

AMERICAN ASSOCIATION OF UNIVERSITY
PROFESSORS – UNIVERSITY OF AKRON
CHAPTER,

Grievant,

and

THE UNIVERSITY OF AKRON,

Public Employer

) ARBITRATOR JACK BUETTNER

)

) Grievance No. 2020-01

) (Article 15, Section 12)

)

)

) **ARBITRATION REPLY BRIEF SUBMITTED FOR**
) **THE UNIVERSITY OF AKRON**

)

)

)

/s/ M. Celeste Cook

M. Celeste Cook (0039004)
Vice President & General Counsel,
Board Secretary
THE UNIVERSITY OF AKRON
Office of General Counsel
Akron, OH 44325-4706
Phone: 330-972-5787
Fax: 330-972-2611
mcook@uakron.edu

/s/ Mark G. Stasitis

Mark G. Stasitis (0073660)
Assistant General Counsel
THE UNIVERSITY OF AKRON
Office of General Counsel
Akron, OH 44325-4706
Phone: 330-972-5787
Fax: 330-972-2611
mstasitis@uakron.edu

DAVE YOST (0056290), Attorney General of Ohio

/s/ George S. Crisci

George S. Crisci (0006325)
Scott H. DeHart (0095463)
ZASHIN & RICH CO., L.P.A.
950 Main Ave., 4th Floor
Cleveland, OH 44113
Phone: 216-696-4441
Fax: 216-696-1618
gsc@zrlaw.com
shd@zrlaw.com

/s/ Sarah J. Moore

Steven M. Nobil (0015707)
Sarah J. Moore (0065381)
Lauren Tompkins (0087304)
FISHER & PHILLIPS, LLP
200 Public Square, Suite 4000
Cleveland, OH 44114
Phone: 440-838-8800
Fax: 440-838-8805
snobil@fisherphillips.com
smoore@fisherphillips.com
ltompkins@fisherphillips.com

TABLE OF CONTENTS

I.	Introduction	1
II.	Akron-AAUP Ignores Its Own Admissions	2
III.	The University Satisfied All of the Required Elements to Invoke Its Authority Under Article 15, Section 12.	6
A.	Catastrophic Financial and Operational Circumstances Exist	6
1.	The Impact Alone of the COVID-19 Financial Fallout upon the University’s CFI Score Establishes the Catastrophic Circumstances, Which Were Avoided Only Because of the Immediate Action that the University Took.	6
2.	The COVID-19 Financial Fallout Prompted Moody’s Investor Service to Downgrade the University’s Outlook from Stable to Negative, but the University’s Immediate Corrective Measures Preserved Its Investment-Grade Credit Rating.	10
3.	Between April 15 and August 15, 2020, the Board of Trustees Addressed the Catastrophic Circumstances that It Faced, and Took Necessary Action to Correct It.	12
4.	Akron-AAUP Repeatedly Mischaracterizes the Financial Data Which Demonstrates that Catastrophic Circumstances Exist.	17
a)	Akron-AAUP Mischaracterized the April 15, 2020 Board of Trustee Executive Session Materials.	17
(1)	Akron-AAUP mischaracterized the use of University reserves in relation to the projected \$65 million-deficit.	17
(2)	Akron-AAUP needlessly drew the structural deficit into question.	20
b)	Akron-AAUP Mischaracterized CFO Dr. Stephen Storck’s July 10, 2020 Video	20
(1)	Catastrophic Circumstances existed even after the July 2020 change in SSI reductions.	22
(2)	The most recent student enrollment data still constitutes catastrophic circumstances.	24
(3)	Student enrollment does not yield the same revenue.	25
(4)	Akron-AAUP needlessly focused on an unused column from Dr. Storck’s worksheet and drew the structural deficit into question.	29
c)	Akron-AAUP falsely contends that the University ended FY20 with a multi-million-dollar surplus.	30
d)	Akron-AAUP unconvincingly compares the University to other public State universities.	33
e)	Remaining items noted by Akron-AAUP are of no consequence	33

5.	Akron-AAUP Improperly Challenges the University’s Decision Making in Addressing the Catastrophic Circumstances that It Faced.....	34
a)	The University was not required to draw down its reserves just to avoid faculty layoffs.	36
b)	The University Took Action within Its Control.	36
c)	Article 15, Section 12 Does Not Require the University to Exhaust Every Cost-Saving Measure.	40
d)	Akron-AAUP’s Allegation Regarding the Cuts Made to Academic Units is of No Relevance as to Whether Catastrophic Circumstances Exist under Article 15, Section 12.	41
B.	Catastrophic Circumstances Render Implementation of Article 15 Procedures Impossible. .	42
C.	Akron-AAUP’s Collateral Attacks on the University’s Exercise of Article 15, Section 12 Authority Are Irrelevant Distortions that Should Be Disregarded.	47
1.	Cost Reduction Measures at Other Public Universities Are Not Material.	47
2.	Inability to Specifically Calculate Cost Savings in FY21 Based on Discontinuation of Six Colleges is Immaterial.	48
3.	Not Furloughing Non-Akron-AAUP Employees is Immaterial.	48
4.	Exercise of Its Fiduciary Responsibility Does not Mean the University is Indifferent.	49
5.	Akron-AAUP Never Intended and Has Not Agreed to Actual Cost-Saving Measures	49
6.	Article 33, Section 3 – Separating Fact from Fiction.	50
7.	Akron-AAUP Presents Misleading Information Regarding Athletics.....	51
8.	Akron-AAUP Remains Ahead by Head Count as Compared with Other Work Groups.....	52
9.	The University is not Using the Pandemic as an Excuse to Hurt Faculty.....	53
10.	Akron-AAUP’s Position on the University and Its Mission is Grossly Misplaced.....	53
11.	Akron-AAUP’s Concern for the University Meeting its CARES Act Obligations is Hollow and Self-Serving.....	54
12.	Perceived Impacts on the University’s Dance Program and Public Administration and Urban Studies and Developmental Programs Do Not Extinguish the Existence of Catastrophic Circumstances.	54
IV.	Once Article 15, Section 12 is Invoked, Retrenchment Procedures No Longer Apply.....	55
V.	The University Met Its Section 12 Obligation to Provide Evidence, to Meet, and to Discuss a Proposed Course of Action with Akron-AAUP.....	58
VI.	The NTT Faculty Issue is Not Properly Before the Arbitrator.	60
VII.	Conclusion.....	61

I. Introduction

Akron-AAUP's brief demonstrates a failure to understand the basic financial management methods and reporting used by higher education institutions. Throughout its brief, Akron-AAUP makes erroneous assumptions, inferences, and statements regarding the University's finances and claims them as indisputable facts. The numbers are the numbers. A financial report is made within a context for a specific purpose¹ - its content cannot be cut and pasted in pieces and parts from various documents to create a valid argument. Such an approach is inherently unsound and appears throughout the entirety of Akron-AAUP's initial brief.²

Akron-AAUP failed to meet its burden of proof in this case. As already explained (see University Initial Brief, pp. 79-81), Akron-AAUP has the burden to prove its case by a preponderance of the evidence. It wholly failed to do so. Indeed, without presenting any legal argument, Akron-AAUP assumed the University carries the burden of proof in this case.³ Even if the University carries the burden, the University certainly met this standard having presented more than a preponderance of evidence on the issues to be determined.³

¹ A budget provides an overall high-level view of the University's revenue and expenditure priorities on a modified accrual basis. It does not present a detailed line-by-line accounting of all revenue and expenditure items. An unaudited financial report for a fiscal year presents a snapshot of actual revenue and expenditure items with comparison to projections for those items on a modified accrual basis. An audited Statement of Revenues, Expenditures, and Changes in Net Position (income statement) is one of three audited financial statements for a fiscal year which provides year-end detail for the actual revenue and expenditures using the accrual method of accounting.

² The University notes it expects Akron-AAUP will continue this approach in the reply brief and objects to Akron-AAUP's anticipated continued mischaracterization of the University's financial reports and information.

³ See, Akron-AAUP Initial Brief, p. 46 - Akron-AAUP states, "[t]he Administration has not proven catastrophic, unforeseen, and uncontrolled circumstances that render compliance with Article 15 impossible or unfeasible." [Emphasis added].

II. Akron-AAUP Ignores Its Own Admissions

From April 24, 2020 until July 14, 2020, Akron-AAUP openly acknowledged the financial crisis the University faced due to the COVID-19 pandemic and the consequential need to implement a reduction in force in FY21. Akron-AAUP's about-turn and aggressive campaign to maintain status quo for its membership ignores its initial reaction to the catastrophic circumstances that befell the University in April 2020.

On April 23, 2020, President Miller delivered remarks to the community titled *Redesigning The University of Akron Affirming Our Promises in the Post-COVID World*. See, University Exhibit

92. President Miller stated in pertinent part that,

Our intention was to present a full strategic plan to the Board of Trustees at its June 2020 meeting. We were well on our way to achieving that goal.

We now face a very different – and unprecedented – set of circumstances. These are circumstances not of a political nature. Circumstances not related to a policy change or workforce reorganization or routine competitive pressures. These are circumstances not related to our own pattern of work or the internal give and take, which are features of all large organizations.

We are now faced with circumstances foisted upon us by an infectious disease having a global impact. All areas of commerce, social interaction, education, even the climate, are affected by this global event.

Your response to this pandemic has been beyond extraordinary. I could not be prouder to work with colleagues who in the space of two weeks transitioned the entire curriculum of a major research university to a remote format, engaged all of our students and integrated them into the new model, continued their important work with one another via video and telephone and, through it all, continued to care for each other, our students and this community.

Thanks to your work, The University of Akron is open for business.

President Miller then candidly stated,

We have admirably weathered the first shocks of this pandemic and kept the University operating. We must now turn our attention to the future. This will

require us to act immediately and with bold confidence to deploy a new design for this University.

But the financial, economic and social realities of the post-COVID world mean The University of Akron that prevails within our tradition of excellence will, without question, have to be a very different university.

- We will be leaner and much more integrated in our work.
- We will retain our strengths in science and engineering, business, law, social science, health science, and select areas of the arts and humanities, which are critical to this region. But, we will deploy those programs in a new design with fewer colleges and less administration.
- We will leverage what we have learned in this crisis to deploy a more creative mix of remote and face-to-face learning in order to meet the needs of the varied circumstances of our students.
- We will have a smaller physical footprint.
- We will maintain a program mix that pays close attention to redundancy with sister institutions in the region.
- We will have a much leaner and more focused research operation.
- We will have a much leaner and smaller athletics program.
- We will all work in ways different than those traditionally common in the Academy.
- We will share governance, negotiate, make decisions and take action with greater efficiency.

The major work we have before us in the next two months is to implement the details of the new University of Akron. [Emphasis added].

The next day, on April 24, 2020, the Akron-AAUP publicly responded to President Miller and stated,

The administration has committed to making cuts to athletics and administrative costs as well as shrinking the physical footprint of the University. We support these decisions, as difficult as they are.

See, University Exhibit 93. Akron-AAUP offered to work with the Administration to help set the University on the “right path” and recognized the need for “collaboration” and “shared governance” as a way to solve problems. *Id.* At that moment, Akron-AAUP appeared to recognize

the gravity of the situation and expressed a desire to work with the University to achieve the best outcome.

On May 15, 2020, a mere four days before the University formally notified Akron-AAUP of invocation of Article 15, Section 12, Akron-AAUP publicly stated to its membership,

Article 15, Section 12 provides an exception to the procedures in Article 15 where ‘catastrophic circumstances, such as force majeure’ render the procedures ‘impossible or unfeasible.’ **It is arguable that this clause applies to the current situation.** [Emphasis added]. **However, the Chapter believes that this clause does not excuse the Administration from complying with Sections 6 and 7, which provide the order of release and the notice required before release. It is the Chapter’s position that this clause only applies to procedures in Sections 1-4.**

Akron-AAUP clearly acknowledged Article 15, Section 12 arguably applied to the current situation. *See, University Exhibit 94.* This Akron-AAUP notice also acknowledged the impossibility or unfeasibility of utilizing the Article 15 retrenchment procedures to implement the critically-needed layoffs in FY21,

the Chapter believes the Article 15 process cannot be used to eliminate any faculty for the upcoming year. [Emphasis not added].

Akron-AAUP’s pursuit of Issue 1 in this arbitration is frivolous, especially given these open admissions on May 15, 2020. *Id.*

Throughout June and July, the Akron-AAUP continued to admit the existence of a significant financial crisis at the University and that faculty reductions were anticipated. For example, on June 9, 2020, the AAUP again stated “the University is experiencing serious financial difficulties.” *See, University Exhibit 95.* In that same article, the Akron-AAUP went on to discuss its option to litigate Article 15 Section 12, ultimately conceding,

However, the Chapter’s leadership believes, given the tenuousness of the University’s finances, that win, lose or draw, such litigation likely would further

endanger the University's future and ultimately be a no-win situation. We believe the Administration shares this view.

Id. On June 24, 2020, Akron-AAUP discussed the current status of negotiations and stated it was negotiating to get the "least damaging agreement" as the "University is in a difficult financial position, so this will be a concessionary agreement." *See, University Exhibit 96.* Again, on July 5, 2020, Akron-AAUP stated "Akron-AAUP realizes that the University of Akron (UA) is in a financial crisis." *See, University Exhibit 97.* In that post, the Akron-AAUP explained that in order to address the crisis, the University asked colleges to propose FY21 budget cuts. Akron-AAUP went on to acknowledge that in connection with budget cuts,

Wages and benefits comprise the major portion of the academics budget; therefore, we anticipate significant faculty reductions. *Id.*

Finally, on July 14, 2020, the Akron-AAUP issued a press release regarding a UA Faculty rally. The press released stated, in connection with the current budget shortfall, "Akron AAUP is bracing for unprecedented layoffs of faculty." *See, University Exhibit 98.*

At all relevant times from April 24, 2020 to July 14, 2020, Akron-AAUP knew the University's COVID-19 created financial circumstance was a sound basis for invocation of Article 15, Section 12. *See, University Exhibits 93 through 98.* Akron-AAUP also knew it was impossible for the University to use Article 15 to implement retrenchment in FY21 to secure necessary cost savings to address the financial crisis. *See, University Exhibit 94.* Akron-AAUP's pursuit of this arbitration is in sharp contrast to its admission on June 9, 2020 that "win, lose or draw, such litigation likely would further endanger the University's future and ultimately be a no-win situation." *See, University Exhibit 95.*

III. The University Satisfied All of the Required Elements to Invoke Its Authority Under Article 15, Section 12.

A. Catastrophic Financial and Operational Circumstances Exist

The crux of this case boils down to whether catastrophic circumstances existed that made compliance with the Article 15 retrenchment procedures impossible or unfeasible when the University invoked Article 15, Section 12. The University took the required prompt action to ensure the University's financial and operational viability,⁴ while Akron-AAUP erroneously claims otherwise, describing the University as merely exercising extreme caution and prudence.

Neither an effective reaction to a catastrophic circumstance nor the passage of time eliminates the catastrophic characteristic of a circumstance. Despite Akron-AAUP's contentions otherwise, the COVID-19 pandemic's impact upon the University exists and has not disappeared.⁵ The consequential catastrophic circumstances created by the COVID-19 pandemic for the University also continue to unfold into FY21. Akron-AAUP's wholesale denial of what is happening to the University and its financial and operational impacts is startling.

1. The Impact Alone of the COVID-19 Financial Fallout upon the University's CFI Score Establishes the Catastrophic Circumstances, Which Were Avoided Only Because of the Immediate Action that the University Took.

Akron-AAUP's misplaced reliance on Senate Bill-6 financial metrics fails to address the more robust Composite Financial Index ("CFI") financial metrics utilized by the University, its accrediting body (i.e. the Higher Learning Commission "HLC"), and by Moody's Investment

⁴ See, University's Initial Brief, pp. 16-67 and 81-94.

⁵As of September 3, 2020, there are 25,884,895 cases of COVID-19 worldwide, with 6,011,042 in the United States and 120,471 in Ohio and 859,130 deaths worldwide, with 183,610 in the United States and 3,939 in Ohio. See, *University Exhibit 99*, COVID Data. On August 28, 2020, the model from the Institute for Health Metrics and Evaluation at the University of Washington projected that 317,312 people may die from COVID-19 in the United States by December 2020. That is more than 136,000 additional deaths, with a daily death rate of 2,000 per day.

Service (“Moody’s”). The CFI metrics provide the most realistic view of the University’s financial situation. Akron-AAUP presented no evidence to rebut or challenge these facts.

Under legislation enacted years ago, Ohio identified metrics by which ODHE could monitor the relative health of public universities – the SB-6 ratios. This metric pulls financial data from various public universities to calculate a viability, a primary reserve, and a net income ratio and then arrives at a composite score.

The CFI financial metrics, as developed by the public accounting firm KPMG and the investment banking firm Prager, Sealy & Co., is widely recognized as providing a high standard of reliance and is regularly used by accreditation, banking, and investment agencies, including the University’s own regional accrediting body, its creditors, and the rating companies that grade the University’s financial and investment viability. *See, University Exhibit 83.* By relying on information from audited financial statements and using four core ratios, the CFI effectively measures an organization’s financial well-being. *Id.* A CFI score derives from combining the four ratios using specific weighting for each. *Id.*

The four core ratios of the CFI financial metrics are: (1) primary reserve ratio; (2) viability ratio; (3) net income ratio; and (4) return on net assets ratio. As described by its authors, the primary reserve ratio,

measures the financial strength of the institution by comparing expendable net assets to total expenses. Expendable net assets represent those assets that the institution can access quickly and spend to satisfy its debt obligations. This ratio provides a snapshot of financial strength and flexibility by indicating how long an institution could function using its expendable reserves without relying on additional net assets generated by operations.

Ratio Analysis in Higher Education: Measuring Past Performance To Chart Future Direction, KPMG and Prager, McCarthy & Sealy, LLC, 4th Edition, p. 11.

An institution's financial health is identified based on the range within which a CFI score falls. *Id. at 83(E)*. For example, a score of 3 or above trending in an upward direction indicates financial well-being and potential for an institution to grow and expand. *Id.* A score under 3 that is trending in a downward direction signals the need to re-engineer the institution (score of 3 to 1). *Id.* Based on GASB Statement Nos. 68 and 75,⁶ public entities with pension and other post-employment benefit obligations could utilize these new accounting and financial reporting requirements to achieve a more precise CFI calculation. *Id. at University Exhibit 83*. The University began using GASB 68 and GASB 75 in FY15 and FY18 respectively. *Id.*

A CFI score of 1.1 signals a need to make systemic changes to the University's business model (such as the personnel and operational changes that the University implemented); and, a score of 1.0 or lower prompts the University's 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/called by the bondholders. *See, University Exhibit 83(E)*.

Since at least FY14, the University's CFI score has been less than 3.0. *See, University Exhibit 83(F)*. The University's CFI score has trended downward since 2017, moving from 2.4 in FY17 to 2.1 in FY18 to 1.1 in FY19. *Id.* The University specifically excluded the impacts of GASB 68⁷ in calculating its FY19 CFI at 1.1. Had the impact of GASB 68 been included, the University's more

⁶ See, University Exhibit 83, p. 11 for a fuller explanation of GASB Statement Nos. 68 and 75.

⁷ Including GASB 68 and GASB 75 is not required as public universities are not statutorily required to provide post-employment benefits.

precise FY19 CFI score would have been 0.1. See, University Exhibit 100 and University Exhibit 83, at p. 11-12.

At its April 15, 2020 meeting, the Board reviewed in executive session the then-known and quantifiable impact of COVID-19 on the University's FY20 CFI score, which it projected at **0.7 or 0.8 (without the impact of GASB 68)** based on an estimated \$8 million in refunds for Auxiliary Services, \$7 million in CARES Act funding, and an -8% market decline. *See, University Exhibit 8, p. 4.* This point is significant and not contested by Akron-AAUP. A CFI score without the impact of GASB 68 and 75 assumptions is less precise than one that includes these assumptions. The University Board knew with certainty on April 15, 2020 that it was at a critical financial red alert – its projected FY20 CFI score was 0.7 or 0.8 (without the impact of GASB 68) based on the effects of the COVID-19 pandemic as of that date. Akron-AAUP did not contest this truth. The University Board also knew with certainty that its financial situation was even worse because the more precise CFI score with GASB 68 and 75 would logically be a negative number. In fact, the projected CFI score for FY20 with the impact of GASB 68 and 75 would be **-1.6**. *See, University Exhibit 100.* Akron-AAUP did not contest these facts. It is inescapable – the COVID-19 pandemic jettisoned the University into a catastrophic financial and operational abyss.

The University had to initiate bold and decisive financial analyses, options, and actions based on its April 15, 2020 projected FY20 CFI score. Since April 2020, the University implemented an estimated \$44 million in cost-saving reductions in its FY21 budget (including the faculty layoffs in question here) in order to avert financial disaster. Even with these reductions, the University remains in the crosshairs of potential financial ruin. As noted earlier, the CFI score is calculated based on four ratios. The primary reserve ratio is necessarily lowered as the University's available

reserves diminish. Drawing from reserves in reaction to financial revenue and expenditure impacts in FY21 is simply not a viable option. A \$7.8 million-draw on reserves (the projected FY21 deficit remaining *after* implementation of all cost-saving measures by the University) would produce a projected FY21 CFI score of **-2.4** with the impact of GASB 68 and 75. *See, University Exhibit 100.* If this case resulted in reinstatement of Akron-AAUP faculty, the projected FY21 CFI score would fall further to at least **-2.5**. *Id.* Simply put, the University's operation and viability is not sustainable at these levels. Any new negative impacts to revenue or expenditures in FY21 will necessarily catapult the University even further into this catastrophic abyss.

Further deterioration of the CFI score in FY21, therefore, would only add to the University's catastrophic circumstances, place the University in a far more dire situation, prematurely accelerate debt repayment, and negatively impact its accreditation and credit standing. In terms of FY21, it is critical the University does not experience a drastic change to its net revenue or operating reserves so that its CFI score and credit rating have a realistic opportunity to stabilize and hopefully recover.

2. The COVID-19 Financial Fallout Prompted Moody's Investor Service to Downgrade the University's Outlook from Stable to Negative, but the University's Immediate Corrective Measures Preserved Its Investment-Grade Credit Rating.

On August 26, 2020, after the filing of initial briefs in this case, Moody's issued a credit opinion ("Moody's 2020 Analysis"). *See, University Exhibit 101.* In its reporting, Moody's revised the University's outlook to negative from stable. The Moody's 2020 Analysis noted the University's "strong fiscal management" and stated,

[w]hile the University of Akron's management has demonstrated strong fiscal decisions in the face of persistent pressures, we view its ability to continue

adjusting to substantial operating challenges as constrained. Further cost cutting efforts will face stiff opposition from bargaining units. *Id. at p. 1.*

Moody's 2020 Analysis recognized credit challenges include "pandemic driven pressures" noting,

[t]he negative outlook reflects our view that the University of Akron's ability to continue adjusting to material and persistent operating pressures will be constrained by challenges that are accelerated by the pandemic. Heightened challenges have the potential to drive fiscal deterioration to levels no longer consistent with the university's current rating category. *Id. at p. 2.*

Moody's 2020 Analysis also specifically stated the following factors could lead to a further rating downgrade:

- Further declines in operating revenue or inability to adjust expenses rapidly enough, leading to deterioration in operating performance and debt affordability
- A reduction in financial reserves or liquidity
- A sustained disruption or reduction in state funding. *Id. at 2.*

A material change in FY21 to the University's current financial situation will undoubtedly result in further destabilizing UA's operations.

Recognizing the decision in this case would materially change the University's FY21 financial position, the University took required action to address this potential contingency. As detailed in a later section, on August 21, 2020, the University initiated Article 15 retrenchment procedures to be implemented as early as possible (FY22 and FY23) while noting the potential need to invoke Article 15, Section 12 in FY21. This current arbitration case will make or break this University.

3. **Between April 15 and August 15, 2020, the Board of Trustees Addressed the Catastrophic Circumstances that It Faced, and Took Necessary Action to Correct It.**

Faced with the direct impact of the COVID-19 pandemic on the University's operations, the Board of Trustees met on April 15, 2020 to review the potential financial circumstance it could experience for the remainder of FY20. During the executive session, the Board used a packet to support robust discussion to better understand the looming circumstance befalling the University. *See, University Exhibit 77.* Akron-AAUP conceded the University provided Akron-AAUP with this information pursuant to a Non-Disclosure Agreement on or about April 20, 2020. *See, Akron-AAUP Brief, p. 10.*

That packet did the best it could with very little information and no concrete experiential basis in consequential impacts occasioned by global pandemics. What we know is what was and was not known on April 15, 2020. Key **known** items included:

- Governor DeWine declared a State of Emergency in Ohio on March 10, 2020 based on COVID-19 (*see, University Exhibit 15*);
- That same day, the University restricted physical presence on-campus and cancelled on-campus events (*see, University Exhibit 16*);
- The University then immediately took steps to move all courses to on-line learning delivery at the end of Spring break, beginning March 30, 2020 (*Id.*);
- A few days later, Ohio's Director of Health issued a state-wide Stay at Home Order effective April 6, 2020 through May 1, 2020 (*see, University Exhibit 23*); and,
- Also in March 2020, the University received its SSI monthly revenue deposit, reflecting a -2.3% as compared to December 2019, a variation historically in the range of normal (*see, University Exhibit 12*), which delayed the revelation of the dire financial fallout that was immediately below the horizon.

What was not known was how COVID-19 would continue to impact directly and indirectly the University's revenue and expenditure streams and the resulting consequence to the University's Primary Reserve Ratio and CFI score. Akron-AAUP ignored these facts in its brief.

During the April 15, 2020 meeting, the Board discussed various areas of known COVID-19 impact, which included:

- The University refunded to students approximately \$7.8 million in room, board, facility, and transportation fees (*see University Exhibit 77, p. 2*);
- The University computed a projected CFI score of .7 as of June 30, 2020 based on a then-projected operating deficit of \$6.8 million for the remaining 2½ months of FY20 and an anticipated 8% decline in market value of the University and its Foundation's endowments with the \$7.8 million in room, board, and fee revenue reduction (*Id., p. 3*);
- Minimizing any further reduction to the CFI score in FY20 required maintaining the Primary Reserve Ratio and its weight in calculating the University's CFI score (*Id. at p. 4*);
- The University was advised to expect a 20% reduction in SSI revenue for the remaining 2½ months of FY20 and for the entirety of FY21 – estimated as a \$5.1 million-revenue reduction over less than three months in FY20 and a \$19.3 million-revenue reduction in FY21 (*Id.*);
- The University projected a \$1.6 million-deficit in Athletics by the end of FY20 (*Id.*);
- The University implemented a hiring pause for the foreseeable future, except where vital programs demonstrated need (*Id. at p. 6*);
- The University examined rules and contract obligations governing reductions in force for all employee groups (*Id. at p. 7*);
- The University reviewed its CARES Act funding – noting 50% was required to be spent for emergency aid for students and the remainder to cover costs associated with the significant change in the delivery of instruction due to COVID-19 (*Id. at p. 8*);

- The University expected a potential \$6,762,091 draw on its operating reserves in FY20 based on then known facts (*Id.*);⁸
- The University projected a resulting \$65 million-draw on operating reserves in FY21 based on certain assumptions, but noted in pertinent part:

Unrestricted net assets were approximately \$83.5 million as of June 30, 2019. Should we draw \$6.76 million in FY20, that would reduce the amount of reserves to \$76.7 million. Drawing an additional \$65.4 million in FY21 would thus reduce our reserves to \$11.3 million. Such a draw on reserves of that magnitude would have a devastating impact on liquidity and thus the University's ability to operate. It would result in a significant downgrade to the University's credit rating and raise serious concerns for the Higher Learning Commission, the University's regional accrediting body. Finally, it would necessitate a restructuring of the institution in order for it to continue operations beyond FY21.

As discussed below, Akron-AAUP did not contest the situation that existed on April 15, 2020 and did not dispute the facts and projections outlined in the April 15, 2020 Board executive session packet. The University began its budgetary work based on that uncontested information. On April 15, 2020, the state of information upon which the University had to make informed choices in FY21 budgetary planning supported a \$65 million-budgetary deficit in FY21. That constituted a catastrophic circumstance and necessitated the course of action taken by the University from April 2020 to present.

At its April 15, 2020 meeting, the University's Board examined the Financial Report FY20 for eight months-ended February 29, 2020. *See, University Exhibits 27 and 28.* That report reflected months pre-dating COVID-19's arrival. In executive session, the Board discussed the

⁸ The original projected FY20 deficit was reduced to an estimated \$6.8M deficit as of the Financial Report for FY20, nine months-ended March 31, 2020 as a result of receipt of CARES Act funding of \$7.1M in the Spring of 2020 (shown on the chart in CFO Dr. Storck's video), campus wide expenditure restrictions implemented in April 2020, and other cost-saving measures implemented between April 2020 and June 30, 2020 that yielded additional savings.

then-anticipated financial impact of COVID-19 on FY20 and FY21. *See, University Exhibit 77.* That discussion identified the potential projected \$65 million-budget deficit in FY21 and was the basis for the University’s leadership beginning to work on appropriate courses of action to address the anticipated shortfall prior to Fall 2020.

Less than a month later, on May 5, 2020, Governor DeWine officially announced the \$775 million in reductions to Ohio’s General Revenue Fund. *See, University Exhibit 31.* Shortly thereafter, the University received its May 2020 SSI monthly revenue deposit of \$6,266,926, a -25% reduction as compared to December 2019. *See, University Exhibit 12, p. 1.* The manifestation of a multi-million-dollar budget deficit one month into the COVID-19 pandemic with only two months remaining in FY20 is a catastrophic circumstance. Further, the existence of a corresponding multi-million-dollar budget deficit for FY21 (set to begin July 1) is also a catastrophic circumstance.

Akron-AAUP conceded that a catastrophic circumstance “requires a present catastrophe – not the possibility of one in a future worst-case scenario.” *See, Akron-AAUP Brief, p. 12 ll. 16-17.* A catastrophe to the University’s revenue stream occurred as a direct result of the COVID-19 pandemic beginning in April 2020. When this fact became inescapable on May 5, 2020, the University took specific action to invoke Article 15, Section 12 and notified Akron-AAUP accordingly on May 19, 2020.⁹ *See, University Exhibits 78, 79, and 81.*

At its May 29, 2020 special Board meeting, the University focused on action necessary to properly address its FY20 budget deficit and to prepare for the impact of the COVID-19 pandemic

⁹ These notifications are more fully discussed on pp. 62-63 and 106-113 of the University’s Initial Brief.

on FY21. *See, University Initial Brief, pp. 33-36.* The Board did not adopt a FY21 budget at its May 29, 2020 meeting.

On June 17, 2020, the University's SSI monthly revenue deposit was \$6,266,926, another **-25%** reduction as compared to December 2019. *See, University Exhibit 12, p. 1.*

On July 15, 2020, the University's Board passed eight resolutions as part of its effort to address the looming FY21 budget. *See, University Exhibits 61, 62, 63, 64, 65, 66, 67 & 68.* These resolutions were expected to yield approximately \$17 million in cost reductions in FY21. Prior to July 15, 2020, the Board's actions secured approximately \$4.3 million in savings. *See, University Exhibits 38, 39, 40, 41, 42, 43, 44, 45, 46, 53, 56 & 58.*

At its August 12, 2020 meeting, the University's Board passed Resolution No. 8-11-20 *Pertaining to the Approval of the FY 2020-2021 Akron and Wayne General Fund Combined Budget.* *See, University Exhibit 74.* The FY20 projected budget assumed a **-15%** enrollment decline in FY21 as well as an SSI reduction of **-8.8%.** These assumptions did not materially change the catastrophic circumstances occasioned by the COVID-19 pandemic as compared to the FY21 projected budget in April 15, 2020. Rather, as President Miller explained to the University's Board a mere nine days before the filing of initial briefs,

The minimum total reduction in revenue compared to FY20 is \$29,620,000. This is an historic number representing nearly a 22% reduction in FY20. In my time in higher education, I have never seen a single year reduction of this magnitude. [Emphasis added]

Thus, this year's revenue decrease, now projected to be \$29M could be as large as \$41M. [Emphasis not added]

Given the variability in revenue and expenses possible in the coming months, we caution the Board that the draw on reserves could range from \$7.8M to as much as \$32M. [Emphasis not added]

See, University Exhibit 70. The fact that April 2020's projected FY21 \$65 million-budget deficit was reduced in August 2020 based on the SSI revenue and TGO revenue adjustments does not mean that new money is now available or that there is a \$15 million-"surplus" as Akron-AAUP claimed in its brief.

4. Akron-AAUP Repeatedly Mischaracterizes the Financial Data Which Demonstrates that Catastrophic Circumstances Exist.

a) Akron-AAUP Mischaracterized the April 15, 2020 Board of Trustee Executive Session Materials.

In presenting its case, Akron-AAUP ignored the entirety of the above-listed facts regarding the April 15, 2020 Board meeting and the packet of information the Board reviewed (which the University shared with Akron-AAUP) and never challenged their accuracy. This is factually significant. All of the foregoing items are undisputed.

Instead, Akron-AAUP focused on one primary point regarding the April 15, 2020 Board packet: the materials allegedly projected a \$65 million-draw on reserves for FY21. *Id. at pp. 10-11.*

(1) Akron-AAUP mischaracterized the use of University reserves in relation to the projected \$65 million-deficit.

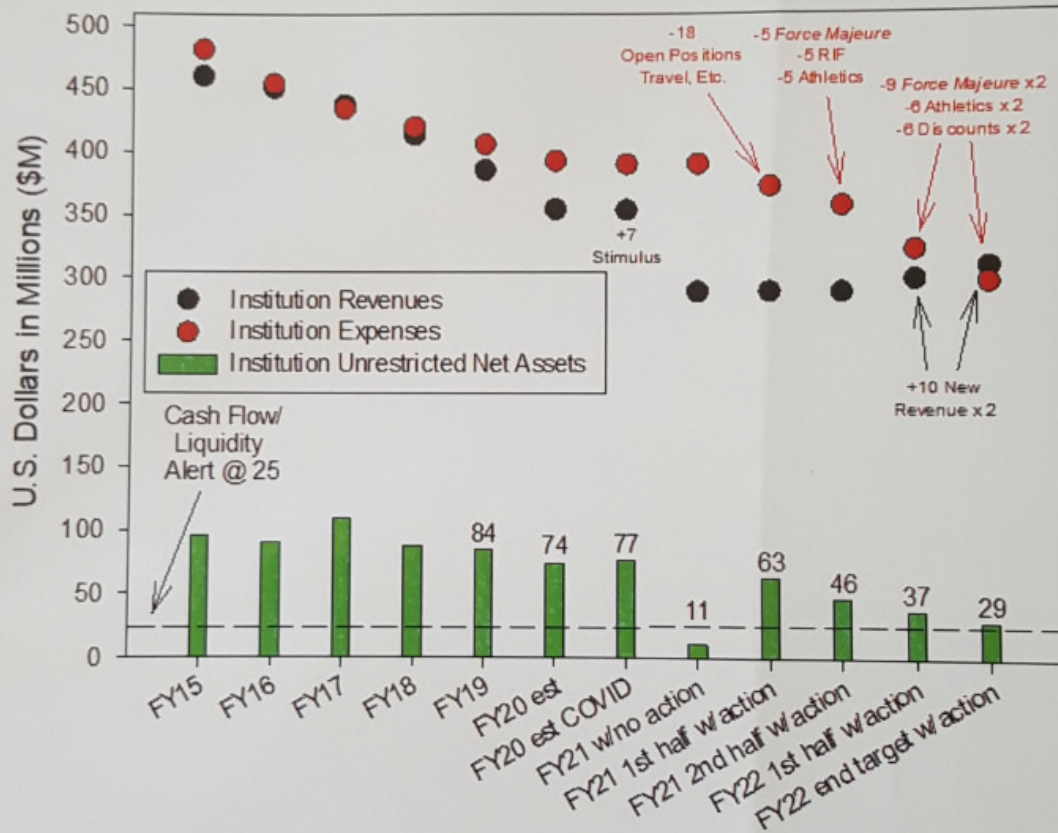
While the Board projected a \$65 million-budget deficit for FY21, it very specifically stated that, "[d]rawing an additional \$65.4 million in FY21 would thus reduce our reserves to \$11.3 million ... [s]uch a draw on reserves would have a devastating impact on liquidity and thus the University's ability to operate." *See, University Exhibit 77, p. 9.* Akron-AAUP's claim that the Board intended to draw \$65 million from its reserves to cover the projected \$65 million-budget deficit

is incorrect and ignores the remaining pages of that document. Specifically, the packet stated on page 11:

The University of Akron was operating within an unsustainable model prior to the COVID crisis. The University was undertaking an aggressive strategic reshaping which focused on growth of high-demand academic programs, retention, and the optimization of other revenue streams in addition to expense reductions over a period of three years. This approach is no longer viable. Now, the University must undertake a full re-design of itself in the coming year with the goal of implementing the new design as soon as possible but no later than fall 2021 ... All this must be done in full transparency ... But it will also have to be done very quickly. The Figure below demonstrates the challenge of this undertaking. The hypothetical set of moves (in red) coupled with optimistic new revenue projections burden the University with significant liquidity challenges while reaching an end point that does not completely solve the problem. Charting a path through the current fiscal situation is the only job we have in the coming months.

The packet then provided on page 12 a graph depicting a “Hypothetical Solution Trajectory for post-COVID UA.”

Hypothetical Solution Trajectory for post-COVID UA



The option of utilizing force majeure was clearly identified based on the catastrophic circumstance such as that depicted on the chart occurred. Akron-AAUP did not take issue with this chart and completely ignored it in its initial brief.

Within the context of the earlier CFI section (pp. 7-10), the Board explored the current post-COVID trajectory in the above-chart, which explored how the University might address the projected \$65 million-FY21 deficit. This chart implicitly acknowledged the University's reserves could not be used beyond a certain level – it did not draw below \$25 million in operating reserves. The bottom left of the chart specifically identifies the “cash flow/liquidity alert @ 25” and draws

a corresponding dotted line, thereby indicating the "point of no return" from a financial perspective. This context drove the options identified in red descriptors of "-18 Open Positions Travel, Etc." and "-5 Force Majeure -5 RIF -5 Athletics" and "-9 Force Majeure -6 Athletics -6 D is counts x2" at the top right hand of the page. The chart memorialized the unsustainability of the University under the current circumstance and assumed \$20 million in "new" revenue in FY22 for discussion purposes. Notably, conjecture on additional monies did not materially alter the University's predicament as the chart demonstrates. This confirmed the University had to take prompt action to address the catastrophic circumstances and could not simply sit back, wait, and hope for better times.

(2) Akron-AAUP needlessly drew the structural deficit into question.

Akron-AAUP then questioned the existence of the University's structural deficit, noting it was not specifically identified or explained within the April 15, 2020 packet. The University never claimed the April 15, 2020 packet was intended to provide a detail of the structural deficit it has carried since FY12. The structural deficits were irrelevant to this discussion, as the deficits created by the COVID-19 pandemic overwhelmed and engulfed the much smaller structural deficits that the University previously had addressed. Consequently, drawing the structural deficit into question because it was not detailed in a packet that focused upon remedying the catastrophic circumstances the University encountered by the COVID-19 pandemic is baseless.

b) Akron-AAUP Mischaracterized CFO Dr. Stephen Storck's July 10, 2020 Video

Despite the University having provided significant information to Akron-AAUP's leadership from April 20, 2020 through July 10, 2020, Akron-AAUP leadership requested Interim

CFO Dr. Stephen Storck (“CFO Dr. Storck”) create a video that could, in simplified fashion, explain the University’s projection in March of a FY21 \$65 million-budget deficit. When Akron-AAUP asked the University to have CFO Dr. Storck provide a video presentation regarding the FY21 \$65 million-budget deficit projected in March, the University acted in good faith to provide it.

Akron-AAUP then mischaracterized the nature of the video and its context in an apparent attempt to create an issue where none exists.¹⁰ CFO Dr. Storck very clearly introduced his video as one “containing comments on the assumptions that were used to project the FY21 General Fund budget in March of this year.” That is what Akron-AAUP leadership asked him to do and that is what he did.

Akron-AAUP now argues erroneously that no catastrophic circumstances existed because it perceives two positive changes occurred that completely invalidate the information shared in that video. Specifically, Akron-AAUP contends that the July 2020 announced change in SSI reduction, combined with improved August 2020 Fall enrollment numbers, materially transformed the University’s financial position out of the realm of catastrophic.

¹⁰ Akron-AAUP’s blatant manipulation of the CFO Dr. Storck video began on July 28, 2020 when Akron-AAUP published the “UA’s Budget Presentation: Dr. Rudy Fichtenbaum Responds” video presentation and document on its website, distributing it to its membership. That communication falsely claimed the University had not provided Akron-AAUP financial information so that it could verify the finances of the University, and then used University financial reports to hypothecate falsely that \$129.2 million dollars in revenue was “missing” and that the University had a surplus of \$24.9 million in FY19. *See, Akron-AAUP Exhibit 10.* Akron-AAUP released Dr. Fichtenbaum’s report as part of its campaign to have its membership reject the 7/13/20 tentative agreement reached by the parties, which contained concessionary terms that would have been in effect at the beginning of Fall 2020 to help offset the FY21 budget deficit.

The University responded to the false information in Dr. Fichtenbaum’s report, and a back-and-forth occurred between Dr. Fichtenbaum and CFO Dr. Storck. *See, Akron-AAUP Exhibits 10, 17, 18 and University Exhibits 59 and 83.* The University believes the CFO Dr. Storck and Dr. Fichtenbaum debate was relevant in only one context – to support the University’s unfair labor practice charge against Akron-AAUP filed August 28, 2020 which seeks relief from Akron-AAUP’s violation of Rev. C. 4117.11 (B)(1), (2), & (3). *See, University Exhibit 103.* This arbitration involves facts and numbers. Dr. Fichtenbaum established he could not interpret financial reports.

(1) **Catastrophic Circumstances existed even after the July 2020 change in SSI reductions.**

Four days prior to the video being released on July 10, 2020, the Ohio Department for Higher Education (“ODHE”) notified the University that the previous estimate of a \$20 million-decrease in SSI funding for FY21 and FY22 was changed to an \$8.7 million-reduction¹¹ for FY21, and CFO Dr. Storck did not shy away from that development. He openly shared that information in the video in a segment titled “Potential Impacts ODHE update on SSI projections \$9 million less in SSI – significant decline.” CFO Dr. Storck clearly explained that ODHE specifically cautioned that its current projection remains subject to change based on economic factors and realized tax collections. As Chancellor Randy Gardner stated in the July 6, 2020 ODHE notification,

Please note that, as with all line items in this challenging budget environment, I must place a “warning label” on this positive news. This new FY21 SSI amount is subject to change if the overall budget and supporting state revenue sources were to significantly worsen during the fiscal year compared to current projections. [Emphasis added]

See, University Exhibit 83(D).

ODHE’s update on July 6 did not materially change the University’s dire situation. While the degree of decline in revenue was less than originally announced, the actual reduction in the University’s SSI monthly revenue in May 2020 and June 2020 remained catastrophic in nature. The FY21 State Share of Instructional Distribution Schedule (7/1/20-6/30/21) published on July 6

¹¹ When the ODHE initially advised the 14 public universities that SSI funding would be cut by 20% in FY21 and FY22, UA expected its \$99M for FY20 would be reduced to \$79M in FY21. Had the ODHE reduced SSI by 20%, UA would have experienced a much deeper reduction because SSI is based on a rolling three-year formula, computed one-year in arrears and UA’s enrollment declined in each of those years. UA’s SSI budget for FY20 was \$99,139,000 while as of July 6 the University was expecting to receive \$90,445,000 in FY21 and that is the amount in the FY21 budget. That is a reduction of \$8,694,000 or \$8.7M which is a reduction of 8.8% as compared to the 4.38% reduction identified in Chancellor Gardner’s July 6, 2020 letter, that UA would have suffered had its enrollment remained stable. Review of the funding information on ODHE’s website confirms UA sustained the largest percentage cut of any of the 14 institutions. *See, University Exhibit 110.*

identified the University’s monthly SSI revenue payments scheduled for July 2020, August 2020, and September 2020 in the amount of \$7,537,044 per month. *See, University Exhibit 84, p. 1.* This amount reflected a **-9.7%** reduction as compared to the pre-COVID-19 SSI monthly-revenue in the first six months of FY20. *See, University Exhibit 12, p. 1 and University Exhibit 104.* When considered in context, the decline in the University’s SSI monthly funding is as follows from December 2019 to present:

<u>Month</u>	<u>SSI Monthly Revenue Deposit</u>	<u>Percentage Change from December 2019</u>
December 2019	8,343,088	
January 2020	8,148,596	-2.3%
February 2020	8,148,595	-2.3%
March 2020	8,148,595	-2.3%
April 2020	8,148,595	-2.3%
May 2020	6,266,926	-25.0%
June 2020	6,266,926	-25.0%
July 2020	7,537,044	-9.7%
August 2020	7,537,044	-9.7%

Akron-AAUP contends the revised SSI funding projection for FY21 from ODHE “is a net positive change of approximately \$11M for the 2021 fiscal year.” This is simply untrue and grossly mischaracterizes the facts. A change in finances from negative \$65 million to negative \$54 million does not create a positive \$11 million. It is not “added” revenue; it is just less of a reduction. The University still cannot afford to maintain the 178 employees it laid off. What Akron-AAUP calls an “\$11M swing,”¹² is merely a different degree of catastrophe. It is catastrophic, nonetheless.

¹² Akron-AAUP suggests that the “\$11M swing” would cover the salaries and benefits of Akron-AAUP members on the RIF list. Even if there was an infusion of new revenue (which there is not), it is rather presumptuous to lay claim to that money and assume it would be best used to only benefit Akron-AAUP members. The entirety of the University’s workforce has been impacted by reductions in force. Further, all work groups except Akron-AAUP made economic concessions to contribute to addressing the FY21 projected deficit. That Akron-AAUP is using the sacrifices of other stakeholders to support its argument for status quo for itself should not be entertained.

Historically, the largest percentage change in the University's SSI revenue between FY17 and FY19 was a -3.65% decline. *See, University Initial Brief, p. 84.* The most recent pre-COVID-19 fiscal year was 2019. In comparison with FY19, the University experienced a -25.0% SSI funding reduction in FY20 in a two-month period, an overall -8.35% variance from FY19. Based on the current funding level for FY21, the University will experience an overall -11.2% variance from FY19 in its SSI revenue. What Akron-AAUP erroneously calls a "net positive change," is in fact the currently known catastrophic drop in SSI revenue occasioned by the COVID-19 pandemic for FY21. As Chancellor Gardner made clear, the SSI funding in FY21 is subject to change. *See, University Exhibit 83(D).* Based on everything occurring from March 10, 2020 to present, the University now clearly has enough knowledge to appreciate that government orders prohibiting mass gatherings necessarily impact the University's operation and have a catastrophic impact to its revenue and expenditure streams. If these events occur again during FY21, the University's finances will be worse, not better.

(2) The most recent student enrollment data still constitutes catastrophic circumstances.

Akron-AAUP next focuses on the University's enrollment projections identified by CFO Dr. Storck in the July 10, 2020 video. Akron-AAUP argues the enrollment projections CFO Dr. Storck used should have been those available July 8 and not those from April 14. Again, Akron-AAUP mischaracterizes the nature and purpose of the video.

As mentioned earlier, at the very beginning of the video, CFO Dr. Storck stated he was providing "comments on the assumptions that were used to project the FY21 General Fund budget in March of this year." In March, the enrollment projections from April 14 and July 8 were not available. CFO Dr. Storck was open and transparent in his video presentation and shared

under a segment titled “Potential Impacts Enrollment uptick, but caution” that the University had in recent weeks experienced an improvement in enrollment for Fall 2020 from a projected decline of 20% to one of 15%. He clearly stated the numbers were preliminary and could be impacted in upcoming weeks to bring it down to the original estimate.

Akron-AAUP argues the University’s July 8, 2020 projected 15% enrollment decline for Fall 2020 represents a “trend [that] is unmistakably and consistently positive.” *See, Akron-AAUP Brief, p. 13.* This argument is flawed for multiple reasons.

Akron-AAUP ignores the fact that a 15% student enrollment decline is still catastrophic. This change is not, as Akron-AAUP contends, a revenue increase; it merely is a smaller revenue reduction than originally projected, but catastrophic nonetheless. It is tantamount to saying a tightrope walker is closer to the ground whether the rope be at 80 feet or 100 feet. The drop remains catastrophic in both instances. As noted earlier, the purpose of the CFO Dr. Storck video was to comment on the FY21 \$65 million-deficit projected in March 2020. That he recognized an improvement in projected enrollment in July 2020 does not materially change the catastrophic character of the information and data he had in March 2020 when he began to develop the FY21 budget.

(3) Student enrollment does not yield the same revenue.

Although the enrollment projection may have appeared better than first projected, actual enrollment numbers cannot be relied upon to yield the same level of revenue because the University is not fully open and is operating with far less students physically on campus. Revenue streams resulting from students being on campus will be impacted based on their absence. For

the Fall of 2019, the University delivered 85% of its classes in a manner that involved the students being physically on campus, with the majority being 100% in-person classes.

Fall 2019					
Campus	CAT	Sections		Seats	
AKRON	In-Person	3515	77%	70440	79%
	Off Campus	325	7%	3226	4%
	Online	341	7%	8895	10%
	Hybrid	94	2%	2224	2%
WAYNE	In-Person	215	5%	3254	4%
	Off Campus	67	1%	922	1%
	Online	6	0%	38	0%
	Hybrid	7	0%	147	0%
Total		4570	100%	89146	100%
	Delivery	Sections		Seats	
	In-Person/Hybrid	3831	84%	76065	85%
	Remote	739	16%	13081	15%
	Total	4570	100%	89146	100%

In-person delivery yields specific revenue (e.g. room and board; dining; parking).

For Fall 2020, the percentage of class delivery type is as follows:

Fall 2020						
Detail	Campus	Delivery	Sections		Seats	
	AKRON	In-Person	920	23%	12282	15%
		Off Campus	244	6%	2294	3%
		Online	2033	51%	50847	62%
		Hybrid Group	403	10%	8085	10%
		Dual Delivery	110	3%	2823	3%
	WAYNE	In-Person	60	1%	625	1%
		Off Campus	62	2%	731	1%
		Online	92	2%	2527	3%
		Hybrid Group	75	2%	1366	2%
		Dual Delivery	19	0%	368	0%
	Total		4018	100%	81948	100%

	Delivery	Sections		Seats	
	In-Person/Hybrid	1458	36%	22358	27%
	Remote	2431	61%	56399	69%
	Dual Delivery	129	3%	3191	4%
	Total	4018	100%	81948	100%

The comparison between last year and this year is significant in two major ways, both of which negatively impact the University's Tuition, General Service, and Other Fees ("TGO") revenue stream. First, the class delivery model completely flipped. In-person/hybrid delivery moved from 85% in Fall 2019 to 27% in Fall 2020. This means substantially less students are on campus and less revenue will result. Remember that while on campus, students buy food, beverages, supplies, etc. and use facilities, parking, residence halls, etc. – vital UA revenue streams not included in tuition. Akron-AAUP's reliance upon enrollment percentages ignores this dramatic shift in class delivery and the associated TGO revenue impact.

Student enrollment¹³ cannot be assumed to yield the same TGO revenue as occurred in past years because of the substantial change in delivery model. Even though on the eighth day of classes for Fall 2020, enrollment declined **-6.6%** as compared to Fall 2019 in total enrollments and **-11.9%** in new freshmen enrollments, these figures do not reveal the full weight of the problem.

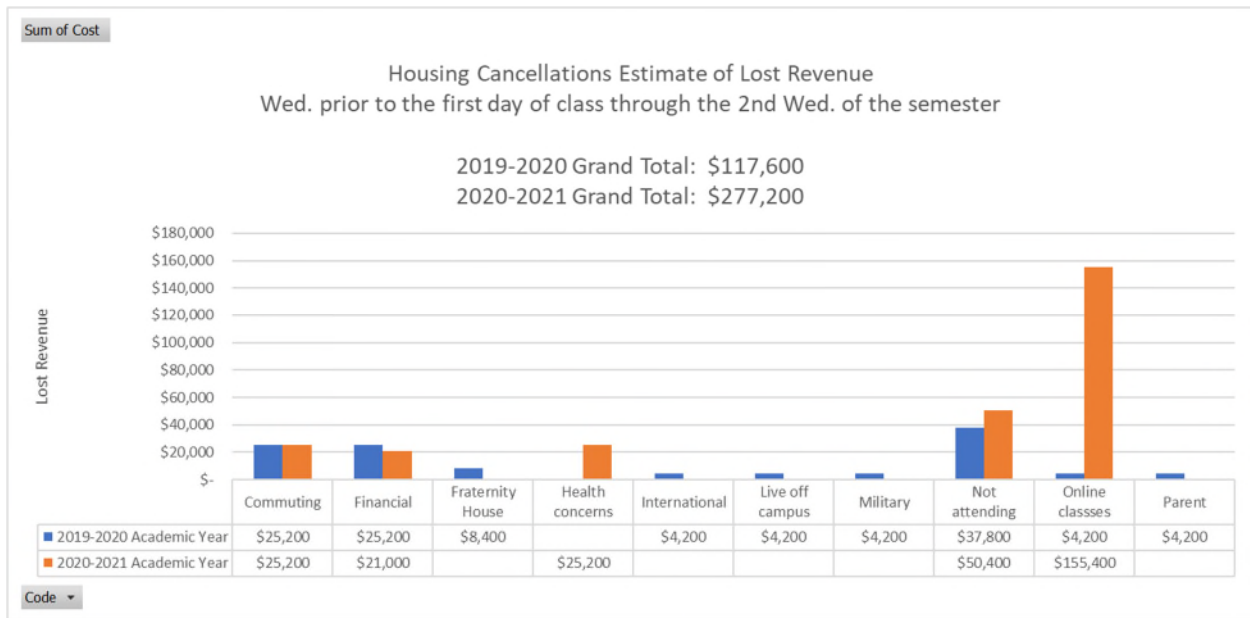
Actual class sections declined **-12.1%** for Fall 2020, nearly twice the enrollment reduction in students. Tuition revenue is derived from classes taken and not by head count alone. The lower student head count, combined with the double-digit percentage drop in class sections,

¹³ The University's total enrollment numbers include high school students enrolled at the University under College credit plus programs ("CCP"). CCP does not generate the same tuition revenue that post-secondary student enrollment generates. From Fall 2019 to Fall 2020, CCP enrollment percentage increased from 12.9% to 14.4%, which artificially reduces the enrollment decline and further undermines revenue streams. See, *University Exhibit 105*.

exacerbates an already negative financial impact. With only 15% of these class sections being held physically on campus, other important pockets of revenue (e.g. residence halls, parking, student recreation center, dining, etc.) will also be impacted.

The University had originally scheduled and published more on-campus sections for Fall 2020 than now exist. Some faculty modified to a full remote delivery from what had already been scheduled by the University as hybrid courses with built-in on-campus face-to-face instructional time. Specifically, of the University's approximately 4,018 course sections, faculty modified 347 (8.6%) from hybrid to pure remote. This creates yet another unanticipated negative disruption to the University's TGO revenue stream in FY21 as it pulls more students off campus. The fact remains that catastrophic circumstances existed in May 2020 and additional negative COVID-19 impacts will emerge throughout FY21 and beyond. Students who now have no in-person classes can be expected to demand refunds of their facilities fee, transportation fee, room and board, etc.

The University is already experiencing dramatically reduced revenue from room and board for students living in the residence halls. The University had 2,334 active housing contracts on August 26, 2019 and 1,781 on August 24, 2020. This is a -24% reduction in students living on campus. In addition, due to changes in course delivery mode (to online) and expressed health concerns, students are canceling their residence hall contracts at a significantly higher rate than last year at this time. These cancellations represent at least an additional \$176,400 in lost revenue from residence halls as shown on the below-chart. This trend in housing contract cancellations is expected to continue as the semester progresses.



(4) **Akron-AAUP needlessly focused on an unused column from Dr. Storck’s worksheet and drew the structural deficit into question.**

Akron-AAUP’s brief states,

“Here again, we see clear discrepancy between what is being assumed and what the most recent data actually shows.” *See, p. 14.*

Utilizing its Exhibits 14 and 15, Akron-AAUP then tries to create the impression a discrepancy exists in CFO Dr. Storck’s video presentation based on the “transfer-in”¹⁴ lines of these exhibits.

Akron-AAUP Exhibit 14 contains worksheets Dr. Storck used when he created the July 10 video. Why CFO Dr. Storck created these worksheets and how they were used by him is not reflected on the documents. In fact, the record contains no evidence on how or what specific data CFO Dr. Storck relied upon in creating the video. Review of the documents does confirm that

¹⁴ The “transfer-in” line designates monies transferred into the General Fund from other funds of the University.

all the “transfer-in” lines highlighted by Akron-AAUP in its brief were not used in the video. Akron-AAUP has no basis to argue a discrepancy exists.

Next, Akron-AAUP claims,

(Ex. 14), there is a \$13.8 million transfer-in to the General Fund for FY20, which represents a draw from operating reserves. (Green highlighting added). We assume that this number provides the justification for the claim of a \$14 million “structural deficit.” *See, p. 14.*

Simply put, this is incorrect. A structural deficit exists when an entity’s actual revenues are less than its actual expenditures. The University has experienced a structural deficit since FY12 as its overall expenditure increases have outpaced its revenue streams each year. *See, University Exhibit 91.* In the July 10 video, CFO Dr. Storck explained that the structural deficit in FY20 was addressed, in part, by the University restructuring its long-term debt, use of reserves built into auxiliary operations, deferring capital improvements, and limiting operating funds of departments, all of which are one-time fixes. *See, CFO Dr. Storck video beginning at 5:12.*

CFO Dr. Storck’s July 10, 2020 Video presentation achieved its intended purpose. That it may now be outdated does not mean the circumstances that it provided comment on did not exist. Akron-AAUP’s challenge of the video it requested does not support its position. It is a matter of fact and record that catastrophic circumstances existed for purposes of Article 15, Section 12. The University’s later comments regarding the catastrophic circumstances and its action to address the financial crisis do not transform what occurred.

c) **Akron-AAUP falsely contends that the University ended FY20 with a multi-million-dollar surplus.**

Akron-AAUP took significant unsupported liberties with the University’s financial reports. Specifically, Akron-AAUP claimed,

Therefore, the actual projected surplus for the University is \$16.2 million.

In fact, it appears that on a cash basis the University is running a multi-million surplus. *Akron-AAUP brief at p. 16.*

Suggesting a surplus without any support and based on manipulation of the University's financial reports is irresponsible, particularly when the University is in the throes of addressing the most catastrophic circumstances in its history. Akron-AAUP uses the same methodology Dr. Rudy Fichtenbaum employed in erroneously alleging the University was "missing \$24.9 million" in FY19 and that it had a surplus of that amount.

The University's audited financial statements are prepared utilizing the accrual basis of accounting as required by Generally Accepted Accounting Principles ("GAAP") and are based upon Governmental Accounting Standards Board reporting standards ("GASB"). *See, University Exhibit 83, pp. 2 & 3.* The primary purpose of audited financial statements is to present the complete financial position of the University as of year-end – not the results of operating budgets for the fiscal year. *Id.* Using these financial statements to allege results of operating budgets of a fiscal year is intellectually dishonest and inappropriate.

The operating budget does not include all of the University's financial information and does not claim to do so. *See, University Exhibit 84, p. 3.* Rather, only those primary items the University strives to control during a fiscal year are captured on the budget. *Id.*

Akron-AAUP manipulated the University's unaudited Financial Report for the eleven months-ended May 31, 2020 to create the false impression the University had a FY20-ending multi-million-dollar surplus. This is not accurate. In fact, the University projected it would need to transfer in (that is, draw from reserves that will negatively affect the CFI) a projected

\$2,573,000 to balance its books. *See, University Exhibit 77.* It should be noted the University took significant cost reduction measures that impacted FY20 and supported it in bridging the budget deficit without transferring in a larger amount.

To support its surplus allegation, Akron-AAUP created its own statement or compilation of revenues, combining the “Total Revenues” line from the General Fund, Auxiliary Fund, and Department of Sales and Services FY20 budget pages. Next, Akron-AAUP added the “Total Expenditures” line from each of the foregoing budget pages. Then, Akron-AAUP subtracted those overall numbers and erroneously declared a \$16.2 million “actual projected surplus” for FY20.

This methodology is flawed for multiple reasons:

- GAAP principles and GASB standards do not support this methodology as it fails to account for transfers in and from each of these funds, which results in double counting on the revenue side. So any combination of these budgets must necessarily adjust for the movement between the funds in order to accurately reflect an overall financial position.
- The Akron-AAUP methodology excludes the much more comprehensive statement of revenues, expenses, and changes in net assets, and does not include any adjustments or accrual for liabilities, investments, or costs.
- The approach assumes a pure and total cash basis can be appropriately extracted from a report made under a modified accrual basis. This assumption is wrong.

Had a \$16.2 million-surplus existed on the Financial Report FY20 eleven months-ended May 30, 2020 report, the “Transfer-in (draw on operating reserves)” line would not have shown a \$2,573,000 projected transfer. As of May 30, 2020, with all of the reductions implemented by the University through that date, the University was positioned for a \$2,573,000 budget deficit, not a \$16.2 million-surplus.

d) Akron-AAUP unconvincingly compares the University to other public State universities.

Akron-AAUP also suggested utilizing a comparison of reported expendable net assets by ODHE based on FY19 Audited Financial Statements to support its position that the University is not experiencing a catastrophic circumstance. The paragraph it devoted to this purpose compares ODHE's assessment of the expendable net assets of Wright State University to that of UA. This approach fails to provide a holistic examination and analysis of both institutions and their fiscal situation. It also uses less robust financial metrics, ones not used by the University's accreditation and credit evaluative agency. Further, the SB-6 ratios Akron-AAUP used appear materially different, and no explanation is provided as to the consequence of the resulting composite score as it relates to the financial well-being of each institution to operate. Lastly, Akron-AAUP disregards the fact that every public university has different reserves, long-term debt, short-term debt, assets, liabilities, and revenue and expenditure streams. Comparison without holistic and robust examination of the finances of each institution is meaningless.

e) Remaining items noted by Akron-AAUP are of no consequence

Akron-AAUP concedes the FY21 budget projection approved by the University's Board in Resolution 8-11-20 contains a projected \$7.8 million-dollar budget deficit. It calculated the budget deficit based on subtracting the budgeted expenditures from the budgeted revenues and then reconciling the identified transfers. That math left a \$7.8 million-deficit, which appears on the line "Transfers-in (Draw on Operating Reserves)" as \$7,833,000. Had Akron-AAUP used this same method when it reviewed the Financial Report for FY20 eleven months-ended May 2020, Akron-AAUP would have confirmed that FY20 projected a \$2,573,000 deficit as of May 31, 2020 instead of fabricating a \$16.2 million-surplus. Regardless, Akron-AAUP fails in its attempt to

minimize the significance of the \$7.8 million-budget deficit gap remaining in the originally projected \$65 million-deficit in March 2020, later revised to \$56 million in August 2020. The fact remains, the \$7.8 million-figure is the result of implementing cost-savings measures in excess of \$44 million through difficult and sound financial management.

Akron-AAUP also finds fault with the University's -15% decline in enrollment assumption pointing to the August 12, 2020 enrollment projections. As explained in an earlier section, the -15% enrollment assumption is based on enrollment data and was five percentage points less than the -20% decline figure used by the University when it began its FY21 budget planning in March 2020. Note that new freshmen are down -11.6% and new transfer students are down by -10.9% - it is students new to campus this Fall that are most significant because revenue loss carries forward until graduation for each class. The University needs fewer faculty in Fall 2020 than in Fall 2019 (as it is offering 12.1% fewer classes) and it will need even fewer faculty in Fall 2021. Further, revenue generated by enrollment in FY21 is materially different from that in FY20 and earlier due to changed instructional delivery models and fewer students living on and travelling to campus.

5. Akron-AAUP Improperly Challenges the University's Decision Making in Addressing the Catastrophic Circumstances that It Faced.

Akron-AAUP's brief failed to appreciate or demonstrate any awareness of the full context of the University's situation. The University's budget does not revolve around, and it is not intended for only Akron-AAUP's benefit. Any potential for saving additional money in FY21 should

not be used for, the one purpose sought by Akron-AAUP in this case.¹⁵ If, in fact, the FY21 projected budget is updated based on actual new revenue, then the University will need to determine how those monies should be allocated. Just because they might exist does not mean they will exist. If they do exist, they do not automatically get directed to only reinstating Akron-AAUP members. It is important to remember that every employee group at the University has been impacted – not just Akron-AAUP. The Board also laid off 82 non-Akron-AAUP employees on July 15, 2020. Indeed, every other work group besides Akron-AAUP has sacrificed with salary reductions, increased health care contributions, elimination of retiree/dependent health care, and being subject to furlough. Akron-AAUP rejected such concessions and proposes that it be given sole priority treatment as compared to all other University employee work groups. Beyond employees, students have been impacted by the FY20 and FY21 budget reductions. For example, the University eliminated three University Zip intercollegiate sports programs and those student athletes can no longer participate in them. The University's priority will focus on remaining operationally viable so it can fulfill its mission and obligations to its students, alumni, and the Akron community.

¹⁵ To the extent the 96 Akron-AAUP positions abolished are now lower based on retirements occurring since passage of Resolution 7-7-20 has no relevance to this case. While the potential reinstatement cost may be less if this arbitration found against the University and ordered that remedy, Akron-AAUP members have refused to agree to any concessions in salary or to increased health care premiums as all other work groups. Further, the University needs flexibility to address new financial impacts of the COVID-19 pandemic in FY21 to minimize any further reduction in its reserves.

a) The University was not required to draw down its reserves just to avoid faculty layoffs.

Akron-AAUP proposes that the University draw its operating reserves down \$11.54 million (what Akron-AAUP claims to be the total cost of the Akron-AAUP RIF reduction) in lieu of laying off the 96 Akron-AAUP faculty members.¹⁶ This effectively asks for Akron-AAUP to be treated like a secured creditor in bankruptcy – that its members be given a priority claim to the University’s operating reserves over all other stakeholders. This kind of thinking demonstrates that Akron-AAUP puts itself first, even ahead of the University’s students. This is inconsistent with Akron-AAUP's public expressions of wanting "shared sacrifice" on campus – all other employee groups have been sacrificing since July 2020. Indeed, the non-faculty employee work groups started sacrificing in 2015 when 213 positions were eliminated by the University. Ordering reinstatement of the RIF’d faculty would indeed require the University to draw significantly from its operating reserves. Doing so would lower the University’s CFI rating for FY21 to a problematic level for the University and place it in the position of having insufficient cash flow and reserves to operate at current levels. Akron-AAUP is effectively asking for a remedy that would increase the severity of the catastrophic circumstances the University already addressed through its ongoing course of action from at least April 2020 to present.

b) The University Took Action within Its Control.

Akron-AAUP’s claim that the University failed to cut low-hanging fruit before passing Resolution 7-7-20 is untrue and devalues every person at the University who has sacrificed while Akron-AAUP has refused to contribute to securing a solution. On one hand, Akron-AAUP declares

¹⁶ Akron-AAUP’s suggestion that operating reserves be tapped in lieu of honoring the RIF in Resolution 7-7-20 inherently concedes the University did not have a surplus of \$16.2 million in FY20, which ended less than two months ago.

that no catastrophic circumstances exist, while on the other hand, it proclaims that non-faculty groups should be impacted even more before Akron-AAUP can be touched.

After many days of negotiations from April 21, 2020 through July 13, 2020, the University and Akron-AAUP reached a tentative agreement (“7/13/20 TA”) containing concessions that would have contributed to addressing the FY21 projected \$65 million-budget deficit.¹⁷ By the time the 7/13/20 TA was reached, the University had already taken the following actions to secure cost savings in FY21:

- Implemented salary decreases for non-bargaining unit staff and contract professionals, securing \$2,179,000 in savings for FY21 – *See, University Exhibit 43 & University Initial Brief p. 52;*
- Implemented increases for non-bargaining unit staff and contract professionals in health plan employee contributions from 1/1/21 forward, securing \$350,000 in savings for FY21 – *See, University Exhibit 45 & University Initial Brief p. 52;*
- Eliminated retiree and dependent health care benefits for non-bargaining unit retirees/dependents, securing \$730,000 in savings for FY21 – *See, University Exhibit 46 & University Initial Brief p. 52;*
- Implemented salary decreases for non-bargaining faculty and academic administrators with faculty rank, securing \$920,000 in savings for FY21 – *See, University Exhibit 56 & University Initial Brief p. 52;*
- Implemented increases for non-bargaining faculty and academic administrators with faculty rank in health plan employee contributions from 1/1/21 forward, securing \$75,000 in savings for FY21 – *See, University Exhibit 45 & University Initial Brief p. 52;*

¹⁷ As of July 13, 2020, the FY budget deficit was at \$65 million. It was revised at the August 12, 2020 meeting to a \$56 million-budget deficit.

Therefore, all non-bargaining unit employees had concessionary action implemented before Akron-AAUP even agreed to a tentative agreement. This was far more than low-hanging fruit.¹⁸

The 7/13/20 TA with Akron-AAUP never resulted in one cent of cost savings for FY21.

Despite its commitments to the contrary at the bargaining table, on July 24, 2020, Akron-AAUP's Executive Committee issued a statement outlining its reasons for not recommending ratification "of the Administration's *last, best, and final offer* to the chapter." [Emphasis added]. See, *University Exhibit 102*. This proclamation against ratification occurred three days before the voting window (July 29, 2020 to August 5, 2020).

At the last bargaining session on July 13, 2020, the University specifically asked the Akron-AAUP negotiators to agree to recommend the 7/13/20 TA to their membership. See, *University Exhibit 103*. The Akron-AAUP negotiators stated that their bylaws prevented them from recommending tentative agreements. *Id.* The University then asked the Akron-AAUP team to recommend ratification of the 7/13/20 TA to its Executive Committee. *Id.* Akron-AAUP stated it would not do so, but that the pros and cons of the 7/13/20 TA would be given to the membership. *Id.* The University then specifically asked if Akron-AAUP would commit to not soliciting "no" votes. *Id.* Akron-AAUP represented that it would not solicit "no" votes. *Id.* They explained their intention was to spell out the pros and cons with transparency and to tell the membership what would happen if the 7/13/20 TA was voted down so its membership could understand the

¹⁸ President Miller identified the first action items implemented beginning April 23, 2020, which included senior administrators taking a salary reduction of 10% for FY21; securing a 20% reduction in athletic expenditures for FY21; non-academic administrative divisions securing a 20% reduction in expenditures for FY21; developing a plan to reorganize the academic division to reduce the number of colleges; hiring freeze for FY20, with rare exception; immediately halting all non-essential operation expenditures; developing new work rules for classified, unclassified, and contract professionals; and reopening negotiations with all bargaining units. These initiatives constituted more than the proverbial low-hanging fruit Akron-AAUP insists still exists.

consequences and cast an informed vote. *Id.* The University relied on these representations by Akron-AAUP in finalizing the 7/13/20 TA. *Id.*

At a special Board meeting on July 15, 2020, the University's Board ratified the 7/13/20 TA with Akron-AAUP (*See, University Exhibit 68*) as well as the tentative agreements with concessionary terms the University had with the Communication Workers of America (*See, University Exhibit 62*) and the Fraternal Order of Police (*See, University Exhibit 63*). The Communication Workers of America (two bargaining units) and the Fraternal Order of Police ratified their respective tentative agreements with the University. These other bargaining units also endured a reduction-in-force of positions in their units, as contained in Resolution 7-6-20. The layoffs in Resolution 7-6-20 have not been challenged and offset the FY21 \$65 million-budget deficit by \$5.2 million. This action was certainly also more than low-hanging fruit.

Akron-AAUP's membership vote reportedly resulted in rejection of the 7/13/20 TA – "[o]ut of 364 Chapter members, 184 voted against ratification and 159 voted for ratification." *See, University Exhibit 103*. With this vote, Akron-AAUP's membership ensured the only cost-savings measure the University could practically secure in FY21 prior to the end date (December 30, 2020) of the Akron-AAUP labor contract was through Resolution 7-7-20. Now, Akron-AAUP seeks to overturn this savings. If that occurred, every employee work group except Akron-AAUP will have contributed to reducing the University's budget deficit. Akron-AAUP's statement "[t]he Administration's claim that the Akron-AAUP expects not to share in the hurt is preposterous" (*Akron-AAUP Brief*, p. 25) further demonstrates Akron-AAUP's utter lack of concern for how its position in this case devalues all other stakeholders at the University who

have done their part to support the University in squarely addressing the catastrophic circumstances occasioned by the COVID-19 pandemic.

c) Article 15, Section 12 Does Not Require the University to Exhaust Every Cost-Saving Measure.

Nothing in the labor contract gives Akron-AAUP the priority status it suggests the Arbitrator should confer to it in this case.

Article 15, Section 12 states,

Section 12. The procedure for retrenchment set forth in this Article is designed to accommodate both the orderly change in the University and reductions that must accompany more abrupt changes in circumstances. The parties recognize that catastrophic circumstances, such as 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 this Article. Therefore, this Section 12 shall not be used to accomplish retrenchment as set forth in this Article. If such unforeseen, uncontrolled and catastrophic circumstances should occur, then the University agrees that, 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. [Emphasis added].

The clear language of Article 15, Section 12 asks whether the “catastrophic circumstances” “would render impossible or unfeasible the implementation of procedures set forth in this Article.” This language is not ambiguous. As such, it is bedrock contract law that the clear and unambiguous contract language controls. See e.g., *Willamette Industries – In re Willamette Industries, Inc.*, 1996 WL 34674439 (“...where a contract speaks in clear and unambiguous language, the contract controls. What may have transpired during negotiations does not change the rights of the parties under the written, clear and unambiguous language of the Agreement.”). Akron-AAUP’s suggestion that Section 12 incorporates how the University plans to address the

deficit occasioned by the catastrophic circumstances has no basis. The language makes no mention of how the University plans to address a deficit. Exercise of that discretion would fall within Rev. C. 4117.08(C)(A) and Article 3, Section 2(A) of the Labor Contract, unless expressly restricted by Article 15, Section 12 or another applicable provision in the Labor Contract. No provision in the Labor Contract restricts the University's managerial right to determine matters of inherent managerial policy in its overall budget. Accepting Akron-AAUP's suggested interpretation would effectively insert a new term into Section 12 that was not negotiated by the parties and limits the University's managerial rights in Article 3, Section 2(A) of the Labor Contract.

Akron-AAUP's suggested interpretation would have the effect of granting Akron-AAUP a secured or priority status as compared with every other employee group (and even the students) of the University. Basically, the University's discretion in determining how to create its budget would require it to implement every potential expenditure cut to people or programs before implementing a cut that could impact an Akron-AAUP member's compensation, benefit, or position. This would change the University's mission to being Akron-AAUP faculty-centered instead of student-centered. There is no factual or legal basis for this interpretation. This grievance is not about the University's managerial discretion in determining its overall budget.

d) Akron-AAUP's Allegation Regarding the Cuts Made to Academic Units is of No Relevance as to Whether Catastrophic Circumstances Exist under Article 15, Section 12.

The entirety of this segment of Akron-AAUP's argument focuses on criticizing how Provost Wiencek guided identification of positions to be abolished on the academic side. Nowhere within this segment does Akron-AAUP explain why it is relevant to where it is placed in the brief (i.e.

under Issue #1 – whether catastrophic circumstances under Article 15, Section 12 exist). How Provost Wiencek supported identifying academic budget cuts is not material to Issue #1 in this case, particularly when Akron-AAUP provided no explanation or argument and simply placed narrative under the Issue #1 segment of its brief.

B. Catastrophic Circumstances Render Implementation of Article 15 Procedures Impossible.

The clear language of Article 15 recognizes Sections 2 through 11 as constituting retrenchment procedures. Article 15, Section 2(C) states,

If, after completing this procedure, the Board makes the judgment that retrenchment requires reductions in bargaining unit faculty beyond those conducted through attrition, the following procedures establish the process for implementing any retrenchment. [Emphasis added].

The completed procedure in Section 2(C) refers to the procedures in 2(A)&(B). The following procedures referred to in 2(C) refer to those proscribed in the next sections of Article 15.

Article 15, Section 12 states,

Section 12. The procedure for retrenchment set forth in this Article is designed to accommodate both the orderly change in the University and reductions that must accompany more abrupt changes in circumstances. The parties recognize that catastrophic circumstances, such as 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 this Article. Therefore, this Section 12 shall not be used to accomplish retrenchment as set forth in this Article. If such unforeseen, uncontrolled and catastrophic circumstances should occur, then the University agrees that, 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. [Emphasis added].

Section 12 expressly acknowledges that Article 15 contains the procedure for retrenchment. *See, Sentence 1 above.* This treatment of Article 15 as embodying procedures carries through the entirety of Section 12. *See, emphasized portions above.* There is no mention of the *substantive rights* that the Akron-AAUP manufactured, anywhere in Article 15, or in Section 12 as Akron-AAUP claims. Section 12 specifically provides it cannot be used to accomplish retrenchment under Article 15, further supporting the express allowance of Section 12 to replace Article 15 retrenchment procedures when catastrophic circumstances exist. This point is reinforced in the last sentence of Section 12, where the language specifically identifies what the University is obligated to do when Section 12 is invoked: (a) meet with Akron-AAUP; (b) discuss and show evidence of the catastrophic circumstances (using the criteria in Section 3(A)); and (c) discuss the proposed course of action. Once these obligations are met, Article 15 procedures are null and void, replaced with the Section 12 course of action. To contort the language otherwise, as the Akron-AAUP suggests, would render Section 12 meaningless.

On the question of whether the catastrophic circumstances render implementation of the procedures in Article 15 impossible or unfeasible, the answer is clearly yes. The University explained in its initial brief (pp. 94-102) that impossibility or unfeasibility existed as the Article 15 retrenchment procedures could not be implemented to achieve cost savings in FY21 from the date the window to do so would have opened (i.e. May 5, 2020 when Governor DeWine announced the COVID-19-related SSI revenue reduction). This is true even using the April 15, 2020 date suggested by Akron-AAUP in its brief.

Akron-AAUP's current argument as to impossibility or unfeasibility completely contradicts its previously stated position on this point. As mentioned earlier, Akron-AAUP specifically told its own membership on May 15, 2020,

the Chapter believes the Article 15 process cannot be used to eliminate any faculty for the upcoming year. [Emphasis not added].

Akron-AAUP carried the burden of demonstrating it was *possible* to use Article 15 retrenchment procedures to achieve the required cost savings in FY21 necessary due to the catastrophic circumstances created by the COVID-19 pandemic. Akron-AAUP did not explain at all how Article 15's retrenchment procedures could have been implemented to achieve the necessary savings in FY21. The fact that Akron-AAUP boldly told its membership "**the Article 15 process cannot be used to eliminate faculty for the upcoming year**" (i.e. FY21) confirms the University's case. Should Akron-AAUP's statement be viewed as unclear, Akron-AAUP's recent 2020-06 Grievance titled *University's Invocation of Article 15, Section 3* should be considered. *See, University Exhibit 106.*

For background, on August 21, 2020, President Miller initiated Article 15 Retrenchment procedures as a planning contingency based on the University's current circumstances. President Miller explained,

Since the arrival of the COVID-19 pandemic, The University of Akron acted as necessary to meet the catastrophic circumstances created by unforeseen impacts to its General Fund revenue streams and expenditures that could not be addressed within the existing procedures. All actions taken were necessary, appropriate, and defensible.

Despite our best efforts, certain additional circumstances now exist that require planning contingencies. This letter memorializes only one such contingency plan. It should not be interpreted or construed otherwise.

Certain matters, outside the University's control, could significantly impact FY21 and FY22 and required additional actions be taken. Such matters include but are not limited to: Akron-AAUP's rejection of the July 13, 2020 tentative agreement (which included acceptance of the faculty layoffs implemented under Article 15, Section 12 of the Collective Bargaining Agreement between The University of Akron and The American Association of University Professors, the University of Akron Chapter, effective through December 31, 2020 ("CBA"); pending grievances, arbitrations, lawsuits, and administrative actions challenging the Article 15, Section 12 layoffs; and direct and indirect consequences of the COVID-19 pandemic, which could result in further layoffs under Article 15, Section 12. Nothing herein suggests that Article 15, Section 12 should not have been invoked in May 2020. Nothing herein estops invocation of Article 15, Section 12 during FY21 or FY22, as may be necessary. [Emphasis added].

See, University Exhibit 107.

Six days later, Akron-AAUP filed Grievance 2020-06. That grievance challenged the University's invocation of retrenchment procedures, claiming,

- "The Akron-AAUP disputes that the items listed under item 1 on page 2 of the President's letter constitute a financial exigency as necessary to trigger retrenchment." *See, University Exhibit 106, p. 1.*
- "A reduction in funding does not "require" a retrenchment and such reductions are not the actions contemplated by Section 1(A)(4)." *Id.*
- "Furthermore, the reduction in funding does not require a retrenchment any more than it requires the elimination of football." *Id.*
- "Fourth, for the reasons stated in the Akron-AAUP's opening brief and to be stated in its reply brief in the pending Article 15 arbitration, the Akron-AAUP denies that the Administration has provided evidence that the efforts taken to date (assuming the reinstatement of all faculty on the current RIF list) are insufficient..." *Id. at p. 2.*
- "Remedy: The University will: (i) immediately cease and desist from taking any further action to implement retrenchment procedures it initiated on or about August 21...(iv) if it nonetheless severs any BUFs, reinstate them with back pay (and interest), with all benefits restored retroactively and otherwise make them whole." *Id. at p. 3.* [Emphasis added].

On August 27, 2020, Akron-AAUP President Pam Schulze sent Provost Wiencek a response on behalf of Akron-AAUP to the University's August 21, 2020 initiation of retrenchment, which

recounted many of the foregoing points. Akron-AAUP also notified its membership of these developments, stating,

It is our position that the Administration needs to look to expenses that are not core to its academic mission, especially in light of the substantial reduction in full-time faculty in recent years, as well as in the last couple of months. We continue to believe that peripheral expenditures – such as athletics – need to be reduced further before considering any additional cuts to academics. The Administration also needs to look at reducing the number of administrators, or furloughing those individuals, or having them take deeper pay cuts, as they have at other institutions.” [Emphasis added].

See, University Exhibit 108.

Although Akron-AAUP conceded in Grievance 2020-01 (*See University Stipulated Exhibit B(1)*) that Article 15 Section 2 “has already been satisfied by the multiple voluntary retirement programs offered by the University in recent years,” it claimed in Grievance 2020-06 that Article 15, Section 2(B)&(C) have not been met. This is significant because Akron-AAUP is doing everything it can to maintain status quo for as long as possible, including flip-flopping its position on exactly the same issue in two different grievances. One can draw only one conclusion: Akron-AAUP’s reaction to the catastrophic circumstances created by COVID-19 is that Article 15 cannot be used unless and until the University extracts every dollar of cost savings it can from every student program and from every University employee who is not in the Akron-AAUP bargaining unit and after Akron-AAUP has exhausted every argument it can construct. Hence, Akron-AAUP’s own conduct demonstrates it is impossible and unfeasible for the University to utilize Article 15.

Akron-AAUP’s arguments have the added effect of restricting the University’s managerial rights to determine its overall budget. No such restriction exists in the clear and unambiguous language of Article 15. Akron-AAUP’s argument also seeks to impose non-existent substantive rights for Akron-AAUP members and would grant Akron-AAUP a priority status overriding every

other contractual obligation of the University. There simply is no basis for Akron-AAUP's position. Akron-AAUP is doing everything it can to make it impossible for the University to secure any permanent cost savings from the Akron-AAUP unit in FY21, FY22, or beyond. Indeed, its own membership recognizes this fact,

We are forever grateful for AAUP because they remain steadfast, as does our chapter, that no full-time faculty should be terminated at UA. See, University Exhibit 109. [Emphasis added].

Akron-AAUP's arguments in its brief are unsupported, particularly considering that when the University properly invoked Article 15, Section 12, Akron-AAUP conceded there is a basis for argument on this point, and Akron-AAUP wholly failed to meet its burden in this case.

C. Akron-AAUP's Collateral Attacks on the University's Exercise of Article 15, Section 12 Authority Are Irrelevant Distortions that Should Be Disregarded.

1. Cost Reduction Measures at Other Public Universities Are Not Material.

Akron-AAUP takes aim at the University's top administrators and claims catastrophic circumstances do not exist at UA because five other state universities reportedly had higher percentage salary reductions for their top administrators. *See, Akron-AAUP Brief, p. 19.* Akron-AAUP solely relies on newspaper articles to support its claim and presents no financial comparative data on the financial status of each identified university prior to the COVID-19 pandemic and since it impacted Ohio's higher education institutions. Further, Akron-AAUP provided no analysis of the size of the administrative team at each identified university to compare that with UA. Akron-AAUP also fails to provide detail (e.g. duration) of the reported salary reductions and provides no information regarding other cost reduction measures implemented at those institutions.

2. Inability to Specifically Calculate Cost Savings in FY21 Based on Discontinuation of Six Colleges is Immaterial.

Akron-AAUP points to the fact that on May 22, 2020, the University acknowledged it was not be able to quantify at that moment in time the tangential expenditure reduction from acting to discontinue six of its eleven colleges (Resolution 5-1-20, *See, University Exhibit 39*), and complains the University cannot quantify savings and costs from this redesign until October 2021. *See, Akron-AAUP Brief, p. 20.* The University was open and transparent with Akron-AAUP that actual numbers and analysis would be needed to quantify the information requested. Admitting that one does not have information right now to be able to calculate something, does not mean what is to be calculated does not exist.

3. Not Furloughing Non-Akron-AAUP Employees is Immaterial.

Akron-AAUP's next criticism takes aim at staff, contract professionals, and coaches by finding fault with the University for not furloughing these work groups from approval of new work rule 3359-11-02.1 *Furloughs for Non-Bargaining Unit Employees* on July 15, 2020 to present. *See, Akron-AAUP Brief, p. 20.*

It is true these groups have not yet been furloughed in FY21. They have already sacrificed salary reductions and will see increased healthcare contributions in calendar year 2021, and the University will implement a furlough if it needs to in order to "balance its budget if it experiences a reduction in state funding or other loss in revenue, for any reason, that causes a significant operating deficit." *See, University Exhibit, 42.* What is truly disheartening is Akron-AAUP's disregard for the non-bargaining unit employees who can be impacted by implementation of work rule 3359-11-02.1. In rejecting the 7/13/20 TA, the Akron-AAUP also rejected the negotiated furlough policy that would have applied to Akron-AAUP faculty in limited

circumstances. The remedy Akron-AAUP requests in this case would potentially place the University in the position of being forced to implement rule 3359-11-02.1 to secure additional cost savings from its non-bargaining employees through furloughs to cover the expense of Akron-AAUP reinstatement. The impact of Akron-AAUP members returning to campus at the expense of non-bargaining unit workers would be devastating for the University.

4. Exercise of Its Fiduciary Responsibility Does not Mean the University is Indifferent.

In its brief section in part titled “Shared Sacrifice” Akron-AAUP stated,

The truth is that the Administration has demonstrated its lack of awareness of what makes the University work – its faculty – and its indifference to working with the Akron-AAUP to cooperatively solve problems. *Akron-AAUP Brief*, p. 21.

The University did try to work cooperatively with Akron-AAUP. In good faith, and over the course of approximately three months, the University negotiated and reached a tentative agreement with Akron-AAUP on 7/13/20. That agreement was memorialized in writing by Akron-AAUP’s attorneys, who titled the document what it was: “AAUP Tentative Agreements for Ratification.” *See, University Exhibit 82*. In its brief, Akron-AAUP changed its name and mischaracterized the tentative agreement as a “proposed agreement,” and then proclaimed the University was indifferent to working with the Chapter.

5. Akron-AAUP Never Intended and Has Not Agreed to Actual Cost-Saving Measures

Akron-AAUP next attempts to convince the Arbitrator that it had cost-saving opportunities it offered to the University that were “obstinately” rejected. *See, Akron-AAUP Brief*, p. 21. The University’s Board ratified the 7/13/20 TA. Akron-AAUP’s membership rejected the 7/13/20 TA. Since rejection of the 7/13/20 TA, Akron-AAUP has not presented the University with

any offer of a cost-savings proposal. Instead, Akron-AAUP pursued this grievance seeking to overturn the only cost-savings measure related to Akron-AAUP that the University was able to implement prior to the start of the Fall 2020 semester – Resolution 7-7-20.

Akron-AAUP claims it,

was willing to agree to concessions – including equivalent reductions to salaries and increases in health care contributions that have been applied to other employees. But the Akron-AAUP membership was not willing to abide the extreme, inhumane layoffs pursued by the Administration. *See, Akron-AAUP Brief, p. 23.*

If Akron-AAUP's members were, in fact, "willing to agree to concessions," then they would have approved the 7/13/20 TA that contained those concessions. In the alternative, Akron-AAUP would have proposed an agreement for the University's consideration after its membership rejected the 7/13/20 TA that contained those concessions to which its membership would agree.

On page 23 of its brief, just five lines after the above quote, Akron-AAUP states,

Apparently, relief from the current contract is not actually needed, including the wage concessions to which the Akron-AAUP agreed for this year.

To be clear, Akron-AAUP has not approved or agreed to any wage concessions in FY21.

Furthermore, Akron-AAUP's claim that it is willing to agree to concessions has no basis in fact.

6. Article 33, Section 3 – Separating Fact from Fiction.

Akron-AAUP also asks the Arbitrator to treat the University's decision to pursue negotiations over a successor contract rather than pursue another arbitration for Article 33, Section 3 mid-term modifications as dispositive of the catastrophic circumstances issue. Akron-AAUP neglected to disclose that it used Article 33, Section 3 as a weapon in its campaign to defeat ratification of the 7/13/20 TA. *See, University Exhibit 103.* Akron-AAUP advised its constituents that a better deal could be had by taking the concessionary terms in the 7/13/20 TA to arbitration

once rejection of the tentative agreement occurred. The University was not inclined to effectively reward Akron-AAUP's bad faith conduct, which is currently the subject of an unfair labor practice charge. *Id.*

The University intends to secure concessions from Akron-AAUP in successor negotiations. Had the University pursued Article 33, Section 3 mid-term modifications, it would have had to do so through arbitration. Obtaining relief from the date of arbitration forward would not have secured the cost savings that would have been secured had Akron-AAUP's membership approved the 7/13/20 TA. Since the labor contract expires December 31, 2020, the University's decision to focus on the successor negotiations realistically accepts the situation created by Akron-AAUP. To suggest that the catastrophic circumstances upon which the University invoked Article 15, Section 12 did not (or no longer) exist based on this decision by the University to focus its effort on successor negotiations instead of Article 33, Section 3 mid-term modifications through another arbitration is misplaced.

7. Akron-AAUP Presents Misleading Information Regarding Athletics.

Akron-AAUP next focuses on University athletics.¹⁹ All of its assertions are false or misleading.

¹⁹ Akron-AAUP cites to its position papers on athletics, which promote a deeper cut to athletics and suggest UA drops down to Division II. Exiting the MAC conference now would only exacerbate the University's financial condition. Akron-AAUP maintains that the University could reduce its spending by at least \$14M by simply moving out of Division I to Division II football. Aside from this not being true, it would require the University to drop out of the MAC as it is not possible to drop to a lower division and still remain a member. The MAC also requires that all member schools offer Division I football as a condition of continued membership and **it would cost the University in excess of \$18,000,000 to join a new conference to exit the MAC.** Further, to withdraw from the MAC would be to step away from the group of universities the University competes with for students, faculty and partnerships. Both the Akron-AAUP and the University can agree that maintaining college athletics is expensive and President Miller has been consistent in his public comments (and comments to Akron-AAUP) that the University will continue to review

After discussing the perceived unfairness in how athletics have been impacted by FY20 and FY21 cost reduction measures, Akron-AAUP acknowledges the three highest paid coaches took a voluntary 20% pay reduction for FY21. Akron-AAUP complains that the *force majeure* clauses in the coaching contracts were not invoked. As the University has continually explained to Akron-AAUP leadership, the *force majeure* provisions did not need to be invoked because the coaches voluntarily agreed to reduce their salaries – the highest paid by 20%.

Akron-AAUP also gives an impression that athletics was spared any reduction-in-force. That is simply not true. In Resolution 7-6-20, the University abolished 82 positions, which included seven (7) positions in the Office of Athletics, including two (2) coaches. Akron-AAUP's argument on athletics is misplaced, particularly when the University reduced the athletic budget by 23% and eliminated three sport programs (comprised of student athletes).

8. Akron-AAUP Remains Ahead by Head Count as Compared with Other Work Groups.

Akron-AAUP pushes an analysis that its total salaries would be reduced in an alleged disproportionate manner as compared to administrators and coaches. The University challenges the methodology used by Akron-AAUP. The truer comparative analysis should be by historical head count, as provided by the University in its brief, and not through salary aggregation. *See, University Initial Brief*, pp. 12-13 for data 2010 to 2019. By head count, Akron-AAUP experienced a lower decline as compared with other work groups since 2010. *Id.*

and adjust athletics spending, just as it has in eliminating three athletic program and slashing its FY21 budget by 23%. This, not dropping out of Division I sports or the MAC, is the proper way to reduce Athletics spending.

9. The University is not Using the Pandemic as an Excuse to Hurt Faculty.

Akron-AAUP asserts the University is “merely seizing upon the circumstance of the pandemic to take its past financial imprudence out on the faculty” and “is using the pandemic as an excuse to do all at once what could have been done over time and with proper notice to faculty.” *See, Akron-AAUP Brief, p. 29.* Akron-AAUP provides zero evidence to back up this accusation. The University denies these assertions.

As Akron-AAUP conceded, the senior leadership at the University is newer. President Miller began leading the University in October 2019, Joe Uργο became the Interim Executive Vice President & Provost in November 2019, Interim CFO Dr. Storck began in January 2020, and Provost John Wiencek started at the University in April 2020. *Akron-AAUP Brief, p. 7.* These four individuals had no history with Akron-AAUP and no pre-disposition against Akron-AAUP.

10. Akron-AAUP’s Position on the University and Its Mission is Grossly Misplaced.

Akron-AAUP squarely attacks a vital component of the University and campus life with the purpose of putting its faculty in a place of greater importance than the students. Wrapping itself in the words of the University’s mission, Akron-AAUP states in its brief,

Nowhere in the mission statement does it say that it is committed to subsidizing intercollegiate athletics.

The fact that the Mid-America Conference (MAC) has postponed football for the fall is more evidence that intercollegiate athletics are not essential.

Furthermore, even if there is a revenue shortfall during FY21, the University has adequate reserves and the flexibility to further reduce spending by making additional cuts to athletics.

See, p. 18.

To suggest that students of the University enrolled solely to attend classes discounts the history, traditions, identity, culture, campus life, and student experience embodied at the University. This University and every 4-year post-secondary public university in Ohio offer a full campus and collegiate experience inclusive of academics, athletics, Greek life, and campus activities and programs. Academics represents the core for any post-secondary institution but does not exist to the exclusion of all other parts of the college or university.

This University takes its mission seriously, and all of its actions align with making the UA Zip experience the most fulfilling and rewarding one available for its students.

11. Akron-AAUP's Concern for the University Meeting its CARES Act Obligations is Hollow and Self-Serving.

The University has and continues to meet the requirements of the CARES Act. Akron-AAUP suggests that reinstatement of the faculty through this arbitration could support the University in meeting its legal obligations. Akron-AAUP presented no evidence to support this spurious suggestion.

12. Perceived Impacts on the University's Dance Program and Public Administration and Urban Studies and Developmental Programs Do Not Extinguish the Existence of Catastrophic Circumstances.

On pages 26 to 28 of its brief, Akron-AAUP stated its belief that the University is eliminating two programs through Resolution 7-7-20 by eliminating certain faculty members in the Dance Program and Public Administration and Urban Studies and Developmental Programs. The University denies that it is eliminating these programs through Resolution 7-7-20. Program eliminations fall under the purview of the Faculty Senate, and that body has not acted on such potential program closures.

IV. Once Article 15, Section 12 is Invoked, Retrenchment Procedures No Longer Apply.

Article 15, Section 12 specifically states it “shall not be used to accomplish retrenchment as set forth in this Article.” *See, sentence 3 of Section 12.* The language throughout Article 15 recognizes retrenchment consists of the retrenchment procedures contained therein (Sections 1 through 11). *See, Article 15, Section 1, 2(C), 3, and 12.* The detail of retrenchment procedures does not inherently or automatically create a substantive right. Interpreting the retrenchment procedure sections in such a manner would resurrect the procedure eliminated by Section 12, replacing it with a “substantive right” with the same characteristics as the retrenchment procedure it replaced. This would have the practical effect of overturning action the University took under Article 15, Section 12 in lieu of Article 15 procedures, thereby placing the University in the same financial catastrophic circumstances that it used to invoke Section 12. This circular effect was not intended by the clear and unambiguous language in Article 15, Section 12. Section 12 does not contain or create the substantive rights Akron-AAUP allege exist.

Article 15, Section 12 only references one section in Article 15 as surviving once Section 12 is invoked. Specifically, Article 15, Section 12 states in pertinent part,

If such unforeseen, uncontrolled and catastrophic circumstances should occur, then the University agrees that, 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. [Emphasis added.]

Had any other sections been intended to survive invocation of Section 12, they would have been identified in Section 12 as Section 3(A) was identified. Notably, Akron-AAUP conceded in its

argument that the procedure in Section 2 does not apply when Section 12 is invoked. Akron-AAUP stated,

Section 2 explicitly refers to the required attrition and voluntary retirement step as a “procedure... [t]here may not be time for this procedure in the event of catastrophic circumstances, so Section 12 permits the Administration to skip over this step.

Akron-AAUP embraces the word “procedure” at the beginning of the first sentence of Section 2(C) in the context of attrition and retirement and admits compliance with it is not required when Section 12 applies. Curiously, and without any explanation, Akron-AAUP wholly disregards the word “procedures” later in the very same sentence. Section 2(C) states,

If, after completing this procedure, the Board makes the judgment that retrenchment requires reductions in bargaining unit faculty beyond those conducted through attrition, the following procedures establish the process for implementing any retrenchment. [Emphasis added.]

Section 2(C) is the last section in Section 2 and the above-sentence is the only language in Section 2(C). Following Section 2(C) are Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12. Akron-AAUP’s concession that Section 12 allows the University to “skip over” the “procedure” at the beginning of the Section 2(C) sentence is fatal. There is nothing within the sentence to support such a distinction. Article 15, Section 12 either fully eliminates the Section 2(C) obligations or it does not. Consequently, Akron-AAUP’s own argument acknowledges that Article 15, Section 12 eliminates the University’s obligation to meet all the procedures identified in Section 2(C), which necessarily must include those in Sections 3 through 11.

Akron-AAUP also conceded Article 15, Section 3 contains procedures as does Section 4. Akron-AAUP then identifies Section 4(D) as the specific basis for its argument that Section 12 only applies to Sections 2 to 4. Akron-AAUP’s argument on Section 4(D) is not logical. Section 4(D) must be read in a manner consistent with Section 12 and not as if Section 12’s provisions are non-existent as Akron-AAUP suggests. To accept Akron-AAUP’s interpretation of Section 4(D) would

effectively render Section 12 null and void. Section 12 explicitly states it “shall not be used to accomplish retrenchment as set forth in this Article.” So, the clear and unambiguous meaning of Section 4(D) is within this context and means what it says - “[o]ther than as provided in Section 12,” the University agrees to take no action on retrenchment.” The University is left with two options when one of the four circumstances listed in Article 15, Section 1 occurs. Section 4(D)’s language recognizes this fact. Where a Section 1(A) circumstance occurs, the University can only use retrenchment unless the circumstance is catastrophic in which case Article 15, Section 12 shall apply, and no retrenchment shall occur. The cited sentence in Article 15, Section 4(D) supports the University’s position.

Akron-AAUP’s argument regarding status quo prior to the first labor contract between the parties is unpersuasive. Akron-AAUP is recognized in Article 2 as follows,

The University recognizes the Akron-AAUP as the sole and exclusive representative for the members of the bargaining unit described below for purpose of collective bargaining as defined in Section 4117.01 of the Ohio Revised Code.

The bargaining unit shall include all full-time faculty at the Akron and Wayne College campuses of the University, including librarians holding faculty rank. The following shall be excluded: President, Vice Presidents; Deans; Assistant Deans and Associate Deans of Colleges; Assistants to the President and Vice Presidents; Division Chairs and Department Chairs and School Directors; Adjunct; part-time, temporary, visiting and research faculty; contract professional employees; faculty whose primary appointment is in the University of Akron School of Law; supervisory employees; and all other employees of the University. [Emphasis added.] See, *University Stipulated Exhibit A*.

The Rule cited by Akron-AAUP as embodying *status quo* before the first labor contract applied to categories of employees outside of the bargaining unit as well as employees within the bargaining unit and the order in which those categories would be released. Article 15, Section

6(A) only identifies two categories²⁰ to which it applies: (a) probationary faculty; and (b) tenured faculty. It makes no mention of non-bargaining unit faculty. Consequently, the Rule cited by Akron-AAUP does not reflect *status quo* prior to the first labor contract.

Akron-AAUP's comparison to the rule governing non-bargaining unit contract professionals has no relevance in this case. Akron-AAUP had the opportunity to negotiate the terms of Article 15, including those in Section 12. The language in Article 15 controls.

V. The University Met Its Section 12 Obligation to Provide Evidence, to Meet, and to Discuss a Proposed Course of Action with Akron-AAUP.

Akron-AAUP brief devoted less than one and one-half pages on this issue, likely demonstrating the frailty of the argument. Article 15, Section 12 states in pertinent part,

If such unforeseen, uncontrolled and catastrophic circumstances should occur, then the University agrees that, 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. [Emphasis added].

Put simply, the University had to provide evidence, meet with Akron-AAUP representatives to discuss and show evidence of the circumstances, and meet with Akron-AAUP to discuss the proposed course of action. The University more than met these requirements.

Between April 21 and June 8 (the date the grievance was filed), the parties conducted 10 bargaining sessions, and the University responded to 7 formal informational requests with over

²⁰ Article 29 of the labor contract appeared in a more recent negotiation cycle between the parties to recognize faculty who would not be on a tenure track. Article 15 predates Article 29 and distinguished between full-time faculty by placing them in the category of probationary faculty or tenured faculty. When Article 29 was negotiated, the provisions of Article 15, Section 6(A) were not modified. As noted in Section VI herein, the NTT faculty issue is not properly before the arbitrator and should be denied on that basis.

81 individual requests. Some of the documents provided to Akron-AAUP were only known to the University's Board of Trustees. Their confidentiality remained protected through a Non-Disclosure Agreement to ensure the University could be as transparent as possible with Akron-AAUP regarding its financial predicament.

As the University explained in its Initial Brief (pp. 119-129), it did not take action until July 15, 2020 (more than five weeks after Akron-AAUP filed its grievance). Between June 8 and July 15, the parties conducted about 9 more bargaining sessions and the University responded to 9 formal informational requests with over 49 individual requests and approximately 28 follow-up requests. The number of detailed requests does not include the voluminous informal requests by Akron-AAUP throughout the time period April 21 to July 15.

Nothing in Article 15 Section 12 restricts the University from performing administrative functions or tasks, including analysis and examining options, to decide what course of action to develop so that it can be proposed. Accepting Akron-AAUP's argument would whole-sale eliminate the availability of Article 15, Section 12, thus mandating its rejection.

Prior to action on July 15, the University certainly presented its proposed action to Akron-AAUP along with a wealth of information regarding the context within which it arose. Once the proposed list of Akron-AAUP faculty positions was identified, it was shared. From June 24 to July 15, the parties worked collaboratively to reduce the list from its original 113 positions to 96. The removal of 17 positions from the proposed action best evidences the University did, indeed, meet its Article 15, Section 12 obligations.

VI. The NTT Faculty Issue is Not Properly Before the Arbitrator.

Akron-AAUP added a new issue to Grievance 2020-01 in its initial brief – whether Non-Tenure Track Faculty (“NTT Faculty”) are included in the scope of Article 15. Grievance 2020-01 contains no mention of NTT Faculty. In its brief, Akron-AAUP attributes this omission to the University’s conduct related to its Article 15, Section 12 notification letters. Akron-AAUP states that it asked the University to clarify its position on NTT Faculty and Article 15 (Akron-AAUP Exhibit 48) after reviewing the University’s Step 2 grievance response. Akron-AAUP treats the University’s response to that clarification request (Akron-AAUP Exhibit 49) as the basis for now adding an NTT Faculty issue to Grievance 2020-01.

Akron-AAUP acknowledged that on August 11, 2020 it received the University’s position on NTT faculty and Article 15. *See, Akron-AAUP Initial Brief, p. 40.* Akron-AAUP did not, however, demonstrate that it placed the University on notice that Akron-AAUP intended on adding a new issue to this arbitration because of the University’s August 11, 2020 stated position on NTT faculty and Article 15. Absent such a showing, the new NTT Faculty issue is not properly before the arbitrator and must be denied on that ground.

While a dispute between Akron-AAUP and the University may well exist on NTT Faculty and Article 15, it need not be determined in this case. Akron-AAUP included several issues regarding NTT Faculty and Article 15 in pending Grievance 2020-06. The fifth stated issue in Grievance 2020-06 is,

Fifth, in violation of Article 15, the Administration is excluding non-tenure track faculty from these procedures and is seeking to retrench only TT/T²¹ faculty. *See, University Exhibit 106, p. 2.*

Since the new NTT Faculty issue presented in this case is not properly before this arbitrator and is the subject of another pending grievance, it should not be examined or decided in this case.

Furthermore, the NTT Faculty issue is not a determinative issue in this case. Since this case involves Article 15, Section 12, Article 15 retrenchment is not in controversy.

Finally, AAUP's insistence that NTT Faculty are included in Article 15 retrenchment only strengthens the University's argument that Article 15 retrenchment is impossible or unfeasible in this instance. Although NTT Faculty were included in the Article 15, Section 12 layoffs at issue before the Arbitrator, including them under Article 15 retrenchment would result in wholesale elimination of that employee category and operational paralysis because NTT Faculty primarily teach basic courses at the University. Consequently, including NTT Faculty in Article 15 retrenchment would eliminate NTT Faculty and wholly disrupt operations and course delivery.

The NTT Faculty issue, therefore, is more properly kept in Grievance 2020-06 on Article 15 retrenchment. This will allow both parties a full and meaningful opportunity to present their respective positions on this important issue. The University requests the arbitrator does not consider the NTT Faculty issue, deferring it for disposition in Grievance 2020-06.

VII. Conclusion

The University has more than satisfied all the required elements to legitimately invoke its authority under Article 15, Section 12, and Akron-AAUP has wholly failed to meet its burden of

²¹ "TT/T" faculty is defined in Grievance 2020-06 as Tenure-Track/Tenured faculty.

proof in establishing that the University violated the bargaining agreement in any way. In particular, the University has unquestionably demonstrated that catastrophic circumstances, unforeseen and beyond the University's control, existed that rendered it impossible and unfeasible to implement Article 15 procedures.

This provision of the CBA was designed precisely to address the most extreme circumstances such as those the University experienced, the financial calamity unleashed as a result of a global pandemic, the magnitude of which was last seen 102 years ago. Faced with an enormous budget deficit which would have depleted nearly all of its reserves, the University implemented a series of cost-cutting measures impacting all employee groups and units. Since personnel costs are a substantial portion of expenses, and after all other options were examined, it was determined that layoffs were necessary.

Contrary to Akron-AAUP's allegation that these layoffs were a punitive/retaliatory measure toward Akron-AAUP faculty, the evidence fully supports the University's individual and collective decisions. The rationales prepared by the Department Chairs (and submitted to the Deans who approved them) demonstrate conclusively that much thought, based upon legitimate financial, operational, and programmatic considerations, went into those decisions. Should the Arbitrator need to review these rationales, the University will make them available to him upon request.

These layoffs occurred only after the University had previously implemented substantial staff reductions from other employee groups. In 2015, the University conducted a significant reduction-in-force of its staff and contract professionals, eliminating 213 non-Akron-AAUP positions. No Akron-AAUP positions were eliminated in 2015. In response to the COVID-19

catastrophic circumstances, the University determined that it was necessary to eliminate an additional 178 positions, only 96 of which were Akron-AAUP positions. This action did not negatively impact programs as the University's student:faculty ratio had not yet fully adjusted to reflect the last few years of downward enrollment trending. The University needed to take swift, decisive and responsible action to address its daunting financial situation and achieve permanent savings in FY21.

As Moody's August 26, 2020 independent analysis reinforced, the University's reserves must be protected or else its bond rating will be downgraded – an outcome that will come to fruition if the University is forced to rehire affected Akron-AAUP faculty. Moody's recognized this University's strong financial management and is a better barometer of the University's motives.

To be clear, financial reserves are necessary for any business to survive – they are not a rainy-day fund as the Akron-AAUP would have one believe. The University's financial health relies on maintaining its reserves. The University simply cannot utilize its reserves to address the increased expenditure that would result if the Arbitrator ordered reinstatement. The University's CFI score informed with GASB 68 & 75 (the most robust measure available to analyze its financial health) sits squarely in the negatives and cannot trend downward any further without catastrophic devastation to the University.

If the Akron-AAUP's grievance is granted and the University is forced to rehire the laid-off Akron-AAUP faculty, the University's reserves will be depleted quickly, making the university insolvent and jeopardizing its accreditation and financial rating. This result would be devastating. Article 15 retrenchment was not (and continues not to be) an option given the short length of time in FY21 within which savings must be realized. While awaiting the results of this arbitration

process, the University initiated the retrenchment process merely as a contingency and cautioned Section 12 may still need to be used in FY21. The Akron-AAUP's response was to file a grievance and mount an excessive effort to delay and obstruct even this planning contingency. Akron-AAUP's own actions reinforce the inescapable reality that it is impossible and unfeasible to implement Article 15 procedures.

Akron-AAUP's grievance seeking to obstruct the University's proper invocation of its clear contractual authority to implement layoffs in the face of unprecedented financial calamity caused by the COVID-19 pandemic which has impacted every aspect of the University should, therefore, be summarily rejected and Akron-AAUP should be forced to step up like everyone else has on campus to shoulder some of the painful, but critically essential, cost concessions caused by the ongoing pandemic.

This year, the University celebrates its sesquicentennial. By exercising Article 15, Section 12, the University took the courageous action to stabilize the institution so it has the opportunity to survive and thrive beyond its 150th anniversary and into the future.

Akron-AAUP's grievance challenging the July 15, 2020 layoffs should be denied.

CERTIFICATE OF SERVICE

A true copy of the foregoing was hand delivered to the following at the offices of Fisher

Phillips this 4th day of September, 2020:

Jack Buettner, Labor Arbitrator

Eben O. McNair, IV, Esq.

Jessica S. Monroe, Esq.

Schwarzwald McNair & Fusco LLP

Attorneys for American Association of University

Professors – University of Akron Chapter

/s/ George S. Crisci

George S. Crisci (0006325)

Scott H. DeHart (0095463)

ZASHIN & RICH CO., L.P.A.

Attorneys for The University of Akron

/s/ Sarah J. Moore

Steven M. Nobil (0015707)

Sarah J. Moore (0065381)

Lauren Tompkins (0087304)

FISHER & PHILLIPS, LLP

Attorneys for The University of Akron