

Arbitration Decision and Award

Arbitrator: Jack Buettner

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████████████████████@yahoo.com

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:

Eben O. (Sandy) McNair, IV
Jessica S. Monroe
1215 Superior Ave. East, Suite 225

Participants for Akron-AAUP:

Eben O. (Sandy) McNair, IV	Counsel
Jessica S. Monroe	Counsel
Dr. Richard Londravage	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. RIF List
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.
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. Response to Dr. Ficht

August 6, 2020

31. Excerpt from Athletics 2019
- 32.
33. Transcript of President Miller 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 -
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 (7 (y)7 (R)-6 (u)-6 (l)-6 (e)-6 ()7 (3)-6 (3 0 0 612 792 re W*n B

62. Estimated Cost Savings from Concessions
63. US Census Report

- 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.

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.

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.
 - 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,
88. BUF Reduction Document
89. WHO COVID Data and Ohio Department of Health Data
90. August 21, 2020 President Mi14 (n)-6 (t)-6 (me)14 (n)-6 (t)]TJ ET Q q 0 0 612 792 re W*n BT 6D

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

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 clause of Article 15,
Section 12. The COVID-19 virus and the worldwide pandemic created catastrophic
circumstances that were
was such that Governor DeWine declared a state of emergency in Ohio on March 9,
2020. (UA Exhibit #4) On March 17, 2020, the Board of Trustees passed a

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 credit rating could be downgraded from an investment-grade to a noninvestment grade rating. The accrediting body, the Higher Learning Commission, would then take action to address the probability of the s viability.

1. The University has fared better than its pre-COVID pro 53.5 p

Another issue brought forth was that of NTT faculty. Akron-

projections are subject to change based on economic and realized tax collections. Even

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

1. Financial exigency, defined as financial problems so severe that they threaten the 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 on 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

state revenue sources were to significantly worsen during the fiscal year compared to current . This reduced the projected \$65M budget deficit to \$56M, still a significant 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 . Further, the University used two outside metrics, CFI (UA Exhibit# 100) 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 cash reserves as a source of added revenue. Depleting the reserves, however, would jeopardize the 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, 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 continuation
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 Board of Regents or Ohio General Assembly which requires the University to implement 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, 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 circumstances versus Sections 6 through 11 which they 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 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

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's (t)7 (a)-6 (t)7 hn 1of the ze p1ve first

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 18th day of September 2020,

John F. Buettner, Arbitrator

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