

October 7, 2020

VIA ELECTRONIC MAIL

Dr. Gary L. Miller
President
University of Akron
Akron, Ohio 44325

Dear President Miller:

The University of Akron chapter of the American Association of University Professors, which represents the university's full-time faculty in collective bargaining, has advised the AAUP's national office of the action taken on July 15 by the governing board and administration of the University of Akron to terminate the appointments of ninety-six full time faculty members, sixty-nine of whom had tenure, for the stated purpose of addressing a budget crisis and a projected decline in enrollment. We understand that by invoking a "force majeure" clause in the collective bargaining agreement, the board and administration nullified other provisions in the CBA designed to protect academic freedom and tenure and to ensure meaningful faculty participation during a retrenchment process.

The interest of our Association in this action stems from its longstanding commitment to principles and standards of sound academic governance and of academic freedom, tenure, and due process, as articulated, respectively, in the *Statement on Government of Colleges and Universities* and the 1940 *Statement of Principles on Academic Freedom and Tenure* (both documents are enclosed for your convenience). The *Statement on Government* was jointly formulated in 1966 by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges; the 1940 *Statement* was the joint formulation of the AAUP and the Association of American Colleges and Universities and over the last eighty years has gained the endorsement of more than 250 scholarly societies and higher-education organizations. We note that Article 9 of the collective bargaining agreement currently in force between Akron-AAUP and the University of Akron states that the university subscribes to the 1940 *Statement*, which it quotes at length.

The *Statement on Government* asserts that "[t]he variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others." As a result, effective institutional decision-making requires "adequate communication among these components and full opportunity for appropriate joint planning and effort"—what has come to be called "shared governance." But shared governance is not the same as stakeholder engagement or even democracy. It acknowledges the differences in responsibility, and therefore authority, that each institutional component possesses—with the governing board, the "final institutional authority," having responsibility for the general oversight of the institution, the administration for its day-to-day operation, and the faculty for academic matters. As the *Statement* puts it, "The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status,

and those aspects of student life which relate to the educational process.” Faculty status and related matters include “appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.” The faculty exercises primary responsibility in these areas because the faculty’s “judgment is central to general educational policy.” The *Statement* accordingly asserts that the administration and governing board “should concur” with faculty recommendations regarding the curriculum, academic program, and faculty status “except in rare instances and for compelling reasons stated in detail.” We note that Article 10 of the current CBA states that “the parties agree that it is mutually desirable that the collegial system of shared academic governance be maintained and strengthened so that faculty will have a mechanism and procedures, independent of collective bargaining, for appropriate participation in the governance of the University.”

* * * * *

Regulation 4c, “Financial Exigency,” of the Association’s *Recommended Institutional Regulations on Academic Freedom and Tenure* (enclosed), a document derived from the 1940 *Statement*, operationalizes these basic principles of academic governance for the protection of academic freedom and tenure during a financial exigency, which it defines as “a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means” than terminations of appointment.

Regulation 4c requires faculty participation in every phase of decision-making related to the declaration of financial exigency, the reduction or closing of programs, and the resulting terminations. To quote the AAUP’s *On Institutional Problems Resulting from Financial Exigency* (enclosed), “There should be early, careful, and meaningful faculty involvement in decisions relating to the reduction of instructional and research programs,” adding that “the financial conditions that bear on such decisions should not be allowed to obscure the fact that instruction and research constitute the essential reasons for the existence of the university.”

Regulation 4c accordingly provides as follows:

- “an elected faculty governance body” or “a body designated by a collective bargaining agreement” will participate “in the decision that a condition of financial exigency exists or is imminent and that all feasible alternatives to termination of appointments have been pursued,”
- the faculty as a whole or an elected representative body thereof will have “primary responsibility” for “determining where within the overall academic program termination of appointments may occur” and for “determining the criteria for identifying the individuals whose appointments are to be terminated,”
- prior to the making of any proposals on discontinuing programs, “the faculty or an appropriate faculty body will have the opportunity to render an assessment in writing of the institution’s financial condition,” and
- those faculty members whose programs are being considered for discontinuance “will promptly be informed of this activity in writing and provided at least thirty days in which to respond to it.”

To ensure that the faculty has the requisite information to make these decisions, Regulation 4c requires that the faculty be provided with access to critical financial data, including

- “five years of audited financial statements, current and following-year budgets, and detailed cash-flow estimates for future years” and
- “detailed program, department, and administrative-unit budgets.”

With respect to the due-process protections available to affected faculty members, Regulation 4c requires affordance of “an on-the-record adjudicative hearing” before an elected faculty body similar in basic respects to what the AAUP recommends for dismissal (Regulation 5). In such a hearing, an affected faculty member may contest

- “the existence and extent of the condition of financial exigency,” with the burden of proof resting with the administration,
- “the validity of the educational judgments and the criteria for identification for termination,” with the important qualification that “the recommendations of a faculty body will be considered presumptively valid,” and
- “whether the criteria are being properly applied in the individual case.”

The burden of proof rests with the administration on all issues except a finding by a duly constituted faculty body that a state of financial exigency exists.

There are four final provisions safeguarding tenure:

1. Under Regulation 4c(4),

- An institution may not make new appointments when terminating appointments because of financial exigency “except in extraordinary circumstances where a serious distortion in the academic program would otherwise result” and
- A tenured faculty appointment cannot be terminated before an untenured appointment, “except,” as above, “in extraordinary circumstances where a serious distortion in the academic program would otherwise result.”

2. Under Regulation 4c(5), “Before terminating an appointment” for reasons of financial exigency, the institution, with faculty participation, “will make every effort” to find another “suitable position within the institution” for the affected faculty member.

3. Under Regulation 4c(6), “In all cases of termination of appointment because of financial exigency,” affected faculty members will be afforded notice or severance salary, at minimum, according to the following schedule:

- those in their first year of service will receive three months of salary or notice;

- those in their second year of service will receive six months of salary or notice;
- those in the third year and beyond will receive at least one year of salary or notice.

4. Under Regulation 4c(7), “In all cases of termination of appointment because of financial exigency,” the position of an affected faculty member “will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and at least thirty days in which to accept or decline it.”

* * * * *

According to the information available to us, the action taken to terminate the services of ninety-six full-time faculty members at the University of Akron disregarded almost all of the principles and standards set forth in Regulation 4c of the *Recommended Institutional Regulations*. Akron-AAUP has informed us that

- no “elected faculty governance body” or “body designated by a collective bargaining agreement” participated meaningfully in decisions regarding financial exigency, much less force majeure, and in the determination that “all feasible alternatives to termination of appointments have been pursued”;
- neither the faculty as a whole nor any representative faculty body was afforded “primary responsibility” for “determining where within the overall academic program termination of appointments” would occur and “the criteria for identifying the individuals whose appointments are to be terminated”;¹
- “the faculty or an appropriate faculty body” did not “have the opportunity to render an assessment in writing of the institution’s financial condition”;
- those faculty members whose programs were being considered for discontinuance were not “provided at least thirty days in which to respond to it”;
- none of the affected faculty members were afforded any due-process protections, much less those required under Regulation 4c;
- the administration did not take into account either tenure or length of service in selecting faculty members for reduction in force;

¹ Regarding the faculty’s involvement in the decision-making that led to the terminations and program closures, the chapter wrote as follows:

In spite of Provost [John] Wiencek’s remark in the May 7, 2020, Faculty Senate meeting that ‘big mistakes needed to be avoided, and the only way to avoid that will be with widespread participation,’ such widespread participation never occurred. Faculty governance bodies (i.e. Faculty Senate and Akron-AAUP) had no role in the determination of the need for financial exigency; the process of determining what faculty cuts, if any, were needed; or the process of developing criteria used to decide which faculty to cut. Arguments that Akron-AAUP made regarding alternative options, such as cuts to the academic subsidy from the general fund, were ignored.

Although both Akron-AAUP and Faculty Senate were assured that any program cuts would go through Faculty Senate, there was no discussion in Senate about cuts that amounted to de facto program elimination. In fact, after assuring the Akron-AAUP negotiating team that program cuts would be few and would be discussed and approved in Faculty Senate, Provost Wiencek made the preposterous statement that there simply is no process for eliminating programs at the University of Akron. This is patently untrue. The University’s own rules describe the process of changing or eliminating academic programs.”

- the administration declined to make any effort to find other suitable positions within the university for affected faculty members;
- and the maximum severance salary offered, even for faculty members with many years of service, was a paltry \$12,000.

* * * * *

As noted above, the UA administration invoked force majeure to nullify Article 15, “Retrenchment,” of the CBA, which incorporates many of the standards contained in Regulation 4c.

Our Association most recently encountered the concept of force majeure in its 2006 investigation of five New Orleans institutions—Louisiana State University Health Sciences Center, University of New Orleans, Southern University at New Orleans, Loyola University New Orleans, and Tulane University—for violating the provisions of Regulation 4c in response to the disastrous effects of Hurricane Katrina the previous summer. In 2007, the AAUP placed four of these institutions on its list of censured administrations; happily, by 2011, all four administrations had taken the steps requisite for censure to be removed.

The section of the Report of an AAUP Special Committee: Hurricane Katrina and New Orleans Universities (enclosed) on the LSU Health Sciences Center recounts that the LSU Board of Supervisors approved a “force-majeure exigency plan” for the center three months after the hurricane landed. The board declared,

The Regulations previously adopted by the Board and upon which all related employment contracts are predicated recognize that the time periods for notice of termination or non-reappointment are predicated upon ordinary circumstances (“ordinarily”) and are not controlling during a circumstance such as that in which [the Health Sciences Center] finds itself as a result of the effects of Hurricanes Katrina and Rita [emphasis added].

The result of this declaration, the special investigating committee reported, “was the replacement of the long-established and mandated role of the faculty in decisions regarding educational policy and faculty competence with the virtually total discretion of deans and the chancellor to decide which members of the faculty and what academic programs to retain.”

The investigating committee emphasized that “under the 1940 *Statement*, a bona fide financial exigency allows for the termination of faculty appointments . . . under ‘extraordinary circumstances’ where no less drastic action will suffice.” While acknowledging that “the crisis . . . was indeed devastating,” the committee pointed out that “there were available alternatives, and the administration seems to have chosen one that was antithetical to the institution’s own rules and the traditions of faculty involvement in university governance and decision-making.” The committee accordingly found that “the administration of the Louisiana State University Health Sciences Center discarded the institution’s existing financial exigency procedures, without adequately explaining why it deemed them inadequate, in favor of a new ‘force-majeure’ plan.” It thereby acted, the committee further found, in disregard of the 1940 *Statement of Principles on Academic Freedom*

and Tenure” and “Regulation 4c of the *Recommended Institutional Regulations on Academic Freedom and Tenure*.”

In short, “force majeure” and “financial exigency” refer to situations so severe that they necessitate emergency measures. In American higher education, a declaration of financial exigency typically introduces a process of orderly decision-making that involves the faculty. An invocation of force majeure does not. As this letter has noted, the purpose of Regulation 4c is to set forth procedural standards for just such a crisis, standards that safeguard academic freedom and tenure and that ensure meaningful faculty participation. Obviously, invoking force majeure instead of financial exigency to circumvent these procedural standards would be inimical to principles of academic freedom and faculty governance.²

According to Akron-AAUP, the UA administration’ invoking force majeure had exactly this purpose and effect.

* * * * *

As explained previously, a key provision of Regulation 4c of the *Recommended Institutional Regulations* is that the primary responsibility for developing the criteria for determining which faculty positions are to be eliminated because of financial exigency rests with the faculty. The reason for this provision should be evident—to prevent administrations from terminating the appointments of faculty members based on considerations that violate their academic freedom.

Unfortunately, according to various faculty sources, the criteria employed by the administration for creating the final RIF list are unknown. Even more troubling is the allegation that the administration may have selected some faculty members for reduction in force based on impermissible reasons. As one of these faculty members commented on the Labor Notes blog, “We started to examine the RIF list. Those of us on it started calling it the ‘Hit List.’ The Hit List has many faculty well known for being nettlesome truth-tellers.” Other faculty members have noted that the list contained “a distressing number of international faculty, older faculty, women, and BIPOC (Black, Indigenous, and people of color).” We understand that Akron-AAUP has filed a class-action grievance on behalf of the faculty on the RIF list and that, on August 6, the faculty senate adopted a resolution, addressed to Governor DeWine, decrying the arbitrary nature of the RIF list and calling upon every member of the board of trustees to resign.

* * * * *

The information in our possession concerning the situation at the University of Akron has come to us primarily from Akron-AAUP and from media accounts. We appreciate that you may have additional information that might alleviate our concerns. Absent such information, the facts as we have recounted them in this letter suggest that the action to terminate the appointments of ninety-six

² At least one expert has rebutted the administration’s position that the university’s financial situation was exigent. In a sixty-three-page analysis of the University of Akron’s 2002–2019 financial statements, Dr. Rudy Fichtenbaum, professor emeritus of economics at Wright State University and past-president of the AAUP, found as follows: “While the University clearly faces some challenges, there is nothing in what I have seen in its financial statements that could justify financial exigency.”

Dr. Gary L. Miller

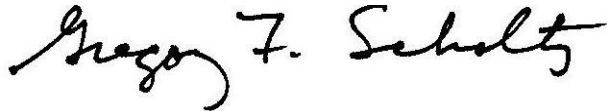
October 7, 2020

Page 7

full-time faculty members at the University of Akron was effected in disregard of AAUP-supported principles and standards of academic governance and of academic freedom, tenure, and due process. We would therefore urge immediate rescission of the notices of separation from service issued to the affected faculty members and future adherence to the above-described standards in any additional efforts to address the institution's financial problems. As you may be aware, the AAUP's executive director has recently authorized a formal [investigation](#) of apparent departures from Association-recommended governance standards at seven institutions. Should a resolution consistent with AAUP-recommended principles and standards not be achieved in this case, the Association's staff will ask the executive director to add the University of Akron to the list of investigated institutions.

We look forward to your timely response.

Sincerely,



Gregory F. Scholtz

Director

Department of Academic Freedom, Tenure, and Governance

Enclosures by electronic mail

Cc: Mr. Joseph M. Gingo, Chair, Board of Trustees
Dr. John Wiencek, Executive Vice President and Provost
Dr. Rex Ramsier, Vice Provost and Director of Academic Administrative Services
Professor Linda Salinga, Chair, Faculty Senate
Professor John McNay, President, Ohio AAUP Conference
Professor Pamela Schulze, President, Akron-AAUP
Professor Susan Ramlo, Vice President, Akron-AAUP
Professor Jeanne-Helene Roy, Secretary, Akron-AAUP
Professor Ira Sasowsky, Treasurer, Akron-AAUP