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Retrenchment Clauses and the Problem of Force Majeure: Evidence from AAUP Chapter Collective Bargaining Agreements in Ohio

Dominic D. Wells¹ and Trey Peters²

Collective bargaining agreements at universities often include an article that addresses retrenchment of faculty as a result of financial exigency, sometimes defined as financial problems that threaten the institution as a whole. Contracts also include language that allows some flexibility in the faculty retrenchment process under extreme circumstances. During the COVID-19 pandemic, the University of Akron administration invoked the “force majeure” clause in the collective bargaining agreement which allowed them to bypass negotiated retrenchment procedures and layoff faculty without consideration of tenure status. Force majeure refers to “uncontrollable events that are not the fault of any party and that make it difficult or impossible to carry out normal business” (Merriam-Webster; n.d.). The Akron faculty union challenged the action by the administration and ultimately agreed to take the issue to binding arbitration. The arbitrator of the case delivered a decision favorable to the administration which allowed for the retrenchment of tenured and non-tenured faculty alike without following most of the procedures negotiated in the retrenchment article of the contract.

Much of the scholarly work on faculty retrenchment focuses on the decision making of management (Alm, 1977; Mingle, 1981; Gumport & Pusser, 1999; Budross, 2002). Retrenchment research became a focus of scholars in the early 1990s following two decades when as much as 80% of faculty layoffs were tied to financial exigency (Rhoades, 1993). Slaughter (1993) argues that retrenchment during the 1970s and 1980s is best understood through the lens of redistribution of wealth and power dynamics. Retrenchment during these decades was at least partially a consequence of a decline in state financial support to public universities (Druker & Robinson, 1994). Additionally, how retrenchment was implemented by universities was influenced by several factors including collective bargaining agreements (Druker & Robinson, 1994). Throughout the 1960s and 1970s, faculty viewed collective bargaining as a mechanism for increasing their role in decision making (Williams & Zirkel, 1988). However, Rhoades’ (1993) analysis of retrenchment showed that faculty often play a reactionary role in the implementation of retrenchment and that collective bargaining agreements

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regularly include “escape clauses” which grant administrators the ability to bypass retrenchment procedures and terminate tenured faculty.³

Following the era of faculty retrenchment, research on collective bargaining in higher education and other public sector professions shifted its focus to other areas. The restriction of public sector collective bargaining rights has received significant attention from scholars (Freeman & Han, 2012; Hertel-Fernandez, 2018; Wade, 2018; Wells, 2021). Recent research on collective bargaining in higher education has explored topics of graduate student worker unionization (Herbert & van der Naald, 2020), faculty pay (Dominguez-Villegas et al., 2020), and the challenges facing faculty during the COVID-19 pandemic and in its aftermath (Picciano, 2021; Rhoades, 2021).

Although scholarly research on faculty retrenchment in recent years is scant, the American Association of University Professors (AAUP) has addressed the issue of financial exigency and retrenchment in their bulletin. In a report on the faculty role in financial exigency, the AAUP argues for a more specific definition of financial exigency and insists that financial exigency is not a legitimate determination by institutions that have shifted resources away from their primary academic mission. Further, they make several recommendations including the opportunity for faculty to assess the financial conditions of the university, to access to the financial data of departments and programs, and to determine if alternatives to termination of faculty have been pursued (American Association of University Professors, 2013).

This research revisits the issue of faculty retrenchment and considers the potential solutions to the problem of force majeure following the arbitration decision at the University of Akron which allowed administration to layoff faculty regardless of rank or tenure status. An analysis of Ohio-AAUP chapter collective bargaining agreements identifies variation in retrenchment clauses. The results of this analysis underscore the importance of specificity in contract language, the gap between tenured/tenure-track faculty rights and non-tenure-track faculty rights, and the problematic language of force majeure. This research concludes with a discussion of how to improve contract language and avoid the negation of faculty rights through force majeure.

Data and Method

A total of 14 collective bargaining agreements from higher education institutions in Ohio are analyzed for this research. All of the contracts are from chapters of the AAUP, and the years covered in the agreements span from 2015 through 2023. Seven contracts cover both

³ An example of an escape clause is given in Rhoades (1993). It states, “The District may skip employees [on the seniority list] if they possess special competencies or credentials essential to the District as long as no more senior employee being laid off has those credentials and competencies [Merced College]” (p. 338).

tenured/tenure-track and non-tenure-track faculty, three cover only tenured/tenure-track, two cover only non-tenure-track, and one covers advisors. Additionally, the contract covering all full-time faculty at North Central State College is included but is not listed in terms of tenured/tenure-track and non-tenure-track because the college does not have a tenure system.

The selection of contracts is limited to Ohio chapters of the AAUP for two reasons. First, by analyzing only contracts from Ohio it is assured that every chapter is working within the same legal framework for bargaining. This assures that variation in retrenchment clauses is not the result of state legislation regulating the scope of bargaining. Second, analyzing only AAUP chapter contracts allows for a fair comparison of the achievements of bargaining units. Though local chapters have the ability to negotiate agreements that address issues specific to their work-places, it is assumed that they also look to the parent organization for guidance in negotiations. By analyzing only chapters of the AAUP, it is assured that the general standards for contracts are consistent.

Content analysis is used to compare and contrast the language in contracts. A concept-driven coding strategy allows researchers to start with a list of codes from previous studies (Gibbs, 2007). Rhoades (1993) identifies several retrenchment article categories that are used in this analysis. Contracts are coded for language pertaining to the following: financial exigency, conditions, consultation, order, alternatives, notice, and recall. Mentioning these categories is not enough to be considered addressing the area. Instead, contracts are considered to have addressed the area if they include definitions or procedures. For example, some contracts mention financial exigency, but it is not considered as addressed in the contract unless it is defined. Conditions clauses provide a list of conditions that justify retrenchment. Consultation clauses involve administrators providing bargaining units with information and allowing them a chance to respond. Order clauses specify the order of layoffs in retrenchment, usually based on rank and seniority. Alternative clauses provide other options to faculty being retrenched, such as early retirement, buyouts, or reassignment to another department. Notice clauses specify the amount of notice retrenched faculty receive based on rank and seniority. Finally, recall clauses define the window of time when retrenched faculty have an opportunity to reclaim their positions in cases where departments are hiring. Table 1 shows which areas are addressed in each of the Ohio AAUP chapter contracts.

Comparing contracts negotiated within the same legal framework is not sufficient for understanding which contracts have achieved the standards set by the AAUP. In order to determine success in each area of retrenchment articles, contracts are compared to the standards defined in the *AAUP Recommended Institutional Regulations on Academic Freedom and Tenure* (2018). The regulations are designed to protect tenure and academic freedom, and they provide a benchmark for this analysis.

Table 1
AAUP Ohio Contract Language Components

Institution	Bargaining Unit	Years	Fin. Ex.	Cond.	Consult.	Order	Alt.	Notice	Recall
University of Akron	TTT/NTT	2015-2020	X	X	X	X	X	X	X
Bowling Green State University	TTT/NTT	2019-2022	X	X	X	X	X	X	X
Central State University	TTT/NTT	2017-2020			X	X	X	X	X
Cincinnati State Technical and Community College	TTT/NTT	2018-2020	X		X	X	X		X
Cincinnati State Technical and Community College	Advisors	2018-2020	X		X	X	X		X
Cleveland State University (Main)	TTT/NTT	2017-2020	X	X	X	X	X	X	X
Cleveland State University (Law School)	TTT/NTT	2017-2020	X	X	X	X	X	X	X
Cuyahoga Community College	TTT	2019-2022		X	X	X	X	X	X
Kent State University	NTT	2016-2019				X	X		
Kent State University	TTT	2019-2022		X	X	X	X	X	X
North Central State College	Full-Time	2017-2020		X	X	X	X		X
University of Toledo	TTT	2018-2022	X	X	X	X	X	X	X
University of Toledo	NTT	2018-2022	X	X	X	X	X	X	X
Wright State University	TTT/NTT	2019-2023	X		X	X	X	X	X

Retrenchment Clauses in Ohio AAUP Contracts

Defining Financial Exigency

For much of its existence, the AAUP has formally recognized the power of colleges and universities to terminate faculty due to financial exigency. In 1925, the AAUP joined with other stakeholders brought together by the American Council on Education to write a statement regarding financial exigency. It stated, “termination of permanent or long-term appointments because of financial exigency should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution” (Woodward et al., 2004). In 1940, the AAUP went a step further by releasing a statement that termination of continuous appointment for reasons related to financial exigency “should be demonstrably bona fide” (American Association of University Professors, 1940). Building on the previous statements, the AAUP first released its *Recommended Institutional Regulations on Academic Freedom and Tenure* in 1957. Revisions have been made to the statement on several occasions, but most recently in 2018. In the most recent statement, financial exigency is defined as “a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means” (American Association of University Professors, 2018).

Of the 14 Ohio-AAUP chapter contracts analyzed, eight include a definition similar to the definition in the AAUP statement. Though the wording varies, contracts emphasize the *severity* of the financial problems which would *threaten* the survival of the institution. Six of the eight contracts that include a definition of financial exigency define it as financial problems so severe that it threatens the institution’s “ability to maintain its operations at an acceptable level of quality.” The remaining two contracts make no mention of acceptable levels of quality, but instead define financial exigency as a financial crisis so severe that it threatens the institution and “cannot be alleviated without terminating the appointments of faculty members.” Other contracts mention “financial exigency,” “budgetary constraints,” or “insufficient financial support,” but do not provide any definition.

Defining “financial exigency” restricts the ability of administration to make cuts because they perceive the university to be in financial crisis without any standard of evidence for what qualifies as a crisis. As stated in the ruling in *Browzin v. Catholic University of America* (1975), “the obvious danger remains that ‘financial exigency’ can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood—a way for the university to rid itself of an unwanted teacher but without according him his important

procedural rights.” Further, though some contracts provide a definition, none of the Ohio AAUP contracts analyzed include “bona fide” in the financial exigency language. In *American Association of University Professors, Bloomfield College Chapter v. Bloomfield College* (1974), the Superior Court of New Jersey ruled that professors who were dismissed from their tenured positions or had their appointments changed from tenured positions to one-year terminal contract positions were entitled to reinstatement because the university failed to show that a bona fide financial exigency resulted in the need to eliminate the tenured positions. The college employment handbook stated that the termination of tenure could occur only under bona fide circumstances caused by financial exigency. Even more concerning than the absence of a definition or the qualification of “bona fide,” the collective bargaining agreements at the University of Toledo for tenure-track and non-tenure-track faculty both state “should the employer *reasonably anticipate* [emphasis added] the existence of a financial crisis of such severity that it cannot be alleviated without terminating the appointment of members” (Board of Trustees for The University of Toledo and The American Association of University Professors University of Toledo Chapter, 2018, p.57). Similar language exists in the contracts at Cleveland State University, main campus and the law school. This language potentially opens the door for administration to begin the retrenchment of faculty not because there are substantial financial problems, but because they predict that there will be in the future.

Conditions Justifying Retrenchment

Of the 14 contracts analyzed, nine of them include conditions justifying retrenchment. Specifying the conditions for retrenchment is important because contracts either imply or explicitly state that the need for retrenchment is determined by the employer (i.e. President; Board of Trustees). Some contracts are more specific in this area than others. The AAUP identifies two conditions under which reduction-in-force resulting in the termination of appointments before the end of the specified term may be necessary: financial exigency and discontinuance of a program or department for educational reasons. Five of the nine contracts with explicitly stated conditions for retrenchment include financial exigency and the discontinuation of a department or program. However, the AAUP notes in the *Recommended Institutional Regulations on Academic Freedom and Tenure* that “educational considerations do not include cyclical or temporary variations in enrollment” (American Association of University Professors, 2018). Nonetheless, some contracts include statements about enrollment as part of the justification for retrenchment. For example, the contract for the tenured/tenure-track faculty at Kent State University states that retrenchment may be necessary when, “a general pattern of declining enrollment exists in the University or in a particular unit(s) or program(s), either of which has seriously affected or will seriously affect the University’s ability to fulfill its academic goals and responsibilities” (Kent State University and American Association of University

Professors Kent State Chapter Tenured/Tenure-Track Bargaining Unit, 2019, p.51). Two contracts, at the University of Akron and Bowling Green State University, include language that specifies how many semesters (5 not counting summer) can justify retrenchment along with the expectation that the enrollment decline will continue.

Some weaknesses in the language stem from vague conditions involving “program changes” or “budgetary restraints,” that potentially give administration leeway in justifying retrenchment. Nonetheless, specificity in the language is not always a solution that constrains the administration and requires them to provide substantial evidence and engage in shared governance in retrenchment decisions. The Kent State University collective bargaining agreement with tenured/tenure-track faculty specifically lists conditions for retrenchment including that it may be necessary if “the University finds it desirable to change or adopt new academic missions” (Kent State University and American Association of University Professors Kent State Chapter Tenured/Tenure-Track Bargaining Unit, 2019, p.51). Though the contract lists specific conditions for retrenchment, this condition in particular leaves a lot of room for administration to justify retrenchment. It raises the question of what the standard is for a “desirable” change.

Consultation with Bargaining Unit

AAUP guidance suggests that there should be a role for faculty to participate in determining if a condition of financial exigency actually exists. A report by AAUP establishes that faculty input in determining financial crisis is rarely, if ever, the case. Instead, administration declares a financial crisis and then faculty involvement follows. Although there are clauses in contracts that involve consultation, often times the clauses are focused on administration sharing information with faculty rather than faculty having input in decision-making (American Association of University Professors, 2013).

Of the 14 Ohio-AAUP contracts analyzed, 13 include language involving consultation. The language can be categorized into two groups: those contracts that involve joint committees and those that simply involve sharing information. Seven of the contracts include language about forming a joint committee made up of representatives from the administration and the faculty union. The committees are then tasked with making recommendations for how to carry out retrenchment or for suggesting alternatives. Some contracts include specific items the committee must take into consideration when forming their recommendations. For example, the contract at Bowling Green State University states that the committee shall consider a program’s, department’s, or school’s “historical role and contributions in the University’s educational, scholarly, and service mission,” the “arrangements which can be made to allow enrolled students

to satisfy degree or certificate requirements,” and “the dependence of other programs in the University on the campus, college, department/school, or program” (Bowling Green State University and Bowling Green State University Faculty Association- American Association of University Professors, 2019, p.72-73). The joint committees then submit their recommendations for consideration by the administration.

Other contracts with consultation language do not include recommendations from joint committees. Rather, they stipulate that the administration share information with the faculty about retrenchment, and they allow the unit or representatives of the faculty (e.g. faculty senate) to respond. For example, the contract at Cincinnati State Technical and Community College allows the faculty senate to respond to information shared by the administration with justifications for exceptions to reduction-in-force strictly by seniority based on programmatic needs. The following clause reads, “the President shall consider such recommendations and shall forward them, along with his or her own, to the Board of Trustees” (Cincinnati State Technical and Community College and American Association of University Professors, Cincinnati State Chapter, 2018, p.48). None of the language regarding consultation allows for faculty to have meaningful input on whether the need for retrenchment exists, but some have more faculty input on how to handle retrenchment, or the possible alternatives, than others. The requirement for a joint committee, with equal representation of administration and faculty, may make it more likely that the president and board of trustees will take recommendations seriously.

Order of Retrenchment

All but one contract analyzed has language on the order of retrenchment. This section defines the order in which faculty should be retrenched, starting with part-time adjunct professors and ending with tenured full professors. Some contracts explicitly state the order of retrenchment while others state that retrenchment should be made in reverse order based on seniority. The AAUP *Recommended Institutional Regulations on Academic Freedom and Tenure* states that the, “appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result” (American Association of University Professors, 2018). Like previous research on faculty retrenchment finds, contracts give administration some discretion even when the order of layoffs is explicitly listed because retrenchment is implemented at the department or program level, so administration is able to implement layoffs that do not follow strict seniority (Rhoades, 1993). Additionally, contracts often include language that allows administration to keep untenured faculty and layoff tenured faculty in a unit if they determine that it is necessary to maintain an academic program (Rhoades, 1993). For example, the contract at University of Akron reads, “In making the final

determination within each subcategory of a major category as to whether or not an individual bargaining unit faculty member will be retrenched, the following additional factors will be given full consideration...”. The contract then lists several items including, “the University’s commitment to affirmative action and its policies adopted thereunder,” “the quality of the bargaining unit member’s service in the areas of teaching, research and publication and University and public service,” and “the impact on the academic program resulting from the release of the bargaining unit member” (The University of Akron and The American Association of University Professors, The University of Akron Chapter, 2016, p.65). Though contracts do give some discretion to administration in the order of layoffs, the recommended institutional regulations language from the AAUP also allows for some discretion. Where the contracts fall short of the AAUP recommendations is in setting the standard for when seniority does not need to be followed. None of the contracts suggest that considerations outside of seniority are *extraordinary* and the standard for what has a significant impact on an academic program is not defined in contracts as a *serious distortion*.

Alternatives to Retrenchment

All of the contracts include language on alternatives to layoffs with varying degrees of specificity. The AAUP recommended institutional regulations cover this in Regulation 4c(1):

As a first step, there should be an elected faculty governance body, or a body designated by a collective bargaining agreement, that participates in the decision that a condition of financial exigency exists or is imminent and that all feasible alternatives to termination of appointments have been pursued, including expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred-compensation plans, early-retirement packages, deferral of nonessential capital expenditures, and cuts to noneducational programs and services, including expenses for administration (American Association of University Professors, 2018).

Although contracts do include consultation in the retrenchment process, faculty involvement in determining if the condition of financial exigency exists is absent. In consultation clauses, faculty are able to offer alternatives to termination, but the sections of the contracts analyzed fall short of the extensive list of possible alternatives included in the AAUP recommended regulations. Most contracts mention “normal attrition” as preferable alternatives to retrenchment. Voluntary early retirement is also included as an option in some contracts. The other options listed in the AAUP regulations, such as furloughs, are absent. Clauses in contracts do allow for faculty in departments or programs going through the retrenchment process to be reassigned to other departments or program if the terminated faculty member is qualified. For example, the contract at Cuyahoga Community College states, “tenured faculty members subject

to layoff under these provisions will be given an opportunity to transfer to another instructional teaching department or equivalent non-instructional unit if they possess the necessary qualifications (1) to teach the courses to be offered for instructional faculty; or (2) to perform the available and required work of non-instructional faculty” (Cuyahoga Community College and The American Association of University Professors Cuyahoga Community College Chapter, 2019, p.12).

Notice of Retrenchment

The AAUP recommended institutional regulations clearly state the notice that faculty should receive based on years of service or tenure status. The regulations state that if a final decision on retrenchment is made by March 1st, then at least three months of notice should be given to any faculty member in their first year of probationary service. The notice increases to six months if the retrenchment decision is made by December 15th for second year faculty regardless of tenure-track status. At least one year of notice is recommended for faculty with more than 18-months of service and for any faculty member with tenure. The recommended regulations also suggest that if an appointment is terminated, the terminated faculty can receive salary instead of notice (American Association of University Professors, 2018).

Overall, AAUP contracts negotiated in Ohio have the notice requirement articulated in the AAUP recommended regulations. Of the 14 contracts analyzed, 10 include language regarding notice if an appointment is terminated. Fewer contracts (three), include language in the section on notice that allows the administration to provide salary instead of notice. Most of the contracts include a schedule where faculty with more years of service receive more notice. The notice ranges from three months for any faculty member in their first year to 18-months for tenured faculty. The contracts that require notice of 18-months actually achieve more notice for tenured faculty than is recommended in the AAUP regulations. Though the contracts overall achieve notice consistent with the recommended regulations, non-tenure-track faculty continue to be at a great disadvantage compared to their tenure-track or tenured colleagues. The contract for non-tenure-track faculty at Kent State University does not require any notice in cases of financial exigency, and the contract for non-tenure-track faculty at University of Toledo requires only three-months of notice regardless of length of service.

Recall of Retrenched Faculty

Regulation 4c(7) of the AAUP Recommended Institutional Regulations on Academic Freedom and Tenure states:

In all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and at least thirty days in which to accept or decline it (2018).

The recommendation is clear and is not divided by tenure status. Of the contracts analyzed, only one does not include any time-frame for recall. Of those with language on recall, the length of time a position had to be empty or offered to the retrenched faculty prior to being filled ranged from one year to five years. Much like notice, there is a divide in contracts when it comes to how much time can pass before the university fills a position without first offering it to a retrenched faculty. Tenured faculty sometimes get larger windows of time for recall than the tenure-track or non-tenure eligible faculty. For example, tenured faculty at University of Toledo and Wright State University can be recalled within three and four years, respectively. Their non-tenured colleagues can be recalled within one year. The difference in time for recall further highlights the need for progress in protecting the interests of the most vulnerable faculty members.

The Problem of Force Majeure

Three of the contracts analyzed contain language recognizing that under extreme unforeseen circumstances, force majeure, the parties understand that the procedures detailed in the retrenchment article may be impossible or unfeasible to implement. Under this clause, the administration agrees to meet with bargaining unit representatives to show evidence of the circumstances prior to taking any action that could be perceived as bypassing retrenchment procedures. Two of the contracts, one at Bowling Green State University and one at University of Akron, use the same language and the term force majeure. The contract for tenure-track faculty at Kent State University includes similar language to the other two, but does not use the term.

It is likely that the people negotiating the force majeure language did not put much consideration into the implications of it being invoked. However, the COVID-19 pandemic created the circumstances for administrations to implement retrenchment without regards to tenure. In May of 2020, the University of Akron invoked the force majeure clause in the collective bargaining agreement with faculty. The university administration began the process of laying off faculty regardless of tenure or rank and without any consideration of the process negotiated in the collective bargaining agreement. When the administration invoked the force majeure clause, they did so with plans to cut \$65 million from the university budget (Pignolet, 2020). In July of 2020, 178 employees including 96 unionized faculty were laid off. The Akron-AAUP released a statement that read in part, “Our hearts go out to our colleagues who, through

no fault of their own, will have their time at the university end so unceremoniously and with so little notice” (Goist, 2020). By the time the layoffs went into effect in August, the number had decreased to 72 faculty. In early August, the Akron-AAUP voted against an agreement that included the faculty layoffs. A total of 364 union members voted, 184 against and 159 in favor. The rejection of the proposed agreement meant that the current agreement the university had with the union remained in effect until the end of 2020. The union then announced it would take the grievances involving layoffs regardless of rank or tenure and the invoking of the force majeure clause to arbitration (Goist, 2020).

Initial briefs were exchanged in August and rebuttals were exchanged in early September. The Akron-AAUP challenged the actions of the administration on the grounds that the university did not demonstrate that the circumstances were sufficient enough to invoke force majeure, the use of force majeure does not excuse the university from complying with several sections in the retrenchment clause in the contract, and the university had not discussed its plan of action as required by Article 15, section 12 of the contract. They argued that the financial condition of the university was not catastrophic and that the financial outlook presented by the administration relied on faulty assumptions and inaccurate projections of student enrollment decline. Further, the Akron-AAUP argued that faculty reductions were counter to its mission statement and that cost-saving measures could be taken in other areas of university operations, including athletics. With regards to the Akron-AAUP stance that force majeure does not excuse the university from complying with clauses in the retrenchment article, the union made a distinction between procedures and rights. They argued that procedures could be bypassed in catastrophic circumstances, but rights had to be honored. Sections in the retrenchment article regarding reductions through attrition, timelines for sharing information, and timelines for consulting the union could be bypassed, but other sections addressing the order of release, notice of release, placement in other positions, and recall could not be bypassed (Buettner, 2020).

The University of Akron administration argued that the worldwide COVID-19 pandemic created unforeseen catastrophic circumstances that were beyond the control of the university, allowing the administration to invoke Article 15, Section 12. Revenue losses from a cut in the State Share of Instruction (SSI), parking, residence halls, and other sources made drastic cuts necessary. The administration acknowledged the existence of cash reserves, but argued that they could not be depleted for reasons such as the risk of a credit rating downgrade. They further argued that the financial issues were so catastrophic that the timelines in the retrenchment article could not possibly be implemented. Perhaps most importantly, the administration opposed the idea that there was a distinction between “procedures” and “rights.” Instead, their interpretation of the force majeure section of the contract excused them from following anything in Sections 1-11 of the retrenchment article. It was the administration’s position that the entire article was

procedural and that any and all sections could be disregarded even if they did not involve timelines (Buettner, 2020).

On September 18, 2020 the arbitrator in the case, Jack Buettner, issued his decision. Buettner concluded that the University of Akron administration was justified when invoking force majeure because the COVID-19 pandemic could not be anticipated or controlled by the administration. He added, “To deny that the COVID pandemic is catastrophic would be to ignore the extent and spread of the disease. It is a worldwide pandemic with worldwide effects. As of September 17, 2020, 6,613,331 total cases were report[ed] in the USA with a death toll of 196,277” (Buettner, 2020, p. 21). After establishing that the pandemic did meet the standard of force majeure, Buettner also sided with the administration on depleting reserves, stating that the university could not risk their credit rating. Additionally, he pushed back on the argument that the university did not make efforts to cut costs outside of faculty by pointing to the elimination of three athletic programs and a redesign of the university college structure as evidence of cost cutting measures. Buettner then dismissed the distinction made by the Akron-AAUP between “procedures” and “rights.” In the decision he stated, “According to Elkouri and Elkouri in *How Arbitration Works*, when the language is clear and unambiguous, the language speaks for itself. This Arbitrator, in reading and interpreting the current language, finds no guarantee of the provisions set forth in Sections 6 through 11 on the basis of rights versus procedures” (Buettner, 2020, p. 24). He then explained that the procedures in these sections, such as the order of release, notice of release, and continuation of health insurance would all be unfeasible for the administration to implement. The arbitrator only found in favor of the Akron-AAUP with regards to sections 9 and 10 of the retrenchment article involving recall within three academic years and first consideration of part-time positions (Buettner, 2020). The Akron-AAUP released a statement following the decision that in-part read:

We are disappointed to announce the results of our arbitration hearing supporting the Administration’s implementation of force majeure. The results are an attack on tenure, due process, and all the legal protections that should be guaranteed by collective bargaining... While we agreed to abide by the arbitrator’s binding ruling, we do not accept that elimination of faculty or faculty positions was warranted or necessary. No other institution in Ohio took this step. It is clear to us that the University did not have to do this, but wanted to do it.” The statement later reads, “We intend to fight any such future moves with all legal means necessary (American Association of University Professors- University of Akron Chapter, 2020).

Though the arbitrator did provide reasoning for why the circumstances met the standard of force majeure, he did not address the inaccuracies of the projections made by the administration. A brief filed by the Akron-AAUP pointed to the discrepancies in the numbers. The

administration projected a \$65-million dollar budget deficit based on a projected 20% decline in enrollment, a 20% reduction in state funding, and a structural deficit of \$13.8 million dollars. Even after enrollment numbers improved to an 8.1% decline in the weeks leading up to the semester and the Ohio Department of Higher Education updated its share of instruction projections decreasing the reduction at University of Akron to \$9 million dollars from \$19.9 million, the administration did not revise their projections substantially (McNair IV & Monroe, 2020).

The arbitrator also did not address the argument from the Akron-AAUP that the financial problems of the university were not caused by COVID-19. The AAUP pointed to the Board of Trustees admitting that the financial model of the university was unsustainable prior to the pandemic and to the fact that enrollment at the university had been declining since 2011 (McNair IV & Monroe, 2020). The financial problems and decline in enrollment gave the administration the opportunity to retrench faculty through the procedures in the collective bargaining agreement prior to the pandemic, but instead they chose to use the pandemic to invoke force majeure. The opening brief filed by the Akron-AAUP states, “To the extent that the University’s financial struggles are not new and are not attributable to the pandemic, the University is merely seizing upon the circumstance of the pandemic to take its past financial imprudence out on faculty instead of where the issues lie: overspending on athletics and administration” (McNair IV & Monroe, 2020).

Following arbitration, a total of 67 faculty were let go, with some on the original list of layoffs opting to retire. The force majeure language in the contract preceded the president of the Akron-AAUP’s time in union leadership. The president, Pam Schulze, said of the force majeure clause, “I think at the time, the thinking was, ‘That will never happen. You just think, ‘But they would never...’ But that was kind of wishful thinking, I suppose” (Pignolet, 2020). Former president of the Ohio-AAUP, John McNay, argued that the move would hurt the reputation of the University of Akron and that invoking force majeure is unlikely to become a precedent given rare events like a global pandemic (Pignolet, 2020). The Akron-AAUP did manage to negotiate the removal of “force majeure” from the contract effective in January 2021, though Article 15, Section 12 of the contract does still include language regarding catastrophic circumstances (The University of Akron and The American Association of University Professors- The University of Akron Chapter, 2021).

Discussion

It is undoubtedly easier to analyze contract language than it is to negotiate it. The AAUP standards are high, and individual bargaining units are challenged to reach the ideal agreement

language for faculty during the course of negotiations. It is the nature of collective bargaining that neither side achieves everything they want in an agreement. Nonetheless, there are lessons to consider based on this analysis of contracts.

It is important for bargaining units to negotiate clearly defined terms and to consider the specificity of contract language. AAUP chapters in Ohio include definitions of “financial exigency,” which help raise the standard for what could be considered financial exigency. However, the contracts fall short with the absence of the suggested AAUP standard of “bona fide.” Not only should bargaining units push for clear language that sets a high standard for claiming financial exigency, they should also be careful of the implications of qualifiers that may shift more decision making power to the administration, such as the inclusion of “reasonably anticipate” in the Kent State University contract financial exigency section. Though specificity in contract language is generally desirable, it certainly does not always result in increased faculty union power. When contracts specify who determines the existence of financial exigency, the power is with the administration as none of the contracts in Ohio live up to the AAUP standard of consultation in determining its existence, though contracts do include consultation on the process after the financial exigency determination.

There are areas where Ohio AAUP contracts largely meet the standards, especially in the areas of notice and recall. Some even exceed the expectations for the window of time for recall. However, even where chapters are achieving the standards set by the national organization, there is a clear divide between tenured/tenure-track and non-tenure-track faculty. Non-tenure-track faculty receive far less notice and have much shorter windows for recall, if they can be recalled at all. There is room for progress in protecting non-tenure-track faculty from retrenchment and bridging the gap between tenured/tenure-track faculty rights and non-tenure-track faculty rights.

Finally, there is the issue of the force majeure contract language. In the case of the University of Akron, the language predated the people who negotiated the current agreement. The force majeure language that seemed like it would never be problematic in-practice obliterated the negotiated procedures for retrenchment. AAUP chapters may have difficulty negotiating force majeure or other language related to catastrophic circumstances now that there is some precedent that the language is a powerful tool for administration. If any gains are to be made with preventing future cases similar to the University of Akron, then it starts with the removal of the term “force majeure” as the Akron-AAUP was able to achieve in their subsequent contract. Clearer language on what can be considered a catastrophic event and clearer language that forces administration to make connections between the catastrophic event and the financial crisis facing the university would also help prevent future cases negating retrenchment procedures. While there is little doubt that the beginning of the COVID-19 pandemic was

catastrophic and unforeseen, there is considerable doubt that it caused the financial struggles of the University of Akron. Bargaining units may also have a potential solution by negotiating language that draws a clearer distinction between procedures and rights. The Akron-AAUP tried to make a distinction between procedures that needed to be followed and the rights of faculty, but were unable to convince the arbitrator that such a distinction existed. Reorganizing retrenchment articles or adding language that defines sections with timelines as procedures and sections regarding things like the order of layoffs or consultation as rights may prevent sections of the retrenchment article from being negated in future catastrophic circumstances.

This research used the AAUP *Recommended Institutional Regulations on Academic Freedom and Tenure* (2018) as a standard for assessing retrenchment clauses in collective bargaining agreements in Ohio. Though AAUP chapters have met the standards in some areas, there are other areas where improvement is needed to balance the power of administration and faculty. This analysis highlights the importance of clearly defined language, the need for improvement in closing the gap between the rights of tenured/tenure-track faculty and non-tenure-track faculty, and the potential solutions to the problem of force majeure contract language. Future research needs to examine the bargaining agreements of chapters in other states and among non-AAUP chapters to determine variations in retrenchment articles based on state legal frameworks or other bargaining strategies. The future research in this area could further shed light on how retrenchment cases, like at University of Akron, can be avoided.

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