

# Arbitration Decision and Award

Arbitrator: Jack Buettner

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In the Matter of:	)	
	)	
American Association of University	)	Grievance #: 2020-01
Professors – University of Akron	)	
Chapter	)	
	)	
and	)	
	)	
The University of Akron	)	

**Date Briefs Were Exchanged:** August 21, 2020

**Date Rebuttal Briefs Were Exchanged:** September 4, 2020

**Date Decision Issued:** September 18, 2020

**Advocate for the AAUP:**

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**Advocates for the University:**

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## **Background and Procedure**

The Parties in this arbitration are the American Association of University Professors, the University of Akron Chapter (Akron-AAUP) and the University of Akron (University). The Akron-AAUP has been the exclusive bargaining representative of all full-time faculty at the University, with certain exceptions, since 2003. The bargaining unit consists of both tenured/tenure-track and non-tenure track faculty. The University of Akron was formed 150 years ago. In 1967, it transitioned from a municipal university to a state university offering over 200 associate, bachelor's, master's, doctorate and law degree programs. The Parties are operating under a collective bargaining agreement (CBA) that is effective July 1, 2018 through December 31, 2020.

On May 19, 2020, the University provided Akron-AAUP a Catastrophic Circumstances Letter invoking the provisions of Article 15, Entrenchment, Section 12. At the Union's request, the letter was revised and reissued on May 22, 2020. On June 8, 2020, Akron-AAUP filed a grievance against the University.

By mutual agreement of the Parties, John F. Buettner was selected as arbitrator for this instant case. By mutual decision, the Parties agreed to an arbitration by briefs in order to expediate the grievance. The initial briefs were exchanged on August 21, 2020, at 5:00 PM at the offices of Zashin & Rich CO., L.P.A. at 950 Main Avenue, Cleveland, Ohio. Both Parties were given two (2) weeks to submit rebuttal briefs. Those briefs were exchanged on September 4, 2020, at the offices of Fisher & Phillips, LLP at 200 Public Square, Cleveland, Ohio.

The Parties stipulated that there is no issue as to procedural or jurisdictional arbitrability and the matter is properly before the arbitrator for a determination on the merits.

**Participants for Akron-AAUP:**

Eben O. (Sandy) McNair, IV	Counsel
Jessica S. Monroe	Counsel
Dr. Richard Londrville	Chief Negotiator
Ms. Catherine Stoyhoff	Immediate Past Chief Negotiator
Dr. Pam Schulze	President
Ms. Kate Budd	Past President
William Rich	Consultant

**Participants for the University:**

M. Celeste Cook	Vice President & General Counsel
Mark G. Stasitis	Assistant General Counsel
David Yost	Attorney General of Ohio
George S, Crisci	Counsel
Scott H. DeHart	Counsel
Steven M. Nobil	Counsel
Sarah J. Moore	Counsel
Lauren Tompkins	Counsel

**The following were submitted into the record as Stipulated Exhibits:**

Stipulated Exhibit #1	Collective Bargaining Agreement: Contract #1 Effective July 1, 2015 through June 30, 2018 and Contract #2 Effective July 1, 2018 through December 31, 2020
Stipulated Exhibit #2	Grievance No. 2020-01
Stipulated Exhibit #3	Step 2 Hearing Answer

**The following were submitted as Akron-AAUP Exhibits:**

1. Current CBA (2015-2020)
2. Board Resolution 7-20-20, Approval to abolish Bargaining Unit Faculty Positions
3. Force Majeure 5-19-20, Midterm Modification Proposal from Administration
4. Grievance # 2020-01 filed 6-8-20
5. Step Two Hearing Answer filed 8-19-20
6. Proposed Agreement Rejected by Akron-AAUP Membership in August 2020, including list of 96 bargaining unit faculty subject to RIF (excluding two other exhibits)
7. Bargaining Unit Positions at Issue (“RIF List”) as of August 17, 2020
8. 4-5-20, Executive Session Board of Trustees Meeting Materials (NDA Protected Information)
9. 8-15-20 Email from Sandy McNair, Esq. to George Crisci, Esq. regarding CARES Act
10. Video Presentation: Dy Rudy Fichtenbaum and accompanying text
11. Enrollment Update: 4-14-20
12. Enrollment Update: 7-8-20
13. Enrollment Update: 8-12-20
14. Document used in Dr. Storck’s Video Presentation
15. August 12 Board of Trustees Materials, Tab 2, Financial Report for 11 Months ended May 31, 2020
16. Financial Summary from ODHE as of March 2020
17. Administration’s Response to Dr. Fichtenbaum’s Report, emailed to Bargaining Unit Members by Administrators
18. Dr. Rudy Fichtenbaum’s Rebuttal
19. FY 21 Proposed Budget (from August 12 Board Meeting Materials)
20. University Rule 3359-20-01
21. CARES Act Recipient’s Funding Certification and Agreement
22. May 29 Board of Trustees Meeting, Special Meeting Minutes
23. News Article: Pay Reductions at Other Universities
24. Administration’s Response to June 1 Information Request
25. Administration’s Response to July 23 Information Request
26. 5-22-20 letter from S. Nobil, Esq.
27. Administration’s Response to August 10 Information Request
28. Administration’s June 11, 2020 Furlough Proposal
29. Akron-AAUP’s July 7 Proposal Regarding Additional Salary Reductions
30. Email from George Crisci, Esq., withdrawing Request for Midterm Modifications,

August 6, 2020

31. Excerpt from Athletics 2019 Financial Statement (from Ohio Auditor's website)
32. Excerpt from Athletics 2010 Financial Statement (from Ohio Auditor's website)
33. Transcript of President Miller's 4-23-20 Speech
34. Summary of Salary Data Provided by University on 8-13-20
  - A. BUF Salaries
  - B. Administration Salaries
  - C. Total UA salaries
35. FY 21 Bargaining Unit List if RIF Stands- Provided by Administration 8-13-20
36. Rationale Form for Dance Position
37. Sample Rationale Form from PAUS
38. Sample Rationale Form from Developmental Programs
39. Second Sample Rationale Form from Developmental Programs
40. April and May 2019 Emails re: Transition of Developmental Programs
41. Email from Provost 5-6-20
42. Summary of Voluntary Separations, Dec.2017-May 2020
43. Provost's Memos to Akron-AAUP regarding DCA analysis and Akron AAUP's questions
44. Age Analysis Provided to Administration Negotiating Team on July 8, 2020
45. BGSU MOU Regarding NTT Notification Extension Due to COVID
46. University Rule 3359-30-01 - Guidelines for Academic Retrenchment (effective 9-30-03)
47. University Rule 3359-30-01 – Contract Professional Information as revised at May 29, 2020 Board Meeting
48. Email from Sandy McNair to Sid Foster, Aug. 4, 2020 (with attachment)
49. George Crisci Response to Sandy McNair, Aug 11, 2020 (with attachment)
50. Sample NTT Notification Letter
51. University Rule 3359-20-03 (as adopted May 2020)
52. University Rule 3359-20-03 (as amended in 2007)
53. First CBA 2005-2009
54. Historical FT Faculty Counts by Campus (from UA Institutional Research website)
55. Excerpt from 2005 Bargaining Unit list
56. Letter from Sarah Moore, Esq., 5-21-20 (excluding attachments)
57. List of Units Excluded from VSRP
58. Emails between Jessica Moore, Esq. and Sarah Kelley, Chief Human Resources Officer, 6-6-20
59. Provost Memorandum to Deans Regarding Retrenchment, 8-25-20
60. Faculty Remaining on RIF List- Final
61. Compensation Tentative Agreement, March 2020

- 62. Estimated Cost Savings from Concessions
- 63. US Census Report “*Postsecondary Enrollment Before, During, and Since the Great Recession*”
- 64. Historical Employee Count (from UA Institutional Research website)
- 65. Dr. Fichtenbaum’s Response to Dr. Storck’s Memorandum (UA Exhibit #83)
  - 65a. FY 2019 Financial Ratio Analysis
  - 65b. Moody’s Investors Service Review
  - 65c. Moody’s Investors Service Outlook
  - 65d. Moody’s Investors Service Ratings Action
- 66. Dr. Fichtenbaum’s Analysis of UA Finance Statements 2002-2019
- 67. Excerpt from Athletics Audit, FY2018
- 68. Bargaining Unit List as of 9-30-19
- 69. Bargaining Unit List as of 6-2-2020
- 70. Final Fall 2020 Enrollment Update
- 71. News Articles Regarding RIF Effect on Programs
- 72. List of Faculty from June 24 RIF List Not Eligible for VSRP or VRIP
- 73. List of Faculty Separations in May 2020 (Provided by HR on 6-2-20)
- 74. BUF Numbers 2010-2020, According Records of Compensation sent by HR to University Archival Services

**The following were submitted as University (UA) Exhibits:**

- 1. A. Financial Report for Fiscal Year Ended 2019
- B. Financial Report for Fiscal Year Ended 2018
- C. Financial Report for Fiscal Year Ended 2017
- D. Financial Report for Fiscal Year Ended 2016
- E. Financial Report for Fiscal Year Ended 2015
- F. Financial Report for Fiscal Year Ended 2014
- G. Financial Report for Fiscal Year Ended 2013
- H. Financial Report for Fiscal Year Ended 2012
- I. Financial Report for Fiscal Year Ended 2011
- J. FY10 and FY 19 Comparison Financial Statements
- 2. Enrollment 2008 to 2019 Enrollment
- 3. FT employees and total enrollment 2010-2019
- 4. Head Counts and Pay Increases
- 5. Response to Akron-AAUP 7/23/20 Information Request - 2020 and 2021 Terminations for AAUP
- 6. A. Transition After Retirement Program Introductory Document.
- B. BOT 6.14.17 Meeting
- C. BOT 10.11.17 Meeting

- D. TARP Savings FY17.19
7. VRVSRP Resolution No. 3-1-19
  8. Resolution 12-19-17 and Resolution 2-11-18
  9. VSRP VRIP IRIP Summary
  10. Resolution 6-15-19 Pertaining to the Approval of the FY 2019-2020 General Fund, Auxiliary and Sales Funds Budgets
  11. Financial Report for Six Months Ended 12/31/19
  12. SSI Transactions Posted to GL FY20
  13. 2/12/20 Board of Trustees meeting packet
  14. 2/27/20 DeWine Update
  15. Governor DeWine Executive Order 2020-01D1
  16. President Miller's 3/10/20 Directive
  17. WHO Declaration 3/11/20
  18. 3/12/20 Ohio Director of Health Order
  19. 3/17/20 Ohio Director of Health Order
  20. University Resolution 3-1-20
  21. 3/22/20 Ohio Director of Health Order
  22. 3/31/20 Ohio Director of Health Order
  23. 4/2/20 Ohio Director of Health Order
  24. A. Ohio Unemployment sheets from Ohio Department of Job and Family Services.  
B. Tax Foundation Article  
C. OSU Article  
D. NPR Article
  25. NDA #1
  26. Enrollment tracking sheets 4/7/20 to 8/19/20
  27. 4/15/20 Board of Trustees meeting packet
  28. Financial Report FY20 Eight Months Ended 2/29/20
  29. 4/30/20 Ohio Director of Health Order
  30. 4/30/20 Email from Director Gilliland
  31. 5/5/20 Governor DeWine Update
  32. 5/6/20 Provost Wiencek Message Proposed Plan for Redesigning UA
  33. 5/14/20 University News Release Redesigning the University of Akron – Athletics Update
  34. 5/14/20 University Frequently Asked Questions
  35. 5/20/20 University Feedback and Next Steps for Academic Design Plan
  36. 5/27/20 Redesigning the University of Akron – Update #3
  37. 5/28/20 Final Report: Redesign of the Academic Structure
  38. 5/29/20 Board meeting packet
  39. Resolution 5-1-20
  40. Resolution 5-2-20
  41. Resolution 5-3-20

42. Resolution 5-4-20
43. Resolution 5-5-20
44. Response to AAUP 2020-6-1 Request, Tab 3 question 2 response
45. Resolution 5-6-20
46. Resolution 5-7-20
47. 2018 Delaware Cost Study Database
48. Provost Wiencek Narrative on Budget Resetting in OAA
49. A. DCS Analysis
  - B. DCS Analysis r2
  - C. DCS College Level
  - D. Copy of Wiencek Data – Spring 2020
  - E. FY21 GF Budget-Colleges JW Recommendation
50. 2020 Delaware Cost Study
51. DCS college level July 6 update
52. Cover to DCS final 7/30/20
53. 6/10/20 Board meeting packet
54. Financial Report FY 20, nine months ended 3/31/20
55. Resolution 6-13-20, Temporary Spending Authority for July and August 2020
56. Resolution 6-14-20, Temporarily Reduce Compensation for Non-Bargaining Unit Faculty and Academic Administrators having Faculty Rank
57. Resolution 6-15-19, Pertaining to the Approval of the FY 2019-2020 General Fund, Auxiliary, and Sales
58. Resolution 6-15-20
59. CFO Dr. Storck 7/10/20 Video
60. CARES funding restrictions
61. 7/15/20 Board meeting packet
62. CWA Resolutions (7-1-2020 and 7-2-2020)
63. Resolution 7-3-20
64. Resolution 7-4-20
65. Resolution 7-5-20
66. Vacant Positions Eliminated 7.15.20
67. Resolution 7-6-20
68. Resolution 7-7-20
69. NDA #2 packet
70. RIF List (retirements highlighted)
71. President Gary L. Miller's remarks before the Board of Trustees on Aug 12, 2020
72. FY21 Budget Planning Worksheet
73. 8/12/20 Board meeting packet
74. Resolution 8-11-20
75. Response to AAUP 7/31/20 Information Request, question 5 response
76. 8/8/20 MAC Conference Announcement

- 77. 4/15/20 Executive Session Board Packet
- 78. Summary notice 5/19/20
- 79. 5/21/20 Article 15 Section 12 Notification. Akron-AAUP
- 80. 5/22/20 Article 15 Section 12 revised Notification #1.
- 81. 5/22/20 Article 15 Section 12 final Notification.
- 82. 7/13/20 TA
  
- 83. CFO Dr. Storck's Memorandum & Exhibits
  - A. Financial Report 6/30/19
  - B. p. 362 of UA Exhibit 73
  - C. FY21 Budget Planning Excerpt
  - D. ODE: FY Budget Update 7/6/20 (see also, UA Exhibit 87)
  - E. Financial Report Document
  - F. KPMG Metric Calculation Chart
  - G. Financial Report Document
  - H. KPMG Calculation Chart
- 84. FY 21 Source Documents
- 85. FY 21 Source Documents
- 86. Gap Year Articles
- 87. July 6, 2020 ODE: Chancellor's Statement
- 88. BUF Reduction Document
- 89. WHO COVID Data and Ohio Department of Health Data
- 90. August 21, 2020 President Miller Memo
- 91. July 1, 2011 to June 30, 2012 Statement of Unrestricted Current Fund
- 92. President Miller's 4-23-20 remarks titled "*Redesigning the University of Akron Affirming Our Promises in the Post-COVID World*"
- 93. April 24, 202 Akron-AAUP Response to President Miller's Announcement
- 94. May 15, 2020 Akron-AAUP Statement Rights Under CBA
- 95. June 9, 2020 Akron-AAUP Statement Follow Up Rights Under CBA
- 96. June 24, 2020 Akron-AAUP Statement Negotiations Update
- 97. July 5, 2020 Akron-AAUP Statement Position of Athletics
- 98. July 14, 2020 Akron-AAUP Statement UA Faculty Rally
- 99. 9-3-20 WHO COVID data and Ohio of Health Data & 9-28-20 the model from Institute for Health Metrics and Evaluation at the University of Washington
- 100. Projection FY20 CFI
- 101. Moody's August 26, 2020 report
- 102. 7-24.20 Akron-AAUP Executive Committee Recommendation
- 103. Unfair Labor Practice Charge against Akron-AAUP
- 104. FY21 SSI Deposit- General Ledger
- 105. Enrollment a/o 8<sup>th</sup> day Fall2020 w/CCP Enrollment
- 106. Akron-AAUP Grievance 2020-06

- 107. August 21, 2020 President Miller Notice on Article 15 Retrenchment
- 108. August 27, 2020 Akron AAUP Statement of Grievance filed Over Retrenchment
- 109. Academe Blog
- 110. ODHE Funding Information Comparison

**ISSUE BEFORE THE ARBITRATOR:**

The Parties stipulate that the issue before the Arbitrator is:

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 (“CBA”) between the University of Akron-AAUP and the University of Akron 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.

**SUMMARY OF AKRON-AAUP’S POSITION:**

Akron-AAUP disputes the University’s use of Article 15, Section 12, to reduce the number of bargaining unit faculty thereby bypassing all other sections of the article.

First, Akron-AAUP contends that the University has not demonstrated that the present circumstances justify the use of the “force majeure” clause in Section 12 that would allow them to negate the rights of the entrenchment process. According to Section 12, these circumstances must be “catastrophic” and “beyond the control of the University”. These circumstances must make it impossible or unfeasible to implement the provisions of Article 12.

The Union argues that the financial condition of the University is not catastrophic. While the effects of the pandemic have caused “exigent circumstances”, that qualifier would allow for mid-term bargaining to make modifications. The University, however, abandoned its request for midterm modifications. Akron-AAUP distinguished “exigent” from “catastrophic”—requiring immediate action versus an apocalypse or disaster. In April, a financial presentation shared with the negotiating team showed a \$65 million draw on reserves for fiscal year ending 2021 (AAUP Exhibit #7) This projection was based on inflated assumptions for the decrease in enrollment and the reduction in state funding. Additionally, it showed a structural deficit of \$13.8 million that was not in evidence. Three months later the same financial outlook was presented, using the same assumptions, even though the Department of Higher Education updated its State Share of Instruction (SSI) decreasing the University’s reduction from \$19.9M to \$9M. Enrollment for the fall semester was significantly better than had been predicted. Akron-AAUP contends the financial outlook was nearly \$30 million better than the original predictions.

The proposed budget for FY 2021 (AAUP Exhibit #19) was presented at the August Board Meeting. This budget, after transfers, showed a total budget deficit of \$7.8M which is less than one-eighth of the projected \$65M deficit that was used to justify the faculty layoffs. The Union argues that a projected deficit is not new and that the University “was operating within an unsustainable financial model prior to COVID crisis.” (AAUP Exhibit #8, p. 19) Thus, COVID did not create a *force majeure* that would allow Section 12 of Article 15 to be invoked.

Akron-AAUP further argues that the University’s faculty reductions are counter to its

mission statement, and it is subsidizing intercollegiate sports at the cost of its faculty. Other public Ohio universities have implemented larger than UA's 10% pay cut for their senior personnel. The Administration did not identify one administrative position that was being eliminated and would not commit to deeper athletic reductions. Other cost saving measures could have been taken, and the fact that the University did not pursue other options does not create a catastrophe.

Mid-term modification discussions were held during the summer. Akron-AAUP suggested cost saving measures such as adjusted retirement incentives and possible furlough options. The Union proposed steeper temporary pay cuts in exchange for fewer layoffs, but the University rejected the proposal. Akron-AAUP was willing to agree to concessions such as equivalent salary reductions and increases in health care contributions that had been applied to other employees. In response to these proposed concessions, the University withdrew its request for midterm modifications.

A second argument Akron-AAUP makes is that the invocation of Section 12 does not negate the other provisions of Article 15. Sections 2 through 4 specify "procedures" that may excused during catastrophic circumstances. Sections 6 through 11, however, spell out "rights" to faculty in the event of retrenchment. Section 6 outlines the order in which faculty would be released based on their employment status. Section 7 provides advance notice of release. Section 8 allows placement of BUF in other positions for which they are qualified. Section 9 provides the right to reinstatement if a position is reauthorized and Section 10 provides first right of refusal for part-time positions. These two sections especially do not impose any time limits or incur any financial burden. The Union contends that these "rights" should not be negated by Section 12.

Lastly, Akron-AAUP contends that the University did not give appropriate notice to BUF being released and did not discuss its proposed course of action as prescribed in Article 15, Section 12. Contract professionals were receiving more notice than tenured faculty. Further, the Union argues that while the University met with Akron-AAUP, its proposed plan of action was not discussed other than that they were enforcing the "force majeure clause" and that they did not intend to comply with the provisions of Article 15. The

University did not provide evidence that satisfied the requirements of Section 3(A) as stipulated in Section 12.

**SUMMARY OF THE UNIVERSITY’S POSITION:**

The University contends that it properly invoked the “force majeure” clause of Article 15, Section 12. The COVID-19 virus and the worldwide pandemic created catastrophic circumstances that were unforeseen and beyond the University’s control. The situation was such that Governor DeWine declared a state of emergency in Ohio on March 9, 2020. (UA Exhibit #4) On March 17, 2020, the University’s Board of Trustees passed a resolution (UA Exhibit #20) that cancelled classes and campus events and moved to online delivery of classes. The events were indeed catastrophic, unforeseeable, and beyond the University’s control thus allowing UA to invoke Article 15, Section 12.

The pandemic and its ramifications created direct and indirect economic impacts, and the University needed to react quickly in order to stay viable. One impact was the unforeseen reduction in Higher Education State Supported Income (SSI). While SSI funding declined in each month from January 2020 through mid-March, it dropped to new levels in May and June. On May 20, 2020, the SSI revenue was down 25% as compared to December 2019. On June 17, 2020, SSI monthly revenue was down another 25% as compared to December 2019. This unforeseen, large reduction occurred within a one-month period. This presented an overall negative change in FY 2020 to -8.35%. Projections for FY21 looked even worse. Another financial impact was the unforeseen reduction in Tuition, General Service, and Other Fees (TGO) revenue which is based on enrollment and associated potential credit hours. Enrollment tracking sheets showed a significant decline in registrations. (UA Exhibit #26). With less than one month remaining in the fiscal year, TGO revenue was -5.6% lower than what was budgeted for FY20. The University needed to close the resulting deficit by the end of the fiscal year.

Additional factors related to COVID impacted the University’s finances such as loss of

parking revenue, loss of EJ Thomas Performing Hall revenue, residence hall refunds and other areas.

While the University does have cash reserves, the University argued that these cannot be depleted. If cash reserves become too low, UA's credit rating could be downgraded from an investment-grade to a noninvestment grade rating. The University's accrediting body, the Higher Learning Commission, would then take action to address the probability of the university's viability.

The University disagreed with the assertion from Akron-AAUP that the entrenchment procedure, as outlined in Article 15, could have been completed in a timely fashion if the University had taken action on April 15, 2020. On that date, there were still many unknowns. The University could predict a serious financial impact but didn't have—and still does not have-- adequate information to gauge the consequences on FY21. Additionally, it was impossible and unfeasible to adhere to the timelines specified in Sections 3, 4, 5, 6 and 7, and to secure the cost savings needed quickly to address FY21.

The University further contends that Section 12 of Article 15 excuses Sections 1-11 of the retrenchment process. Nowhere in the article is there a distinction between "procedures" and "rights" as Akron-AAUP purported. The entire Article 15 is procedural as stated in the article itself. The **procedure for retrenchment** (emphasis added) set forth in this Article is designed to accommodate the orderly change in the University and reductions that must accompany more abrupt changes in circumstances." (Stipulated Exhibit #1, p. 67) All sections, even those without timelines, impose obligations on the University for implementing retrenchment.

The University also refutes the last argument made by Akron-AAUP in that the University improperly took action to bypass Article 15 retrenchment procedures before discussing its proposed course of action. Section 12 does not specify how long before taking action this discussion needs to be had. It just states, "...before taking any action that could be interpreted as bypassing the retrenchment procedures, representatives of

the University will meet with representatives of the Akron-AAUP to discuss and show evidence of the circumstances described above and that this evidence will at least satisfy the requirements outlined in Section 3(A) of this Article and to discuss the proposed course of action.” The grievance was filed on June 8, 2020, but no action in regard to retrenchment had been taken. The Trustees had not taken action nor had Administration made any recommendations. The Administration had not even developed the list of potential faculty to be laid off at the point the grievance was filed. No one was actually given notice of layoff until July 15 with an effective date of August 21. The University contends no action was taken.

The University refutes the idea that department chairs were directed to identify positions for lay off, deemed an action by the Union, on or around April 24, 2020. This occurred as a result of information being shared from bargaining sessions that presented hypothetical scenarios in response to the financial fallout from the pandemic. No one was ever instructed to take action by identifying potential faculty for retrenchment. After the grievance was filed but before any actual layoffs, the University shared a multitude of information with the Union. Nine (9) bargaining sessions were held, forty-nine (49) individual requests for information and thirty (30) follow up requests were processed. Thus, the University feels it adequately discussed proposed courses of action under Article 15, before taking any action.

#### **SUMMARY OF AKRON-AAUP REPLY BRIEF:**

Akron-AAUP began by addressing the issue of burden of proof. While the University contends that Akron-AAUP, as the grievant, has the burden of proof, the Union contends that the University has the burden of proof as to whether catastrophic circumstances exist as stated in Section 12.

Akron-AAUP states that the current circumstances are not catastrophic and do not justify the use of Section 12. They stated the following:

1. The University has fared better than its pre-COVID projections. The draw on reserves for FY21 is less than what was planned before the pandemic.
2. There is no \$56M deficit for fiscal year 2021. The University used overly pessimistic enrollment projections and SSI declines.
3. Historic analysis of University Revenue affirms there is no catastrophe. The university admitted to operating within an unsustainable financial model prior to COVID. (Akron-AAUP Exhibit #8, p.11) Declines in enrollment and SSI have been on a downward trajectory for several years.
4. Unknown COVID risks do not constitute present catastrophic circumstances. Any potential effects are speculation.

Akron-AAUP disputes the University's position that it has not shared in the "sacrifice" other bargaining units have made. Athletics, specifically football, ran at a \$8.5M deficit in FY18 and has incurred no meaningful, permanent reductions for FY21. While other bargaining units have agreed to wage concessions, furloughs, benefit reductions, and elimination of retiree healthcare dependent benefits, none of these changes will take place until FY21. Akron-AAUP agreed to the same salary reduction scale and equivalent healthcare increases as other employees (AAUP Exhibit #6), and proposed even deeper cuts in order to save jobs (AAUP Exhibit #29). The administration rejected the latter proposal and revoked its request for midterm modifications. From Fall 2010 to June 2020, the BUF has been reduced by 30%. With the invocation of Section 12, the BUF will be reduced by 20% in one single action.

The Union contended that Section 12 does not excuse compliance with Sections 6 through 11. Sections 6 through 12 are substantive rights provided to faculty when retrenchment occurs. Further, Administration has not shown it was impossible or unfeasible to follow Sections 2 through 4 or to comply with Sections 6 through 11.

Akron-AAUP alleged that the University did not provide evidence of a need for retrenchment as referenced in Section 12 but delineated in Section 1 (A). Further, the proposed course of action was not discussed with the Union as stated in Article 12.

Another issue brought forth was that of NTT faculty. Akron-AAUP contends that they are included in the scope of Article 15, Sections 1-11.

### **SUMMARY OF THE UNIVERSITY'S REPLY BRIEF:**

The University contends that Akron-AAUP openly acknowledged the financial crisis due to COVID and the need to implement a reduction in force as evidenced by various documents. (UA Exhibits # 93, 94, 95, 96, 97, 98)

The University stated that it had indeed satisfied all the required elements to invoke its authority under Article 15, Section 12. Catastrophic financial and operational circumstances did exist. As evidence, the University used the Composite Financial Index (CFI) and Moody's Investment Service as metrics. The CGI measures an organization's well-being and relies on audited financial statements. The CGI had been trending downward but was projected at 0.7 or 0.8 for FY20 and possibly lower if other factors were included. (UA Exhibit #100) CGI of 1.1 signals a need to make systematic changes to the University's business model; a score of 1.0 or lower prompts the regional accrediting body to issue a letter of concern, prompts the credit rating agencies to consider downgrading the University's credit rating, and exposes the University to having two of its existing debt issues being accelerated or recalled by the bond holders. Moody's, another fiscal metric, issued a credit opinion downgrading the University's outlook from stable to negative (UA Exhibit # 101), recognizing "pandemic driven pressures". Recognizing these catastrophic circumstances, the Board of Trustees took action to make corrections which included use of Section 12.

The University contends that Akron-AAUP mischaracterized the financial data that the University used to demonstrate catastrophic conditions and focused on the alleged projected \$65M draw on reserves for FY21. Even though SSI changes were not as severe as first thought, the Ohio Department of Higher Education cautioned that current

projections are subject to change based on economic and realized tax collections. Even though enrollment decline was not as high as projected, the University states that student enrollment does not yield the same revenue. In-person delivery yields specific revenue such as room and board, dining, and parking. In-person/hybrid delivery went from 85% in Fall of 2019 to 27% in Fall 2020. Numbers alone do not tell the financial picture.

The University argued that it did not end FY20 with a multi-million-dollar surplus as purported by Akron-AAUP, and the attempts to compare UA to other public state universities fell short. Akron-AAUP also challenged the University's decision on how it addressed the catastrophic circumstances. The University took action within its control and secured many cost savings in FY21. It is not required to draw down its reserves or to exhaust every cost-saving measure in order to prevent layoffs. The BUF is just one piece of the financial puzzle and cannot demand preference over other areas.

In regards to athletics, the University acknowledges that the *force majeure* clause was not invoked for coaching contracts but this is because the coaches voluntarily agreed to reduce their salaries with the three highest paid coaches taking a 20% reduction. Athletics was not spared in that eighty-two (82) positions were abolished, the athletic budget was reduced by 23%, and three sports were eliminated.

Additionally, the University argues that once Article 15, Section 12, is invoked, other retrenchment procedures no longer apply. The only requirement in Section 12 is that the circumstances ...” will at least satisfy the requirements outlined in Section 3(A) of this Article.” Thus, Section 3(A) is the only applicable portion of Article 15 after Section 12 is invoked.

The University reiterated its position that it did meet its obligation to provide evidence to discuss a proposed course of action with the Union.

Lastly, the university asks that the issue of NTT faculty, as brought forth by Akron-AAUP, not be considered by the Arbitrator.

## **DISCUSSION:**

In regards to this instant decision, this Arbitrator will not address the issue of NTT faculty being included in the scope of Article 15. This issue was added in Akron-AAUP's initial brief and discussed in their rebuttal but it was not included in the original Grievance 2020-01. This issue is one of several in another pending grievance, 2020-06 (UA Exhibit #106, p.2), and will be addressed therein.

The question of burden of proof was raised by both Parties. This Arbitrator agrees that Akron-AAUP has the burden of proof in this situation. Numerous cases were cited by the University supporting this view. In general, "The party asserting the claim has the burden of proving it." [Exon Mobil Ref. & Supply, 120 LA 1734(Eisenmenger, 2004); West Valley City Sch. Dist., 120 L 756 (Gaba, 2004); South Peninsula Hospital, 120 LA 673 (Landau, 2004)] Conversely, the University does bear part of the burden as stipulated in Section 12 in that they must "show evidence" of the catastrophic circumstances and that this evidence will meet the requirements outlined in Section 3(A) which states:

- A. The University shall provide to the Akron-AAUP evidence of the need for retrenchment, based on the criteria listed in Section 1 of this Article, of efforts to implement retrenchment as outlined in Sections 2(A) and 2(B) of this Article, evidence that these efforts remain insufficient and evidence that clearly documents the necessity for a recommendation to release bargaining unit faculty.

Section 12 contains a *force majeure* clause. According to Black's Law Dictionary, a *force majeure* is an event or effect, both acts of nature or acts of people, that can

neither be anticipated nor controlled. (Abridged 8<sup>th</sup> Ed., Thompson/West, 2005, p.538) To deny that the COVID pandemic is catastrophic would be to ignore the extent and spread of the disease. It is a worldwide pandemic with worldwide effects. As of September 17, 2020, 6,613,331 total cases were report in the USA with a death toll of 196,277. Ohio alone had 133,046 confirmed cases. (cdc.gov/coronavirus/2019-ncov/cases-updates) The economy is still down 11.5 million jobs from pre-COVID times. Many businesses are in severe distress with large companies declaring bankruptcy and smaller businesses struggling to survive. Unpaid rent is as high as \$30 billion. [*The Kiplinger Letter, Forecasts for Executives and Investors*, 2020. The Economy. (Vol.97, No. 36), p.1]

The effects of the COVID pandemic are certainly unforeseen and surely out of anyone's control. The number of cases fluctuates from day to day, week to week, and location to location sending counties in Ohio from a Level 2, Orange, to a Level 3, Red, while hopefully avoiding the Level 4 designation which signifies severe exposure and spread and could result in another state of emergency. Cases of COVID on college campuses have been cited as one of the factors that have pushed counties into the Red zone. [Bamforth, E. (2020, September 4) *Plain Dealer*, p. A5.] The pandemic is affecting colleges in general as cited in *Kiplinger's Personal Finance*. (5 Ways College is Changing. 9/2020, p. 44) There is lower enrollment as families struggle through the recession, tighter budgets as student revenue decreases, federal and state funding cuts, and declining government budgets. In an effort to balance college budgets, smaller staffs are being seen as faculty is laid off or furloughed. Circumstances remain in flux as the state grapples with the disease and its spread. COVID is, indeed, a catastrophic event, and it's resulting impacts are unforeseeable and beyond the University's control.

Having established that a *force majeure* did, indeed, exist, the University needed to satisfy the requirements in Section 1(A):

Retrenchment may be necessary when a judgment made by action of the Board, based upon evidence made available to the Akron AAUP according to the schedules set forth in this Article, indicates one (1) of the four (4) circumstances

listed in Section 1 (A)(4) exists at the University.

1. Financial exigency, defined as financial problems so severe that they threaten the University's ability to maintain its operations at an acceptable level;
2. Significant reduction in enrollment of a college, department, or program continuing over five (5) or more academic semesters (not including summer) and which is expected to persist;
3. Discontinuation of a college, department or program;
4. Action by the Ohio Board of Regents or Ohio General Assembly which requires the University to implement a retrenchment.

Since at least April 21, 2020, University representatives had met regularly with Akron-AAUP to discuss and show evidence of the catastrophic circumstance and *force majeure* in order to plan a proposed course of action. Unforeseen reductions impacted the budget. SSI declines were seen in previous years but not to the extent shown with drops of 25% for both May and June. Early projections showed a reduction of 20% in SSI for which the University had to modify its budget. Later, SSI funding for FY21 was adjusted upward with the caveat that it was "subject to change if the overall budget and supporting state revenue sources were to significantly worsen during the fiscal year compared to current projections." (UA Exhibit #87) This reduced the projected \$65M budget deficit to \$56M, still a significant amount. Unfortunately, COVID has dramatically impacted Ohio's tax revenue creating a budget shortfall which can trickle down to the University at any time.

The University provided weekly enrollment updates to the Union. A documented enrollment decline was apparent which impacts TGO revenue. The University documented many other factors that contributed to the financial emergency such as loss of revenue from parking, facilities use, and student reimbursement in FY20 based upon the change in University operations due to the Governor's Executive Order. Further, the University used two outside metrics, CFI (UA Exhibit# 100) and Moody's Investment Service (UA Exhibit #101) to document their financial status. Both signaled the need for immediate systematic changes in order to maintain their credit rating, the loss of which

could imperil the viability of the University.

The Union disputed the exigency of the financial situation and referred to the University's cash reserves as a source of added revenue. Depleting the reserves, however, would jeopardize the University's credit rating which would have a significant impact on the future of UA. While Akron-AAUP contended that the enrollment projections were not as pessimistic as predicted, they did not take in to account the revenue associated with each student. The University rightly pointed out that less revenue is generated per student doing on-line learning versus those doing in-person or hybrid, and there was a documented decrease in in-person learning from 75% in the Fall of 2019 to 15% in the Fall of 2020.

The University did implement various cost reduction programs and took staffing actions to meet its fiscal responsibilities. It permanently eliminated three athletic programs, redesigned its college structure, exercised its rule-making authority to modify and add rules needed to give it flexibility to implement furloughs during FY21 with minimal notification, and secured concessionary reductions in salary and increased health care premiums with the other three unions. (UA Exhibit #103) While Akron-AAUP challenged the manner in which the University allocated its funds, especially in regard to athletics, it's clear that actions were taken in multiple areas outside of BUF retrenchment to address the financial situation. The Parties did continue bargaining for a successor contract during this time. A tentative agreement (UA Exhibit #82) was reached that would have secured temporary salary reductions and changes in insurance comparable to what other unions had agreed to. The tentative agreement was voted down. Immediate financial action needed to be taken to circumvent the budget shortfalls and all actions were within the scope of responsibilities of the University. Thus, the University did show evidence of financial exigency as stipulated in Section 1(A)(1) and reduction in enrollment as stipulated in Section 1(A)(2).

In regards to Section 1(A)(3), a "discontinuation of a college, department or program", on May 7, 2020, the University released its proposed reorganization that would eliminate or

combine six (6) of its eleven (11) colleges to help offset the budget deficit. Thus, circumstance (3) existed.

The last circumstance referenced in Section 1(A) was (4). It states, “Action by the Ohio Board of Regents or Ohio General Assembly which requires the University to implement a retrenchment.” Ohio General Assembly did take action in enacting House Bill 197 in response to COVID which addresses operations of the State. All orders implemented by Ohio Director of Health Amy Acton, which directly affected the operation of UA, were based on authority in legislation enacted by the General Assembly. These actions may have led to financial difficulties, but it’s a stretch to say the Ohio General Assembly actions required retrenchment.

According to Article 15, Section 1(A), only one (1) of the four (4) circumstances needed to be present to determine the necessity for retrenchment. The University showed that at least three (3) circumstances were present. Catastrophic circumstances did exist with the COVID pandemic that were unforeseeable and beyond the control of UA so invocation of Section 12 was justified.

In the second argument of the grievance, Akron-AAUP alleges that the *force majeure* clause of Article 15 does not excuse the University from complying with Sections 6 through 11 of the Article. Akron-AAUP tried to make a distinction between Sections 2 through 4 by labeling them as “procedures” that may excused during catastrophic circumstances versus Sections 6 through 11 which they labeled “rights” to faculty in the event of retrenchment. The language, however, is clear in that no such distinction is made. According to Elkouri and Elkouri in How Arbitration Works, when the language is clear and unambiguous, the language speaks for itself. This Arbitrator, in reading and interpreting the current language, finds no guarantee of the provisions set forth in Sections 6 through 11 on the basis of rights versus procedures.

This Arbitrator did consider other language in Section 12. It states, “The parties recognize that catastrophic circumstances, such as a force majeure, could develop which are beyond the control of the University and would render **impossible or unfeasible** the

implementation of procedures set forth in the Article.” (Emphasis added) In reviewing Sections 6 through 11, it appears that certain sections were, indeed, impossible or unfeasible to implement. Section 6 sets forth the order in which affected bargaining unit faculty would be released. While this section would normally be the standard for determining which faculty is to be released, Section 6(D) states that notice will be given to BUF according to the time limitations set forth in Section 7. Section 7, Notice of Release, calls for anywhere between three (3) months to eighteen (18) months of advance notice. Due to the expediency of the circumstances and a deadline of July 1, 2020, for a balanced budget, such notice was impossible and unfeasible. Thus, both Sections 6 and 7 were impossible and unfeasible to accomplish in the time frame.

In regards to Section 8, this Arbitrator is not sure if these provisions were applied to BUF before they were released. Little information was given as to how exactly the retrenchment list was created other than that information was provided to department chairs, college deans, and administrative representatives. In my interpretation, with time being a factor and across the board cuts being made in all areas, implementation of Section 8 would not be feasible.

Sections 9 and 10 refer to right of recall if positions are reauthorized. These provisions seem to be both possible and feasible to implement. Even though BUF were not released in the order specified in Section 6, that does not mean they cannot be recalled in that order. Dire circumstances existed to allow BUF to be released according to the provisions of Section 12. Many bargained rights of retrenchment were bypassed due to the urgency of the financial situation. In the future, when the pandemic is under control, financial stability for UA is less uncertain, and there is sufficient time for study, planning, and consultation, the need may arise to reauthorize positions that have been eliminated. It would only seem fair that the released BUF would have first choice to return to those positions according to the provisions of Section 9 and 10.

Section 11 provides for one (1) year continuance of the University health care insurance policy without charge for BUF who are released. Such a financial outlay would only add

to the financial burden documented in the above sections. Thus, Section 11 is not possible or feasible.

Akron-AAUP's third argument was that the University did not discuss its proposed course of action with Akron-AAUP as required by Article 15, Section 12. The University cited numerous examples of instances where the groups met and/or shared information. Between April 21 and the date the grievance was filed, June 8, the Parties conducted ten (10) bargaining sessions. Information, including documents protected by a Non-Disclosure Agreement, was provided to the Union in order to be transparent about the financial situation as it unfolded. UA responded to seven (7) formal requests for information and over eighty-one (81) individual requests during this period. After the grievance was filed on June 8<sup>th</sup> but before the University took action, nine (9) more bargaining sessions were held and UA responded to nine (9) formal requests, forty-nine (49) individual requests and twenty-eight (28) follow-up requests for information.

The University presented its proposed action along with a plethora of information prior to July 15. Once it had compiled the proposed list of BUF slated for retrenchment, it was shared. From June 24 to July 15, the Parties worked together to reduce the original list from 113 to 96 positions. Akron-AAUP was aware of the impending course of action and was actually instrumental in saving an extra 17 positions. The volumes of information that was disseminated as well as the number of meetings show reasonable proof that the University discussed its proposed course of action prior to July 15 as required by Article 15, Section 12.

**AWARD:**

For the reasons stated above, the University demonstrated that present circumstances justify the use of the force majeure clause as outlined in Article 15, Section 12. The force majeure clause does not, however, excuse the University from complying with Sections 9 and 10 which are feasible and possible to implement since there is no immediate financial impact or time frame. Therefore, this Arbitrator finds for Akron-AAUP in the matter of Sections 9 and 10. Further, the University showed a preponderance of evidence that it did discuss its proposed course of action with Akron-AAUP as required by Article 15, Section 12.

This concludes this arbitration.

Respectfully submitted this 18<sup>th</sup> day of September 2020,

John F. Buettner, Arbitrator

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one (1) copy each of the Arbitration report was delivered via email on the 18th day of September, 2020, to

Eben O. (Sandy) McNair and Jessica Monroe

Advocates for Akron-AAUP

and

George S. Crisci, Stephen M. Nobil, and  
Sarah J. Moore

Advocates for the University

*Jack Buettner*

Jack Buettner