatement” when it in fact provides for a substantive right to reinstatement. *Univ. Br. 116*.

C. The Administration Has Not Shown It Was Impossible Or Unfeasible To Follow Sections 2-4.

We acknowledge that the Grievance did not consider the fact that “days” are defined by Article 15 as weekdays during the academic year. *See Univ. Br. 96*. However, there was a simple solution to address this problem if the Administration had been willing to follow the procedures for retrenchment – the Administration could have asked the Akron-AAUP for an accommodation and to continue the work of the procedures over the summer. The Akron-AAUP would have preferred a process that occurred over the summer to having no faculty input in the process whatsoever.

In footnote 43, the Administration contends that the Akron-AAUP could have sought to amend the definition of days pursuant to Article 33, Section 3. The Administration overlooks the language in Article 33, Section 3 which says that the “*University* may seek to modify any provision of this Agreement” and such modification can only be sought when immediate action is required due to exigent circumstances or governmental action. *AAUP Ex. 1* (emphasis supplied). Furthermore, there was no reason for the Akron-AAUP to request changing the definition of days, since the Akron-AAUP does not believe *any* retrenchment is warranted and the Administration repeatedly made clear its unwillingness to adhere to any aspect of Section 1-11 of Article 15.

The Administration claims that it could not have begun the retrenchment procedure in Section 3 on April 15 because “it did not have enough knowledge at that time to fully evaluate the timing within which said reduction had to occur in order to achieve required savings.” The Administration notes that the April 15 meeting materials state “[i]t is too early to predict the full impact of the COVID-19 pandemic.” *Univ. Br. 96*. However, the financial information presented at this meeting was the financial information supporting the \$65M deficit that the Administration relied on to justify its reduction-in-force action.

How can the Administration simultaneously contend that it did not have enough information to invoke normal retrenchment procedures but claim that the same information is sufficient to prove catastrophic circumstances? Section 12 imposes a higher burden than Article 15 requires for normal retrenchment. The Administration cannot point to the April 15 budget projection and say it constitutes sufficient evidence of catastrophic circumstances, while at the same time contending that the information was not sufficient to initiate the procedure in Article 15, Section 3.

D. The Administration Has Not Shown It Is Impossible Or Unfeasible To Comply With Sections 6-11.

Section 12 only applies when catastrophic circumstances “render impossible or unfeasible the implementation of procedures set forth in this Article.” Even if Sections 6-11 are “procedures” within the scope of Section 12, the Administration has not shown that complying with Sections 6-11 is impossible or unfeasible. It claims only that it was impossible to comply and also secure cost savings for FY21. However, as detailed above and in the Akron-AAUP’s opening brief, the Administration has not shown there is any *need* to obtain cost savings for FY21 via an immediate mass reduction-in-force of bargaining unit faculty.

The Administration claims it was impossible to comply with Section 6 because of the time needed to complete identification of those to be affected under Section 6, which it estimated to be 10 to 30 days. *Univ. Br. 99-100*. This is a startling claim, as the Administration in fact took more than 30 days to identify faculty for release. The Administration formally invoked Section 12 on May 19 and provided the Akron-AAUP with a draft list only on June 24. Even before formally invoking Section 12, at least as early May 6, the Administration had directed

administrators to devise plans to reduce their budgets by 20-25%, which would obviously require the elimination of bargaining unit faculty. *AAUP Ex. 41*.

The Administration contends that following Section 6 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. *Univ. Br. 100-01*. It is actually the Administration's process that caused this result, as noted in the press.³³ In any event, the University's contention is completely speculative both because we do not know who would have been laid off or whether the Administration would have looked more closely at other, non-academic reductions.

The Administration has not shown that its financial situation is so dire that it could not provide the notice required by Section 7 or the one year of health insurance required by Section 11. It has also provided no evidence that it is impossible or unfeasible to make the effort to place released BUF in other available positions as required by Section 8. The Administration does not explain why it cannot honor the reinstatement rights in Section 9 or the right of first refusal for part-time teaching in Section 10. There is no conceivable reason why the pandemic would affect the Administration's ability to fulfill these obligations.³⁴

The Administration incorrectly claims that the Akron-AAUP stated the Administration "**should** seek to amend" the timing of Section 7 notices. *Univ. Br. 118 (emphasis supplied)*. In fact, the Grievance states: "The University **could** initiate bargaining under Article 33, Section 3 to reduce the notice required under Section 7." *AAUP Ex. 4 at 3*. The Grievance also states: "If the University wishes to modify the substantive rights provided by Article 15, it should do so by

³³ See news articles attached as AAUP Ex. 71.

³⁴ In footnote 54, the Administration claims that Section 11 is not addressed in the grievance and that the grievance does not allege the affected faculty have been denied health benefits provided for in Section 11. At the time the grievance was filed, no faculty had been identified for layoff, let alone denied health benefits. The grievance clearly contends that the Administration must comply with Sections 6-11 of Article 15 even if it is acting properly under Section 12. The grievance challenges the University's action in its entirety.

Similarly, in footnote 55, the Administration complains that the Akron-AAUP has provided no specific argument regarding Sections 8, 9, 10, or 11 or any claim that the Administration has violated those sections. The Administration informed the Akron-AAUP that it would not comply with these sections; the Grievance contests this decision. The Administration terminated the faculty member's health insurance on August 21 and has provided no evidence of efforts to place released BUF in other positions. As noted in the AAUP's opening brief, the Administration has not provided requested information about offers of part-time teaching to laid-off faculty. See *AAUP Ex. 27, #4*. The response provided appears to list only currently assigned instructors and does not indicate whether someone on the RIF list was offered and declined a part-time teaching offer.

bargaining under Article 33.” *Id.* Seeking modifications under Article 33 is what the Administration is supposed to do when it believes exigent circumstances require immediate action that is inconsistent with the provisions of the CBA.³⁵ Thus, under the Akron-AAUP’s interpretation of Article 15, the Administration is not without remedy if the notice periods in Section 7 or the order of release provisions in Section 6 were truly impossible. The Administration just wishes to act as if it were not constrained by a collective bargaining agreement or its duty to bargain with the Akron-AAUP. For the sake of the University, it cannot be permitted to do so.

V. NTT ARE WITHIN THE SCOPE OF ARTICLE 15

The Administration barely addresses its claim that NTT are not included within the scope of Article 15, although it asserts that the Akron-AAUP’s position would result in the loss of more faculty members because NTT have lower salaries than TT. *Univ. Br. 101*. Obviously, the Akron-AAUP does not propose retrenchment as a remedy. Rather, the Akron-AAUP asserts that the Administration must comply with Article 15 in order to retrench faculty. That is why the grievance remedy states:

The University shall not utilize the force majeure clause to terminate BUF members ***unless and until*** (1) there are circumstances outside of the University’s control which justify invoking the force majeure clause; (2) the University complies with Sections 6 through 11

³⁵ Pointing out to the Administration that it has options under Article 33, Section 3 is not a concession to any of the Administration’s claims, contrary to its assertions on page 118. The Administration also incorrectly assumes that such a modification to Article 15, Section 7 under Article 33 would be permanent. *Univ. Br. Fn. 56*. One-time provisions can be included in a CBA, such as the proposed agreement would have permitted for the reduction in force at issue in this case. Furthermore, the Administration’s claims that it is seeking a “one-time bypass” under Section 12 is unsupported by any evidence. If the Administration prevails in this arbitration, under Section 12, it would be permitted to eliminate any faculty it finds undesirable simply by adopting negative assumptions in a projected budget, because that is the extent of the evidence the Administration has provided in support of its claim of catastrophic circumstances.

With respect to the Administration’s other numerous contentions of concessions by the Akron-AAUP via its grievance, it is important to note that at the time the grievance was filed, the Administration had not provided the Akron-AAUP with the layoff list. Nor had it provided the number of faculty that would be on the list. Nor had it identified the academic units that would be affected. Nor had it identified the criteria that it would use to select faculty for layoff. The Akron-AAUP cannot concede any opposition to the specifics of the Administration’s action when the specifics were unknown to it. The point of the grievance is that the Administration’s stated intention – to terminate faculty on the basis of no objective criteria and without notice – is not permitted by Article 15, for multiple reasons.

of Article 15; and (3) the University meets with the Akron-AAUP to discuss its proposed course of action.

AAUP Ex. 4 (emphasis supplied). The Administration knows that it needs NTT faculty to teach the courses that need to be taught. It cannot cut the number of faculty it wants to by following retrenchment because there would not be enough faculty to teach the classes that are the University's *raison d'etre*. The fact that non-tenure track faculty, who generally teach more courses per semester and generally have lower salaries, would have to be cut first, is a built-in buffer against the Administration turning to retrenchment when it is not truly necessary. It forces the Administration to consider whether it really must do with fewer faculty, or if perhaps cuts should be made elsewhere instead. The Administration evidently wishes to avoid such considerations.

The Administration's contentions about why it removed two paragraphs, which are quoted on pages 111-112 of its brief, from its May 22 letter are untrue. The Administration's position on whether NTT were included in Article 15 was low on the list of ways the Administration was impeding negotiations and creating a hostile relationship with the Akron-AAUP this spring and summer. The Akron-AAUP's counsel did ask the Administration's counsel to remove the needlessly inflammatory accusations that the Akron-AAUP was acting in bad faith and placing its interests above those of students. However, Akron-AAUP's counsel asked the Administration's counsel to remove the language about NTT being excluded from Article 15 because it was incorrect. *See AAUP Ex. 48.*

It is puzzling that the Administration does not believe its removal of the paragraphs in its letter are material to the grievance, yet devotes two pages to recounting the reissuance of the letter. Whether NTT are covered by Article 15 is relevant to the grievance. Now that the Administration again contends NTT are not covered by Article 15, is it going to reinstate the NTT faculty it laid off under that Article?

No. Apparently recognizing the inconsistency of its position that NTT are excluded from Article 15 and then relying on Article 15 to terminate NTT as recounted in the Akron-AAUP's brief on page 40, the Administration now claims that NTT *are* covered by Article 15 Section 12; NTT are just not covered by Sections 1-11. *See AAUP Ex. 59 at 3.* There is no contractual support for this position, which is not the position expressed in either the May 21 letter or the Administration's opening brief in this arbitration. Article 15 refers to "bargaining unit faculty"

which includes NTT and tenure-track faculty throughout its sections. There is nothing in Section 12 to indicate that it applies to an additional group of faculty not covered by the rest of Article 15. The Administration's changed position on NTT is a transparent attempt to justify its prior inconsistent actions.

In its brief, the Administration does not cite any other authority for terminating NTT appointments after the deadline provided by Article 29 or in the middle of a multi-term appointment. In the event the Administration is waiting until its reply brief to make the argument that they have the authority to do so under Article 29, Section 1, as stated in the paragraph removed from its May 22 letter, we address that contention here.

Article 29 governs the appointments of NTT faculty. Section 1 reads:

Section 1. **General Considerations**

Professors of Practice and Professors of Instruction are full-time non-tenure track BUF members (NTT). Such faculty may expect continuing employment if they have satisfactory performance reviews and the University identifies a continuing need for their position. If the University's needs change, such positions may be modified or eliminated.

(Bold emphasis supplied).

Article 29, Section 4 addresses NTT appointments specifically and provides that NTT at the Assistant rank are appointed annually, while NTT at the Associate rank are appointed for three-year terms and NTT at the professorial rank are appointed for five-year terms. Section 4(E) states:

- E. NTT faculty at the associate rank shall be appointed for a three (3) year fixed-term renewable appointment, with a presumption that the BUF member will be renewed unless his or her performance is unsatisfactory or the University's needs have changed. During the term of such appointments, the BUF member may be terminated only for just cause and by means of due process pursuant to Article 14. During the term of such appointments, the unit chair/director will provide the BUF member with written feedback on their progress toward promotion to the senior rank.

The same language is used in Section G for professorial rank NTT, except that the appointment is for five years.

Article 29 also contains a “Schedule of Reappointment and Promotion,” which states throughout that faculty members who are not to be reappointed shall be informed on or before the last day of week 12 of the spring semester. NTT at the assistant rank may be notified of non-reappointment any year, because they have annual appointments. However, NTT at the associate or professorial ranks may only be notified of non-reappointment during the last year of their current 3-year or 5-year term contract.

Specific provisions in a contract prevail over general statements.³⁶ If the language in Section 1 meant that the Administration could terminate NTT positions at any time without notice, the majority of the rest of Article 29 would be meaningless.

The reappointment provisions in Section 4 were negotiated to balance job security for long-serving NTT with the University’s desire for flexibility. If the University’s needs change, the Administration can terminate NTT appointments by notifying NTT by week 12 of the spring semester in the last year of their current appointment. If the Administration wishes to terminate NTT positions outside of that timeframe, it must do so pursuant to retrenchment under Article 15.

The Administration’s reasoning that NTT are excluded from Article 15 because if NTT had to go first, there would not be enough faculty to teach all the courses needed to maintain an academic program is ludicrous. If that would be the result, perhaps the Administration should consider that it is cutting too many faculty. Tenure is not something that is granted on a whim. It is a difficult process that takes years and involves many layers of review. One reward is greater job security. The Administration’s efforts seem more targeted at weakening tenure (or dividing the Union) than addressing its financial situation, as its recent decision to pursue retrenchment under Article 15 against only tenure-track faculty confirms.

³⁶ See, e.g., *Elkouri, supra*, at 9.3.A.Xiv (“Unless a contrary intention appears from the contract interpreted as a whole, or from relevant extrinsic circumstances, more specific provisions should restrict the meaning of a general provision.”).

VI. THE ADMINISTRATION DID NOT PROVIDE THE EVIDENCE REQUIRED BY SECTION 12 OR DISCUSS ITS PROPOSED COURSE OF ACTION WITH THE AKRON-AAUP.

On May 19 – the same day the Administration formally invoked Section 12 (*See AAUP Ex. 3.*) – the Akron-AAUP reported to the Administration’s negotiating team that multiple members had notified the Akron-AAUP that chairs were instructed to develop a plan to cut costs by 25% and without regard to the order of release in Article 15, Section 6. The Administration refused to provide information about this process, which, in the Akron-AAUP’s view, bypasses the retrenchment procedures in Section 2 through 4 of Article 15 without prior discussion with the Chapter.

Section 12 requires the Administration to provide evidence that satisfies at least Section 3(A). Section 3(A) requires the Administration to: (i) show that retrenchment is needed due to one of the four circumstances listed in Section 1; (ii) show that efforts to obtain the reductions through attrition remain in sufficient; and (iii) clearly document the necessity of releasing bargaining unit faculty.

It is perplexing that the Administration claims that it provided evidence of all four circumstances that can lead to retrenchment under Article 15, Section 1(A). *Univ. Br. 107-110.* Significantly, the second and third items in Section 1 cannot, by definition, constitute catastrophic circumstances. Item 2 pertains to a reduction in enrollment in a program, department, or college continuing over five or more academic semesters. A reduction spanning more than two years cannot be “unforeseen” or “sudden.” Item 3 addresses the discontinuation of a college, department, or program. This is not a sudden or unforeseen event outside the University’s control, as required for Section 12 to apply. Eliminating a program requires consultation with the Faculty Senate and, typically, a teaching-out of current students. Moreover, eliminating a program is ultimately a Board decision, so it is not “beyond the University’s control” as required by Section 12. In addition, the consolidation of colleges earlier this year did not result in the elimination of any programs, and the Administration has not provided evidence of enrollment declines by academic unit, only over the University as a whole. Item 4 pertains to an action by the Ohio Board of Regents (now the Ohio Department of Higher Education) or the General Assembly which “requires” the University to implement retrenchment.

The governmental actions cited by the Administration do not “require” the retrenchment of faculty any more than they “require” the elimination of football.

Owing to deficiencies in the Administration’s financial information detailed above and in the Akron-AAUP’s opening brief, the Akron-AAUP does not believe the first basis for retrenchment under Section 1 – financial exigency – is satisfied. These deficiencies also mean that the Administration failed to provide evidence that releasing faculty is “necessary.” We note again that the Administration claims it could not measure the dimensions of COVID’s impact on April 15, but information from April 15 was relied upon to justify the layoffs in this case. The Administration is effectively acknowledging that the information it provided was not reliable.

With respect to efforts to obtain the reduction through attrition, the Administration points out that a \$65M reduction in expenses cannot be met through normal attrition. *Univ. Br. at 111*. The Administration provides no explanation for why such reductions would need to come entirely from BUF, whose salaries only totaled about \$52M for FY20, or why a \$65M reduction is needed when the deficit was supposedly revised to \$56M before the Board acted.

As noted in the Akron-AAUP’s opening brief, a significant number of faculty were not eligible for the voluntary separation or retirement incentive program offered in 2019 (“VSRP”). *AAUP Br. 44-45; AAUP Ex. 57*. In fact, 46 of the 113 faculty on the June 24 reduction-in-force list were not eligible for VSRP and 24 faculty on the list were not eligible for VSRP or the prior retirement incentive program “VRIP.” *See Akron-AAUP Ex. 72*. Therefore, the Akron-AAUP contends that efforts to obtain reductions by attrition were not sufficient.

VII. CONCLUSION.

For the reasons set forth herein and in the Akron-AAUP’s Opening Brief, 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.
 3. NTT are included in the scope of Article 15, Sections 1-11.