

MEMORANDUM OF LAW AND FACTS
IN SUPPORT OF FACULTY BUDGETARY HARDSHIP COUNTERPROPOSAL

INTRODUCTION

This memorandum is drafted on behalf of representatives of the John Carroll University (“University”) Faculty and addresses the legal implications of proposed changes to the Faculty Handbook (“Handbook”) as unilaterally proposed by the University’s Board of Directors (“Board”). The Board’s proposal should not be understood as an attempt to generate meaningful academic discourse and debate; it directly cuts at the legally-binding obligations of the University to its Faculty and the conclusion tail appears to be wagging the dog with respect to the Board’s debate. The Board’s obligations are concrete and subject to scrutiny based on the actions it next takes, particularly if the Board exercises unilateral discretion unfairly, capriciously and in a manner inconsistent with the reasonable expectations of tenured Faculty members.

The University’s challenges with declining enrollment and the financial impact of COVID-19 are not disputed; these matters require attention from the Board. Nevertheless, as stated in the Handbook, “[t]he Faculty shall have primary responsibility for recommendations on policy in such fundamental areas as [. . .] (B) Faculty appointments, reappointments, promotions, *compensation*, the granting of tenure, and dismissal.” Handbook, Part One, V (emphasis added). Where the Board takes independent action concerning Faculty policies, “the power of review and decision lodged in the President and/or the Board of Directors should be exercised adversely only in exceptional circumstances and for reasons communicated to the Faculty.” *Id.*

Accordingly, the Faculty’s counterproposal that accompanies this memorandum must be considered by the Board with the deference granted to the Faculty by the University’s governing documents. First, this memorandum analyzes the fiduciary obligations of the Board as it deliberates the administration’s proposed reductions in Faculty tenure protections, including the much less-restrictive means of achieving the same objective being presented by the Faculty. Second, this memorandum provides an analysis of the potential liabilities that the University and its Board may face if they move forward with the proposed reductions without meaningful dialogue and approval from the University’s tenured Faculty.

**PART ONE – LESS-RESTRICTIVE MEANS PROPOSED BY FACULTY ARE MORE
CONSISTENT WITH FIDUCIARY OBLIGATIONS OF THE BOARD**

Assuming that budgetary hardship is the driving force behind the proposed Handbook amendments, the Faculty’s counterproposal provides a less-restrictive means for the Board to accomplish its near-term objectives without resorting to unilateral attacks on Faculty tenure that would make the University a negative outlier among its peer institutions and jeopardize the standing and long-term interests of the University.

Ohio law requires that each director on the Board make his or her decisions in the best interests of the University and exercise fiduciary duties in a manner that “an ordinarily prudent person in a like position would use under similar circumstances.” R.C. 1702.04(B). While each director may rely on information and reports provided by the University’s officers, counsel and accountants, “[a] director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause reliance on [such] information, opinions, reports, or statements [. . .] to be unwarranted” and any such action is subject to court review. R.C. 1702.04(D)(2); *see also, Townsend v. Antioch Univ.*, 2d Dist. Greene No. 2008 CA 103, 2009-Ohio-2552, ¶ 28 (“the business-judgment rule merely creates a rebuttable presumption that corporate directors act in good faith and in the best interest of their company when making business decisions. It does not preclude judicial review of those decisions.”)

Ohio law prescribes the factors that the Board must consider when deciding on the proposed budgetary hardship amendments. As established by the Ohio legislature, the Board must consider whether the Faculty’s counterproposal: (1) better advances the interests of the employees, suppliers, creditors and customers of the University, (2) takes into account the economy of this state and the country as a whole, (3) properly considers community and societal considerations, and most importantly (4) better serves both the *long-term* and short-term best interests of the University. R.C. 1702.30 (emphasis added).

Further, the University’s existing governing documents, as previously adopted and ratified by the Board, require the Board’s meaningful consideration of the Faculty’s counterproposal. For example, the Board has already determined that the Faculty’s responsibilities include “[s]haring in university budget decisions, especially those which affect academic policies.” Handbook, Part One, V(F). Among the enumerated contractual rights of the

Faculty, “[t]he Faculty has the right to have Faculty members who are not officers of the administration actively involved in the planning process of the University [. . . including representation] on any group which assumes the responsibility for recommending that the President announce that financial exigency exists or is imminent.” *Id.* Part Three, II(E)-(F).

Well before the unilateral introduction of the proposed budgetary hardship amendments in the Board’s September 17, 2020 letter to the Faculty, the Board faced much more dire threats to the University’s standing and credibility due to failures by the Board and the University’s administration to meaningfully engage with the Faculty. Most notably, the University received an action letter from the Higher Learning Commission (“HLC”) threatening the University’s accreditation. While financial factors were noted by the HLC for this extraordinary action, the weight of its analysis focused on findings that were linked to deficiencies in academic rigor, Faculty engagement in student assessment processes, leadership and morale (including Faculty morale), shared governance, and long-term planning. While the HLC lifted its sanction against the University in March 2017, the processes and deficiencies flagged by the HLC risk being repeated with the current short-sighted efforts by the Board and administration to undermine Faculty tenure without giving proper attention to the Board’s fiduciary obligations to the University as an interdependent constituency of interests beyond its officers.

By way of example, the Faculty provided the Board with a resolution ratified by the Faculty on September 23, 2020, highlighting its concerns regarding academic freedom, shared governance, and long-term retention and recruitment of quality professors. That reasoned analysis from the Faculty appears to be completely ignored by the Board despite the University’s governing documents requiring deference by the Board to the Faculty on such matters. Notwithstanding the foregoing, the Faculty is providing a counterproposal to the Board contemporaneously with this memorandum that provides the Board with a path to better resolve short-term budgetary shortfalls without making policy changes that permanently stain the University’s academic reputation, drastically limit the Faculty’s academic freedom, and disincentivize promising academics from joining the Faculty regardless of discipline.

All four factors that the Board is required to consider weigh in favor of the Faculty’s less-restrictive counterproposal. First, the interests of the employees and students of the University are better served by immediately mitigating the impact of budgetary shortfalls through temporary salary reductions across the Faculty and administration. Second, the shorter-term effects of the

counterproposal reflect the immediate economic constraints imposed by the COVID-19 pandemic without resorting to permanent elimination of Faculty tenure protections that may make little sense in light of economic factors that the University sees even two years from now. Third, the University's reputation within the local and national community would be better preserved through a budgetary hardship amendment that does not make the University a negative outlier among peer institutions. Even locally, neither the University of Dayton nor Xavier University faculty report anything even remotely resembling the proposals presently being considered by the Board.¹ Finally, the Faculty's counterproposal better serves the long-term interests of the University as articulated in the supporting analysis for the Faculty's September 23, 2020 motion.

All independent information should be afforded to the Board in connection with this decision (not only the evidence introduced by University officers and counsel). As argued herein, the Board is required to consider whether an irrevocable decision to eliminate Faculty tenure and selectively terminate tenured professors violates its fiduciary obligations to the University when the Faculty is presenting a budgetary hardship counterproposal that resolves the same problem with less-restrictive means and without the many long-term deleterious effects.

PART TWO – A UNILATERAL TERMINATION OF TENURED FACULTY VIOLATES CONTRACTUAL RIGHTS UNDER OHIO LAW

As communicated to the Faculty, Part One of this memorandum assumes that budgetary shortfalls are the problem the Board is intending to address with the proposed amendments. If for some reason, the underlying rationale for the Board's proposed changes is more plainly aimed at enabling the administration to selectively terminate tenured faculty, then the Board must be advised of the liabilities the Board and the University will face in the wake of any such action.

Ohio common law treats professors' tenure protections as an independent contractual property right even in the case of a private university. *See, e.g. Rehor v. Case Western*

¹ The American Association of University Professors letter of October 16, 2020 to Professor Simon Fitzpatrick has been circulated to the Board, which clarifies “[i]n [AAUP’s] analysis of hundreds of faculty handbooks, this is the first time we encountered this [budgetary hardship] category.” AAUP letter at p. 2. The Faculty’s cover letter further refutes the analysis performed by the Board in its “Budgetary Hardship Language Survey” as pretextual justification for a capricious and unfair Board decision that deprives the Faculty of its existing contract rights.

University, 43, Ohio St.2d 224, 230-231 (1975) (“The purpose of academic tenure, as used in the academic community, is the preservation of academic freedom and the correlative protection of economic security for teachers. It insures that a professor will not lose his job for exercising academic freedom, namely, his rights to teach, to think and to speak in accordance with his conscience in the traditions of the academic community.”) (holding that a university’s decisions regarding tenured faculty must be *reasonable* and *uniformly applicable*).

In *Ohio Dominican College v. Krone*, the Ohio Tenth District Court of Appeals upheld the tenure protections of a terminated professor independently of any other agreements between the university and the professor. 54 Ohio App.3d 29 (10th Dist. 1990). Specifically, the *Krone* court stated that “[t]enure bestows upon a person the right to continue employment and, in the facts before this court, the tenure agreement between appellant [Professor] and ODC is a contract which is to be considered separate from the other agreements made between the parties and discussed herein.” *Id.* at 31. The *Krone* court held that the professor’s tenure rights were contractual in nature, rooted in the university’s faculty handbook, and were breached when the university “unilaterally [set] forth a condition for continued employment” to which she did not agree and which were totally out of line with the reasonable expectations of the professor when she was granted tenure. *Id.* at 33-34.

Similarly, the Ohio Second District Court of Appeals articulated the rights that attach to a tenured professor in *Klein v. Antioch Univ.*, 2d Dist. Greene CASE NO. 83CA95, 1984 Ohio App. LEXIS 12267, at *11-13 (Dec. 5, 1984). While the *Klein* court rejected a professor’s claim that his tenure protections allowed him to resign for many years and then be reinstated to the university’s faculty, the court nevertheless articulated the protections afforded to tenured professors under Ohio law.

Tenure at a private university is a personal property entitlement governing the relationship of the teaching faculty and the university. It arises in this case out of the regulations of the institution. Tenure, however, must be distinguished from the individual contract that flows from reemployment. The burden of the evidence for a breach of contract is on the one asserting the breach; however, once the tenure relationship is established the burden is upon the adversary to establish that such personal right was waived, lost or abandoned.

Id.

In the case of the budgetary hardship proposals being deliberated by the Board, the unilateral changes to tenure protections being considered would materially breach the contract in

place between tenured Faculty and the University. Any present Faculty member with tenure protection was granted tenure under the existing Faculty Handbook provisions, which provide that “[t]enure is a continuing contractual relationship between a Faculty member and John Carroll University whereby full-time employment is *guaranteed* for every Academic Year from the time of conferral until tenure ceases.” Handbook at Part Three, IV(A) (emphasis added). The only way that the Handbook contemplates cessation of tenure includes: (1) retirement, resignation, or mutual agreement; (2) discontinuance of a department or program; (3) financial exigency; or (4) extended FMLA leave and/or disability. *Id.* at Part Three, IV(G). Further, “[t]enured appointments are held continuously [. . .] and *such appointments are not contingent upon issuance of annual renewals or contracts* [. . .] nor shall the salary of a tenured Faculty member be reduced except as part of a general reduction of salaries to avoid reaching the point of financial exigency.” *Id.* at Part Three, IV(K)(emphasis added).

Should the Board unilaterally approve the budgetary hardship amendments presented by the administration and should the University subsequently selectively terminate the employment of any tenured Faculty member in good standing, the University and its Board will plainly breach such member’s contract rights. As the Ohio Supreme Court articulated in *Rehor*, the University’s tenure protections serve a legally-recognized purpose that preserves academic freedom and ensures economic security for the University’s professors. Any breach of these legally-protected interests by the Board and University will trigger the same liability that was imposed on Ohio Dominican College in the *Krone* case. The Board is proposing a unilateral and adverse underlying change to the Faculty Handbook’s tenure protections, and as in *Krone*, such a change violates the reasonable expectations of the University professors when tenure was granted to them. Further, as highlighted by the *Klein* court, no terminated Faculty member will have waived, lost or abandoned his or her tenure rights as the Board would be exercising its discretion unilaterally and unfairly.

Any decision by the Board to vest power in the administration to arbitrarily target individual tenured Faculty members with termination would immediately trigger legal liability for the University and the Board. Consistent with Part One, the Faculty’s counterproposal provides the Board with a much less blunt instrument that poses far less legal risk to the University.

CONCLUSION

The Faculty's counterproposal to the Board evidences its recognition of some of the short-term challenges facing the University and presents a meaningful offer to compromise in the form of conceding certain rights that the Faculty arguably need not waive. The Board should carefully consider and give appropriate weight to the Faculty's position, reject the Board's proposed Handbook amendments, and adopt the Faculty's counterproposal. Should the Board move forward with its existing proposal and reject the Faculty's counterproposal outright, this memorandum should serve as a notice of claims against the Board and the University to any applicable insurance carriers.

/s/ BRIAN C. MULHALL

Brian C. Mulhall, Esq. (0092673)
Mulhall Law, LLC
5735 State Rd.
Cleveland, OH 44134
P: (216) 538-3075 / F: (440) 628-3165
Info@Mulhall-LLC.com