AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

1133 19th Street, NW, Suite 200, Washington, DC 20036
PHONE: 202.737.5900 • **FAX:** 202.737.5526 • **www.aaup.org**

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VIA ELECTRONIC MAIL

Professor Simon Fitzpatrick
President
AAUP Chapter
John Carroll University
1 John Carroll Boulevard
University Heights, Ohio 44118

Dear Professor Fitzpatrick:

In your capacity as president of the AAUP chapter at John Carroll University, you have asked staff in the national office of the American Association of University Professors to comment on amendments to the financial exigency policy proposed by the university's board of directors.

Since its founding in 1915, the AAUP has sought to serve the common good by advancing principles and standards of academic freedom and tenure in American higher education. As you are aware, the understanding of academic freedom and tenure prevalent in American higher education derives from the enclosed 1940 *Statement of Principles on Academic Freedom and Tenure*, the joint formulation of the AAUP and the Association of American Colleges and Universities. As the 1940 *Statement* famously states, "The common good depends upon the free search for truth and its free exposition." Under the 1940 *Statement*, tenure, understood as an indefinite appointment terminable only for cause "or under extraordinary circumstances because of financial exigency," is the means of protecting academic freedom in teaching, scholarship, and intramural and extramural speech. The underlying premise is of course that faculty members whose appointments are insecure will lack the freedom to teach, conduct research, and participate in institutional governance with the utmost effectiveness. We are pleased to note that John Carroll University "subscribes" to the 1940 *Statement*, which the JCU faculty handbook incorporates in its entirety.

Procedural standards derived from the 1940 *Statement* are set forth in the AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure* (also enclosed). Regulation 4c, "Financial Exigency," of the *Recommended Institutional Regulations* sets out standards for terminating tenured appointments when a college or university faces a financial crisis so severe that terminating appointments is the only means of addressing it. The AAUP made several revisions to Regulation 4c in 2013 to clarify the definition of financial exigency, to specify feasible alternatives to termination, to prevent arbitrary classifications of programs for discontinuance, to require greater financial transparency, and to afford a role to affected departments.[1]

[1] The definition of financial exigency is now "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" than terminating

The financial exigency policy in the current edition of the faculty handbook (pp. 34–36) is clearly based on the pre-2013 version of Regulation 4c, its greatest strength an emphasis on robust faculty participation in all stages of decision-making. As will be described in more detail further on in this letter, the most obvious deficiencies relative to both versions of Regulation 4c are the lack of a provision requiring the administration to make "every effort to place the faculty member concerned in another suitable position within the institution" (Regulation 4c(5)) and inadequate due-process rights afforded affected faculty members. In addition, as will also be detailed below, the university's current financial exigency policy lacks all the improvements made to Regulation 4c in 2013, a shortcoming that we hope the faculty and administration will soon address.

Despite these weaknesses, the current JCU financial exigency policy is consistent in several crucial respects with AAUP-recommended standards that govern the termination of appointments for financial reasons. The same cannot be said for the proposed policy.

1. Removal of "Less Drastic Means" from the Definition of Financial Exigency

Both the pre- and post-2013 versions of Regulation 4 define *financial exigency* as "a severe financial crisis . . . which cannot be alleviated by less drastic means" than termination of appointments. The "less drastic means" component of the definition requires a determination that "all feasible alternatives to termination of appointments have been pursued."

The current JCU handbook definition of financial exigency contains almost identical language: "an imminent financial crisis . . . which cannot be alleviated by less drastic means than the termination of contracts of tenured Faculty members."

Unfortunately, the definition of financial exigency in the board proposal—"an imminent financial crisis which . . . . threatens the survival of the University as a whole"—removes that clause. Preservation of academic freedom and tenure requires a clear and shared understanding that the termination of tenured appointments is a matter of last resort.

2. Budgetary Hardship

Our most serious concerns about the proposed amendments relate to their introduction of a second category of financial distress: "budgetary hardship." In our analysis of hundreds of faculty handbooks, this is the first time we have encountered this category. If it were simply

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appointments. The new Regulation 4c provides examples of some "feasible alternatives" to terminations: "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." It specifies that "academic programs cannot be defined ad hoc" but "should be recognized academic units that existed prior to the declaration of financial exigency." It requires that the faculty be provided with access to all the relevant financial information in order to make its own assessment of the institutions financial condition, and it requires that the faculty members whose program is being considered for discontinuance be afforded an opportunity to respond. The financial exigency policy in the JCU faculty handbook is based on the pre-2013 version of Regulation 4c and thus does not incorporate these additional elements.

financial exigency under another name, we might regard it as innocuous. But, as outlined below, it clearly is not. Therefore, because the AAUP regards its recommended financial exigency standards as the only legitimate basis for terminating faculty appointments for financial reasons, we would consider any action to terminate tenured appointments on this basis as illegitimate.

The requirements for declaring "budgetary hardship" are far less demanding than those required for financial exigency. The board of directors need only determine that "action is needed and in the best interests of the university to restore financial stability and implement the University strategic plan." The conditions that could trigger a declaration include, but are not limited to,

(1) cases where the university "experiences *and/or forecasts* a continuing operational budget shortfall without extraordinary cost-cutting measures and/or windfalls for more than two years" (emphasis added);
(2) cases where the university deems cuts "necessary to restore the University's *or a department's or program's* financial stability" (emphasis added);
(3) circumstances that have or will result in a "significant negative impact on University financial ratings"; and/or
(4) circumstances that may make the university unable to "meet financial standards mandated by the U.S. Department of Education or the University's regional accreditor."

The threshold for declaring "budgetary hardship" is thus considerably lower than the Regulation 4c threshold for declaring financial exigency. A projected two-year budget deficit, or a finding that a department is not "financially stable," would suffice. Even setting aside obvious concerns about how the vague and pliable phrase "financial stability" might be construed, these conditions patently fall short of those that threaten the survival or academic integrity of the university *as a whole*, which is the scope required for bona fide financial exigency. The "budgetary hardship" provisions also do not require that the conditions cannot be addressed by less drastic means than termination of appointment.

Even though its threshold is easier to cross, a declaration of "budgetary hardship" under these amendments would confer upon JCU's board and administration sweeping unilateral powers to close academic programs and/or to terminate tenured faculty appointments within those programs. Under AAUP-supported standards and widely recognized academic norms, these are powers that may be exercised on financial grounds only through joint action with the faculty under conditions of bona fide financial exigency. As noted above, "budgetary hardship" is not financial exigency and therefore, under AAUP-supported standards, an illegitimate basis for terminating faculty appointments.

3. Faculty Involvement

The procedural standards of Regulation 4c require faculty participation in every phase of decision-making related to the declaration of financial exigency, the reduction or closing of programs, and the resulting terminations. To quote the AAUP's *On Institutional Problems Resulting from Financial Exigency* (enclosed), "There should be early, careful, and meaningful faculty involvement in decisions relating to the reduction of instructional and research programs," noting that "the financial conditions that bear on such decisions should not be allowed to obscure the fact that instruction and research constitute the essential reasons for the existence of the university."

Regulation 4c(1)-(2) accordingly provides as follows:

- "An elected faculty governance body" or "a body designated by a collective bargaining agreement" will participate "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."
- To ensure that these faculty have the information needed to make these decisions, they will be provided with access to critical financial data, including "five years of audited financial statements, current and following-year budgets, and detailed cash-flow estimates for future years" and "detailed program, department, and administrative-unit budgets."
- Prior to the making of any proposals on discontinuing programs, "the faculty or an appropriate faculty body will have the opportunity to render an assessment in writing of the institution's financial condition."

The JCU faculty handbook currently requires the vice president of finance to provide the faculty annual reports concerning the financial health of the university. The handbook also requires that through its faculty representatives the faculty must be "actively involved" in planning processes. The proposed amendments would delete these requirements, depriving the faculty of the information it would need to discharge its remaining handbook duty to make recommendations to the president concerning a declaration of financial exigency.

Under the proposed amendments, the faculty would have *no* role in a declaration of "budgetary hardship." That decision would rest solely with the board after consultation with the administration and would be presented to the faculty as a fait accompli.

Once a condition of financial exigency has been declared, Regulation 4c(1) holds that the faculty as a whole or an elected representative body thereof will have primary responsibility for "determining where within the overall academic program termination of appointments may occur" and for "determining the criteria for identifying the individuals whose appointments are to be terminated." This is in keeping with the principles of shared governance that assign faculty primacy in decisions concerning educational policy, the curriculum, and faculty status.

The current version of the JCU faculty handbook incorporates this recommendation. It states that "the judgments determining where within the overall academic program termination of appointments may occur should be primarily the responsibility of the Faculty through a committee elected by the Faculty for this purpose." It further states that "the Faculty or an appropriate Faculty body should exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated."

However, the proposed amendments to these passages would eliminate these provisions and thereby diminish the emphasis on the faculty's primary responsibility for making these decisions in conditions of financial exigency. Under the amendments, judgments about where terminations should occur will "be initially recommended" by faculty representatives within three business days of a declaration of financial exigency. Similarly, under these amendments, faculty representatives would only recommend the criteria to be used in decisions about which appointments to terminate.

Faculty would be also have a limited role in making these decisions under conditions of "budgetary hardship." The proposed amendments state that the provost will consult with the faculty council "to identify options" for addressing the hardship. At that point, faculty involvement in these crucial matters concerning the curriculum and faculty status would cease altogether. The provost would make recommendations regarding program closure and terminations to the president, who would make final recommendations to the board of directors within thirty days after a declaration of budgetary hardship. The board may accept, reject, or revise those recommendations at its next regular meeting or at an emergency meeting.

4. Prioritization of Tenured Positions

Regulation 4c(7) provides that a tenured faculty appointment cannot be terminated before an untenured appointment under a declaration of financial exigency "except in extraordinary circumstances where a serious distortion in the academic program would otherwise result." Nor may new hires be made while tenured positions are being terminated except under the same extraordinary circumstances.

These provisions are not included in the current JCU faculty handbook language governing financial exigency. Nor are they included in the proposed amendments concerning financial exigency or "budgetary hardship." Rather, in all these circumstances tenure is listed as merely one factor among many that should be included in the criteria for determining which positions to cut, rendering tenure protections essentially meaningless.

5. Right to a Hearing

Regulation 4c(3) requires affordance of "an on-the-record adjudicative hearing" before an elected faculty body similar in basic respects to what the AAUP recommends for dismissal (Regulation 5). In such a hearing, an affected faculty member may contest

- "the existence and extent of the condition of financial exigency," with the burden of proof resting with the administration,
- "the validity of the educational judgments and the criteria for identification for termination," with the important qualification that "the recommendations of a faculty body will be considered presumptively valid," and
- "whether the criteria are being properly applied in the individual case."

As noted earlier in this letter, rather than providing a hearing on these matters with the burden of proof described above, the JCU faculty handbook currently provides a terminated faculty member a narrow right to appeal to the Faculty Grievance Committee: only the application of the criteria to the faculty member's individual case may be contested.

We note with alarm that the proposed amendments would deny faculty members of the right to appeal *any aspect* of a termination for financial exigency or budgetary hardship, undermining the fundamental rights of academic due process that Regulation 4c(3) is meant to protect.

6. Suitable Alternative Positions

Under Regulation 4c(5), "Before terminating an appointment" for reasons of financial exigency, the administration, with faculty participation, "will make every effort" to find another "suitable position within the institution" for the affected faculty member.

There is no provision in the JCU faculty handbook, either in its current form (as noted earlier) or under the proposed amendments, requiring the institution to make any effort to relocate a faculty member under conditions of financial exigency. The "budgetary hardship" amendments provide some assurances, but those are nevertheless weaker than the 4c(5) standard for financial exigency: they require only that the university make a "good-faith attempt" at relocation and they do not specify the efforts must be undertaken prior to the termination of appointment.

7. Notice and Severance

Regulation 4c(2) holds that faculty members whose programs are being considered for discontinuance "will promptly be informed of this activity in writing and provided at least thirty days in which to respond to it."

The JCU faculty handbook, in its current form and under the proposed amendments, does not require that faculty in programs being considered for closure for financial exigency or "budget hardship" be notified before decisions are made, nor are those faculty afforded a right to respond.

Under Regulation 4c(6), "In all cases of termination of appointment because of financial exigency," affected faculty members will be afforded notice or severance salary, at minimum, according to the following schedule:

- those in their first year of service will receive three months of salary or notice;
- those in their second year of service will receive six months of salary or notice;
- those in the third year and beyond will receive at least one year of salary or notice.

The JCU faculty handbook currently meets this standard. Under the proposed amendments, however, faculty in their second full year of appointment would receive only three months' notice or severance, and faculty in their third year or beyond would receive only six months' notice or severance for termination due to financial exigency.

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As outlined above, John Carroll University's current faculty handbook policy on termination of appointments because of financial exigency, though consistent in several essential respects with AAUP-recommended standards, has several notable deficiencies. Those deficiencies, however, pale in comparison to those contained in the proposed amendments, especially the proposed policy on budgetary hardship.

As we have emphasized, that policy is fundamentally at odds with the 1940 *Statement of Principles on Academic Freedom and Tenure* (and, thus, with JCU's handbook). If adopted, its provisions would permit the termination of tenured faculty appointments on a basis that falls well short of a bona fide financial exigency that threatens the institution as a whole; they would deny the faculty meaningful involvement in many of the crucial decisions that would affect their livelihoods and the academic mission of the institution; and they would deprive the faculty of vital due-process rights to contest those decisions. John Carroll University would in effect be eliminating tenure as it is commonly understood. It therefore comes as no surprise to learn that on September 23, by a vote of 100 to 2, the university's faculty adopted the following resolution: "As a demonstration of good faith, we ask that the Board of Directors withdraw the "Budgetary Hardship" amendment to the Faculty Handbook by the close of the business day on September 28th, 2020. This amendment strikes directly at the heart of tenure at this institution, leaving all faculty members tenured in name only."

We hope that these comments prove useful to you and your colleagues. Please let us know if we can help facilitate efforts to bring the institution's policies into fuller accord with AAUP-supported standards and do keep us informed of any developments at JCU so that we can continue to monitor the situation.

Sincerely,

Mark E Criley

Mark Criley
Program Officer
Department of Academic Freedom, Tenure, and Governance

Enclosures by electronic mail

Cc: Professor John T. McNay, President, Ohio AAUP Conference