

GRIEVANCE NO. 2020-01

GRIEVANCE
REGARDING
UNIVERSITY'S INVOCATION OF ARTICLE 15, SECTION 12

June 8, 2020

To: Sidney C. Foster, Associate Vice President for Faculty Relations

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

Grievance:

On May 19, 2020, the University of Akron formally invoked Article 15, Section 12 (referred to as "the force majeure clause") of the collective bargaining agreement between the University of Akron-AAUP and the University of Akron ("CBA") and declared its intent to reduce the number of bargaining unit faculty ("BUF") pursuant to that section. The University further declared that, owing to force majeure, it is not bound by any of the other clauses in Article 15.

The Akron-AAUP disputes these actions on the following bases:

1. The University has not demonstrated that the present circumstances are sufficient to justify the use of the force majeure clause.
2. The force majeure clause does not excuse the University from complying with Sections 6 through 11 of Article 15.
3. The University has not discussed its "proposed course of action" with the Akron-AAUP as required by Article 15, Section 12.

I. The Present Circumstances are Not Sufficient to Justify the Use of the Force Majeure Clause.

The first sentence of Article 15, Section 12 states that the retrenchment procedures in Article 15 are designed to accommodate "both the orderly change in the University *and* reductions that must accompany more abrupt changes in circumstances." (Emphasis supplied.) The force majeure clause exists only to excuse compliance with parts of Article 15 (which parts are addressed below) when circumstances are more extreme than "abrupt changes." These circumstances must:

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

The University has not demonstrated that the present circumstances are catastrophic. There are actions the Administration has taken and has yet to take to address its pressing but not catastrophic financial condition, which would not involve retrenchment.

The University also has not demonstrated that the present circumstances are beyond its control. The University has a budget shortfall in part due to its own past and present financial imprudence. The effect of the coronavirus pandemic on the University has only exacerbated problems that the Akron-AAUP has been asking the University to address for years. If the University were to rein in its non-academic spending, the budget shortfall would be manageable. The University also has significant control over its financial resources. It has the ability to cut other expenditures. It has the ability to focus on revenue-generating activity. It has the ability to draw upon its reserves. Instead, it wants to use the pandemic to further cut spending on its core academic mission, which generates almost all of the University's revenues.

Moreover, the University has not demonstrated that the present circumstances render it impossible or unfeasible to comply with Sections 1-5 of Article 15. The University was aware of the likely effect of the coronavirus on the University's budget at least by April 15, 2020, when the Board of Trustees was briefed on the issue. If the procedures of Article 15 had begun on that date, retrenchment could have been completed by May 25. Section 2 has already been satisfied by the multiple voluntary retirement programs offered by the University in recent years. Section 3 requires the Provost to notify the deans/directors of affected units or programs with a rationale for proposed reductions, with a copy to the Akron-AAUP. This could have been accomplished on April 15. The unit members would then have had ten days to submit recommendations under Section 3.C (April 25th). Under Section 4.A, a Joint Committee on Retrenchment would have needed to be formed by April 20th. The Joint Committee has 30 days to submit advisory recommendations to the President. If the University had immediately provided the unit-member recommendations to the Joint Committee, this deadline could have been as early as May 25th. Complying with Article 15 was not impossible or unfeasible – the University simply chose not to abide by the CBA or to participate in shared governance.

Certainly, having to close the residence halls and move classes online this past semester was unforeseen. However, it was not unforeseen that the University's budget would not be balanced, that the University would overspend on non-revenue generating activities, or that enrollment would decline as it has in recent years.

The University cannot simply expend its resources unwisely and then claim it must terminate faculty because of an Act of God.

II. The Force Majeure Clause, If Applicable, Would Excuse the University Only From the Requirements of Sections 2-4 of Article 15.

Article 15, Section 2 states that if the Board makes the judgment that retrenchment requires reductions in BUF beyond those resulting from attrition, “the following procedures establish the process for implementing any retrenchment.” Section 3 specifies the information that the

University must provide to the Akron-AAUP and how members in an affected unit may provide input on how to carry out the proposed retrenchment. Section 4 prescribes the procedures for consulting with the Akron-AAUP via the Joint Committee on Retrenchment, which then submits a recommendation to the President within 30 days. The President then submits the Joint Committee's recommendations with his own to the Board. Section 4(D) states: "Other than provided in Section 12 of this Article, the University agrees to take no action regarding retrenchment until the President and the Board have reviewed the recommendations from the Joint Committee on Retrenchment."

The Akron-AAUP asserts that these procedures in Sections 2-4 are the "procedures" of the Article referenced in the force majeure clause. Sections 6-11 do not set out "procedures" to follow—they set out substantive (rather than procedural) rights when BUF positions are eliminated.

Section 6 requires that faculty within an affected unit must be released in a certain order. This is not a procedure to be followed, but rather a substantive protection of rank and seniority.

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

Section 8 provides other substantive job protections – the University must endeavor to place BUF in other available positions.

Section 9 provides a substantive right to reinstatement if the same or similar position is reauthorized within three academic years. Section 10 provides for a right of first refusal to part-time teaching positions. Section 11 provides that reappointed BUF will be credited with their previous rank and tenure. It also provides that BUF released due to financial exigency will receive one year of health insurance without charge.

The force majeure clause is intended to be used when there is not time to follow the procedures of Article 15. Sections 6-11 are not procedures – they are substantive rights – and they do not take *time* as do the procedures in Sections 2, 3 and 4. It is not a time-consuming process to respect rank and seniority as required by Section 6. The University could initiate bargaining under Article 33, Section 3 to reduce the notice required under Section 7.¹ The right of first refusal of part-time teaching opportunities also imposes no time or procedural burden on the University.

Notably, the rights to reinstatement require no immediate action of the University at all. How could circumstances be so catastrophic that the University would be precluded from

¹ Article 33, Section 3 permits mid-term modifications of the CBA (as a result of bargaining or interest arbitration if an agreement cannot be reached during bargaining) in the event immediate action is required due to exigent circumstances. If the University wishes to modify the substantive rights provided by Article 15, it should do so by bargaining under Article 33. The University has initiated Article 33 bargaining over other substantive concessions (including reductions in pay and increases of employee contributions for healthcare), but has not requested modifications to the substantive requirements of Article 15—which the University and the Chapter agree the University could do.

guaranteeing a BUF reinstatement to their position if the position is re-opened two years from now? If the position is not re-opened, there is no reinstatement right.

III. The University Has Not Discussed Its Proposed Course of Action With the Akron-AAUP.

The last sentence of Section 12 requires the University to discuss its proposed course of action with the Akron-AAUP. Although the University has met with the Akron-AAUP, no aspects of its proposed course of action have been disclosed other than the bare fact that the University is invoking the force majeure clause and that the University does not intend to comply with any of the other provisions of Article 15. Section 12 also requires this discussion to be done “before taking any action that could be interpreted as bypassing the retrenchment procedures.” Upon information and belief, the University directed chairs to identify positions to be eliminated as early as April 24th. This is a bypass of the retrenchment procedures.

Contract Violations:

Article 15

Remedy:

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

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