In the Matter of the Arbitration between

ASSOCIATED FACULTIES OF THE UNIVERSITIES OF MAINE, MEA/NEA

and

UNIVERSITY OF MAINE SYSTEM

OPINION AND AWARD

Grievance Nos. 599-14—01-P, 612-15-01-P, 615-05-01-P, and 616-05-01-P

The parties submitted this case to arbitration pursuant to their collective bargaining agreement effective December 19, 2013 through June 30, 2015. Seven days of hearings were held between April 28 and September 10, 2015. Howard Reben, Esq., appeared on behalf of AFUM; and Glenn Israel, Esq., Linda McGill, Esq., and Patricia Peard, Esq., appeared on behalf of the System. Post-hearing briefs and reply briefs were received by November 23, 2015.

ISSUE

The parties did not agree on the precise framing of the issues being arbitrated under the four consolidated grievances. Based on the parties' proposals and the entirety of the record, I find the issues to be as follows:

> Did the University violate the collective bargaining agreement by
> 1. its decision to retrench faculty members in the fall of 2014;
> 2. and/or, the selection of particular faculty[1] members to be retrenched;

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[1] Initially the four grievances were filed on behalf of the twenty-six AFUM faculty members who were retrenched. Eleven of the faculty withdrew from the proceeding. The remaining grievants include [redacted]

3. and/or, the manner in which it implemented the retrenchments?

If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 3 – BOARD ASSOCIATION RELATIONS

. . .

B. The rights, functions, powers, duties and responsibilities of the board and its officers and agents, under applicable state law and the Bylaws of the Board, including the Board's right to alter or waive existing Bylaws or policies in accordance with the procedures specified in the Bylaws shall remain vested in the Board and in said officers and agents except as modified by this Agreement.

. . .

ARTICLE 17 – RETRENCHMENT

A. "Retrenchment" shall mean the discontinuance of a unit member with a tenured appointment or continuing contract from a position at any time . . . for bona fide financial or program reasons including temporary or permanent program suspension or elimination.

B. 1. For retrenchment within designated units, there shall be the following retrenchment categories:

a. less than one (1) year of employment
b. one (1) to three (3) years of employment
c. four (4) to six (6) years of employment
d. seven (7) to ten (10) years of employment
e. eleven (11) to fifteen (15) years of employment
f. sixteen (16) to twenty-one (21) years of employment
g. more than twenty-one (21) years of employment

2. No tenured unit member shall be retrenched if there are non-tenured unit members in the retrenchment unit.

[redacted]

3. No unit member with a continuing contract shall be retrenched if there are unit members without a continuing contract in the retrenchment unit.

4. Where unit members are equally qualified under 1 through 3 above, unit members will be retained whose qualifications are most essential to the mission and purpose of the retrenched unit.

5. The above order of retrenchment shall be applied in such a way as to minimize any adverse effect on affirmative action employment programs.

C. Unit members to be retrenched shall be informed as soon as possible. Unit members shall receive the applicable notice period provided for in Article 7, Reappointment and Non-Reappointment and Contract Status, except for unit members with tenured or continuing contract appointments shall receive at least one and one-half years notice of retrenchment, as described in Section D of this Article and be notified of the decision to retrench the faculty member's position no later than October 31 or March 31 of the semester in which notice or retrenchment is given.

D. Unit members with tenured or continuing contract appointments shall fulfill their professional responsibilities for the remainder of the semester in which they are given notice, and shall thereafter receive one and one-half (1½) years of total compensation. During this one and one-half (1½) year period, such unit members shall have no further professional obligations to the University unless appropriate alternate or equivalent employment at the retrenched unit member's campus, with the expectation of continuance beyond eighteen months, is made available to the unit member in accordance with Section E of this Article. . .

E. At the time of notice of retrenchment, the University shall make a reasonable effort to locate appropriate alternate or equivalent employment within the University for retrenched faculty members. A retrenched unit member shall have a priority right to alternate or equivalent positions within the bargaining unit from which the unit member was retrenched.

. . .

F. For the purpose of this Article, a retrenched unit member shall have been considered to have been laid off.

ARTICLE 19 – LEAVES

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B. SABBATICAL LEAVES

. . .

4. b. The unit member must return to the University for at least one academic or fiscal year following the sabbatical. Agreements to the contrary must be in writing prior to participation. Salary received during the sabbatical must be returned to the University where neither of the above is satisfied.

ARTICLE 27 – NON-DISCRIMINATION

The University and the Association agree not to discriminate illegally with respect to wages, hours and working conditions based upon: race, color, religion, sex, sexual orientation, including transgender status or gender expression, national origin, citizenship status, age, disability, genetic information, veterans status or membership or non-membership in the Association.

ARTICLE 32 – PROGRAM ELIMINATION

The Association shall be notified in writing of any proposed elimination or suspension of a program to which unit members are assigned at the time a Program Elimination Procedure is initiated. The Association shall have the opportunity to meet and discuss with the campus administration prior to completion of an impact study.

BACKGROUND

USM Structure. The University of Maine System (UMS or System) is comprised of seven universities, the largest of which is the University of Maine, in

Orono, and the next largest is the University of Southern Maine (USM), approximately two-thirds the size. The remaining five universities are significantly smaller, as are the School of Law and some forty outreach centers and course and cooperative extension sites.

The System is overseen by its Board of Trustees and although each university is charged with the responsibility of developing an operating budget, ultimately the System has a unified operating budget. The majority of non-capital revenue is derived from student tuition and fees, with progressively lesser amounts coming from the annual State appropriation, grants and contracts, gifts, and endowment income. How the State appropriation is allocated among the component institutions is decided upon by the Board of Trustees. In recent years, an outcomes-based formula has been adopted for a portion of the appropriation that has resulted in the USM receiving a disproportionately larger share of the total.

Prelude to Retrenchment. The issues that arose surrounding the eventual decision of the USM administration to eliminate programs in the fall of 2014 and retrench tenured faculty were not new. After the world, national, and state economies began to contract in 2007, concerns were being raised about the ability of USM to maintain its extant level of operations. In February, 2008, then Interim Provost Mark Lapping notified the USM faculty that permanent, base-budget savings would be necessary to enable the institution to be sustainable. He identified around thirty undergraduate, graduate, and certificate programs that had low enrollment and graduation numbers. He opined that a process of program assessment would have to be undertaken, although he opined that he did not expect this would lead to the elimination of full-time faculty positions. A year and one-half later Kate Forhan, the successor provost, issued her own equally extensive list of programs, based on the number of degrees conferred, that had to be considered for elimination or merger.

The financial situation faced by the System became more stressed. The noncapital State appropriations peaked in Fiscal 2008 at $200 million and declined in subsequent years. After five years of large tuition and fee increases, the Board instituted caps on increases because it was concerned the schools were pricing themselves beyond the reach of the Maine population, whose median income had not kept pace with inflation, let alone the rate of tuition increases. Enrollment across the System was dropping, meaning the main source of revenue was shrinking.

In 2011, the Board of Trustees tasked the academic officers at each university to review all programs that had fewer than five graduates in each of the prior three years as part of an system-wide initiative called "New Challenges, New Directions." This analysis was performed at USM jointly by representatives of the administration and the Faculty Senate. Approximately thirty such programs were identified and Provost John Wright recommended the elimination of four of them, with varying actions to be taken regarding the balance.

During this period and in the ensuing years, USM sought to stay within its budget as its revenue was shrinking by laying off 100 non-faculty employees, deferring maintenance, and reducing real estate costs. In August, 2013, then President Theodora Kalikow and the president of the Faculty Senate formed a USM-wide Directions Package Advisory Board comprised of representatives of all stakeholders. One member was Joseph McDonnell, who had come to USM in July, 2011 as the dean of the College of

Management and Human Services. The Board presented its recommendations to Kalikow in February, 2014. Among its findings were that 90% of the USM student body was from Maine, and the number of in-state high school graduates would continue to decline, dropping over 12% between 2012 and 2021. The enrollment at USM, as reflected by credit hours, declined by 4% between 2012-2013 and 2013-2014, and was 6.6% below the budgeted amount, meaning there was a significant revenue shortfall. It was determined that class size was unusually small for a public university and that many programs were under-enrolled and were not self-sustaining, meaning tuition and grant revenue did not cover the expenses, which were mostly faculty and staff salaries. Various programmatic ideas were advanced to attract more students and increase enrollment, thereby generating more revenue. Among the recommendations to reduce costs was that any programs that were not self-sustaining should be examined and tested for consolidation or elimination.

By the time the administration submitted its proposed budget for Fiscal 2015 to the USM, it showed a $9.5 million deficit. The Finance Committee of the System Board ultimately directed USM to find $2.5 million in savings, which USM achieved by cutting $450,000 in goods and services, $900,000 from the voluntary separation of faculty who had not previously indicated they were leaving, and the remainder from reductions in non-faculty positions. That left a projected deficit of $7 million. Because reducing expenses by a number of that magnitude would have a profound effect on the University, the Board of Trustees agreed to give USM up to $7 million to cover the deficit. As recounted by Richard Campbell, who was then the vice president for Finance and Enrollment Management at USM, and Rebecca Wyke, the vice chancellor for Finance and Administration of the System, it was made clear to the USM administration that the $7 million infusion was a one-time act and USM would have to take the steps necessary to submit a balanced budget for Fiscal 2016.

The money that was made available to USM came from the System's $15 million Budget Stabilization Fund, which had been established in 2010 and had been built from net investment income that exceeded budgetary expectations. This was the first time the Fund was being tapped. USM was not the only university that needed assistance to cover deficits. Authorization was also given to transfer up to $900,000 to Orono, $1.3 million to Fort Kent, and $797,000 to Machias, leaving a balance of about $5 million.

Program Eliminations. Section 305.5 of the System's Administrative Procedures Manual establishes the process to be followed when a university contemplates the elimination of an academic program. In summary, when the notion of elimination arises from a campus, the president of that campus is to develop a program elimination proposal that covers seven specified topics, including the input obtained from meeting and discussing the considered action with AFUM. The proposal is sent to the vice chancellor for Academic Affairs, who submits the proposal to the chief academic officers from the seven universities, who make a recommendation to the vice chancellor, who in turns makes a recommendation to the chancellor. Section 305.5.6 then states:

> The Chancellor's recommendation of the Program Elimination Proposal to the Board of Trustees for its review and final approval, to come before the Board twice a year at the January and July Board meetings.

At its meeting on March 10, 2008, the Board of Trustees considered and approved the elimination of the Associate of Science in Legal Technology Program at the

University of Maine at Augusta. The record does not establish whether any AFUM members lost jobs as a result of this action. The same is true regarding the elimination of the BS in Environmental Management and Policy and BS in Information Systems Engineering at the University of Maine approved by the Board at its March 16, 2009 meeting; and the BS in Bilingual Secondary Education and BS in English/Drama/Art Secondary Education Programs at Fort Kent approved at the November 15, 2010 Board meeting. At its May 19, 2014 meeting, the Board approved the elimination of five academic programs at USM. USM President Kalikow had solicited recommendations from the USM Faculty Senate and AFUM in January and in response, USM AFUM President Christy Hammer had communicated the following regarding all five programs:

> This is to confirm that there are no contractual concerns with the proposed elimination of the [ ] program at USM. These programs are empty of faculty and students and were voted on by the SEHD faculty to replace or eliminate some time ago. USM faculty senate also voted agreeing with these eliminations.

Paul Johnson is a faculty member at USM and is the grievance representative for AFUM at the campus. He is also a member of the Faculty Senate and the Senate Executive Committee. Johnson and several other members of the Executive Committee met with USM Chancellor James Page on July 14, 2014. Johnson testified that Page told the representatives that program eliminations can only occur at the July and January meetings of the USM Board of Trustees.

Decision to Retrench. In late March, 2014, thirteen tenured faculty were notified by the then Provost Stevenson that they were being retrenched. AFUM filed a grievance on behalf of eleven of those faculty and within days Kalikow rescinded the retrenchment notices of those eleven.

On June 26, 2014, Kalikow submitted to System Chancellor Page notice pursuant to Section 305.5 of USM's intention to move forward with a proposal to eliminate the Master's Program in American and New England Studies, the Bachelors Program in Arts and Humanities at the Lewiston/Auburn Campus (LAC), and the Bachelors Program in Geosciences. At this time it was believed that USM was facing a $12.5 million deficit in its Fiscal 2016 budget. Kalikow had previously met with the USM Faculty Senate, which had put forth a number of alternative budget cuts and savings. The stated rationales were that these programs had low enrollment, low graduation rates, high faculty to student ratios, and hence high relative cost to the University because tuition and grants did not nearly cover the cost of the faculty. Additionally, the LAC program duplicated course content available at other USM campuses and on-line. All three programs were identified by Forhan, and two by Lapping, as programs to be considered for elimination. Pursuant to Article 32 of the collective bargaining agreement, USM administrators subsequently met with the AFUM leadership and discussed the program elimination proposal.

In July, 2014, David Flanagan, who had been the CEO of Central Maine Power, chair of the Board of Trustees of the University of Maine System, and chair of the Board of Visitors of USM, was named interim president of USM. He immediately tasked the four deans of schools within USM to begin reviewing the academic programs with an eye towards making budget cuts. On August 14, 2014, the chief academic officers of the universities in the System unanimously approved the USM proposal to eliminate the three academic programs. On August 15, Flanagan sent a letter to Page submitting the proposal to the System Board of Trustees for review by its Student and Academic Affairs Committee on August 29, 2014, and by the full Board at its September 22, 2014 meeting. The three program eliminations were unanimously approved by the full Board. The Board did not vote at that meeting, nor any other meeting, to waive the requirement of Section 305.5.6 that the chancellor's recommendation of a program elimination proposal to the Board of Trustees is "to come before the Board twice a year at the January and July Board meetings."

In August, 2014, Flanagan appointed McDonnell to fill the vacancy in the provost position. By the time McDonnell assumed this role, it was believed by the administration that the projected budget gap for Fiscal 2016, assuming no changes in the academic programs, had grown to $16 million because enrollment continued to fall below projected levels and grant revenues also declined. This figure included the $7 million shortfall that the System stated it would not cover after Fiscal 2015.

McDonnell began meeting with Thomas Dunn, a former manager at Accenture Consulting who was experienced dealing with budget reductions, and Campbell, the chief financial officer at USM. McDonnell was asked to reduce faculty expenses by $6 million to $7 million, and the other two administrators would try to find the rest of the amount needed to balance the budget from other areas of the university, such as eliminating forty-six non-AFUM positions, reducing planned facility maintenance, and cutting miscellaneous expenditures. Given the average cost of faculty salary and benefits of $120,000, McDonnell determined that he would have to cut fifty full-time tenured or tenure-eligible faculty positions to save $6 million. It was McDonnell's understanding that the collective bargaining agreement limited faculty retrenchments to October 31 and March 31, and he felt all changes should be accomplished in fall so incoming students would have all this relevant information about the school when they were making their decision in the spring about whether to come to USM. Assuming all these reductions were achieved, USM would still be left with a projected $1.6 million deficit, which the System agreed USM could expend from USM reserve funds.

At this point McDonnell did not know how many faculty would need to be retrenched to hit the budget targets because he did not know how many faculty would take advantage of the early retirement incentive program that had been in effect for two years. The cost of the early retirement incentives was being borne by the System, rather than the individual universities. The deadline for accepting early retirement was in mid-October. McDonnell also understood that even if fifty faculty elected to retire, retrenchments might still be necessary because some retirements would be in departments with high student enrollment, meaning those faculty would have to be replaced with new hires.

McDonnell reviewed the information the deans had amassed regarding each academic program, listing the number of faculty, sections taught, and number of majors. He also had a document that detailed whether each program had been identified by prior provosts for possible suspension or elimination. Another document broke down the number of sections, students, credit hours, and revenue generated from tuition and grants for each program. Based on this information, and his discussion with deans and associate deans, McDonnell concluded that USM's range of programs was "a mile wide and an inch deep," and many programs were requiring significant subsidies that he believed the university could not afford. He felt there were four possibly overlapping approaches: eliminate existing programs, keep the programs but thin them, reimagine programs so they crossed previous boundaries, and look to the other universities in the System to coordinate offerings.

On August 28, 2014, Flanagan and McDonnell addressed the faculty and staff at the annual opening day meeting. McDonnell explained that USM was facing a fiscal crisis, having to deal with a $16 million budgetary shortfall. He said the university had 6000 full-time equivalent students, but faculty for a 7500 student body. Only about 780 of the 4000 students who applied were coming, and almost 40% of the students who enrolled left after their first year. He articulated the four possible approaches to addressing the crisis, and solicited everyone's suggestions. He met with department and program chairs in subsequent weeks and discussed the alternatives.

McDonnell ultimately adopted six criteria for assessing programs: student interest, financial contribution in the form of revenue, whether the program was unique or was a duplication, whether the curriculum within a program could be slimmed down, the extent of the community engagement, and the relationship of a program to the other parts of the System. Of the seventy-five programs, he considered fifteen for elimination if the totality of the budget reduction were going to come from program elimination alone. He ultimately decided to recommend the elimination of two additional programs, beyond the three already approved by elimination by the Board of Trustees: Applied Medical Sciences and French. The essential reason was that on average both programs graduated fewer than five students annually and the costs of the faculty exceeded revenue from tuition, in the case of Applied Medical Sciences, and funded research.

McDonnell sent a letter to the faculty on October 6 detailing the various steps that would be taken to reduce the budget deficit. These included restructuring numerous departments and programs, eliminating the two additional programs, and eliminating fifty faculty positions. McDonnell specified how many positions would be cut from each of twenty-five departments or programs, including the five programs that were being eliminated. He stated that he would not know if retrenchments would be necessary until after the October 20 deadline for the retirement incentive program. McDonnell noted that the proposals for program elimination would be sent to the Faculty Senate and AFUM that day for their review by October 17, and consideration by the System Board of Trustees later in October, in time for layoff notices to be sent to faculty by the contractually mandated October 31 deadline. On October 20, McDonnell learned that only twenty-five of the forty faculty who accepted the retirement package were in departments or programs scheduled for elimination or reduction.

On October 6 Flanagan submitted to Page the notification of USM's intent to pursue the elimination of the Masters of Science in Applied Medical Sciences and Bachelor of Arts in French programs. On October 17, after the Faculty Senate had provided their objections to the program eliminations, and AFUM had proffered its oral and written input, Flanagan submitted the program elimination proposals to Page. The chief academic officers approved the proposals and the Academic and Student Affairs Committee of the USM Board of Trustees voted to recommend the proposals on October 22, after hearing from Flanagan and McDonnell. After the vote, Committee members fielded comments and questions from numerous students, faculty, staff, and members of the public who extolled the value of the programs. The Board of Trustees considered the proposals at a special October 24 meeting held at USM. Flanagan and McDonnell presented the rationale behind the proposal, and the Board then got comments in opposition to the proposal from almost sixty individuals. Page reported that the Trustees had given USM from the previous spring to take the steps necessary to balance its budget. He stated that although program eliminations were difficult, the time had come for USM to act. The Trustees then voted nine to two to approve the elimination of the two programs.

Selection of Individuals For Retrenchment. Once McDonnell learned of the faculty who would be retiring, he determined that twenty-six other faculty from a range of departments would need to be retrenched to achieve the cost reductions he sought. McDonnell conveyed to the USM Human Resources Department the numbers of positions in which departments would be impacted, but he played no role in identifying the particular faculty in those departments who would be retrenched.

The USM Human Resources Department contacted Mark Schmelz, the director of Labor and Employee Relations for the System, for guidance on how the retrenchment procedures in Article 17 should be implemented. He told them that only if the first four factors were equal would the affirmative action provision in B.5 come into play to break a tie. The Human Resources Department sent to Schmelz an analysis of each department that McDonnell had indicated needed to have one or more retrenchments. The department-by-department breakdown listed each faculty member in the department with their tenure status, tenure date, hire date, service date, gender, race, age, and veteran status. Where the retrenchment was the result of a program elimination, the rationale for the elimination was also included. In every case where the entirety of a program was not being eliminated, the faculty member designated for retrenchment was the junior person. Schmelz forwarded all the material to Meghan Clough, the associate director of Human Resources and Director of Equity & Diversity for the System, and asked her to determine if the proposed retrenchments at USM would demonstrate an adverse impact based on age and gender. Schmelz believed such an analysis had to be conducted to comply with Article 27, the non-discrimination provision of the collective bargaining agreement,

Clough had extensive experience in human resources, and had performed adverse impact analyses fifteen to twenty times previously, having taken courses in discrimination law and related statistical practices during her graduate studies and afterward. She does not have an advanced degree in statistics.

Using the sheets provided by USM that listed all the faculty by department, Clough reviewed the recommended retrenchments by individual and by work unit or group. She believed that best practices and research support an analysis at the level of the functional group affected, the level at which the selection decision was made. She inputted the data into the Fisher Exact Test calculator, which she believed was the most appropriate and precise tool for small sample analysis. Given that many of the departments had between three and five faculty, the samples were deemed to be small. Clough used both what she termed the 5% standard for determining if a result could be attributed to something other than chance, and the more conservative 10% standard. She also utilized a two-tailed approach, which she termed a more conservative method, focusing more on likelihood and less on direction.

Looking at the data on the individual, function, and group level, the closest she came was 13%, which she said was many standard deviations above 5%, and even above the conservative 10% standard. Clough also conducted a T-Test, a less exact methodology, comparing the leavers versus stayers, which included the retirees, reasoning that retirement constituted a self-selected choice. In every department or work unit, and in the faculty as a whole, Clough found that there was no statistically significant impact because of gender or age. Clough was aware there was an Affirmative Action Plan that was drafted in 2003. She did not review or consider that plan in reaching any of her determinations because she felt the document was "aged out" and making decisions based on old statistics would have produced invalid results.

After Clough informed Schmelz of her findings, retrenchment notices were sent to twenty-six faculty members before October 31, 2014, effective at the end of the fall semester. The System agreed to contribute the $4 million that would be expended for the eighteen months of salary due the retrenched faculty, and the $7 million attributable to the retirement incentive for the forty faculty who decided to take advantage of that option. AFUM filed four grievances regarding the program eliminations and retrenchments, which were ultimately consolidated.

Efforts to Locate Employment. On October 28, Schmelz and Clough sent a notice to the employee relations liaisons and chief academic officers of all the universities in the system entitled "Facilitating Employment Support for Retrenched AFUM Employees at USM." They identified the following action item to be taken immediately:

> Please ensure your job postings are up-to-date and posted as of 10.28.14. Retrenched faculty will be referred to a central website where UMS will be posting all job postings found on campus websites to see if they have interest in any current vacancies. Additionally, UMS and USM will

> cross-reference the departments and areas of teaching expertise of retrenched faculty to all open University positions, including teach-out positions. UMS HR will contact any employees for whom there may be a possible employment option at another campus. USM HR will work with any campuses involved to facilitate a review of qualifications and the consideration of an interested faculty member.

The memorandum stated that for the two years following the effective date of the retrenchment, retrenched USM faculty had to be informed of any vacancies at other universities before the positions could be generally posted so they could indicate their interest in being considered. The ultimate hiring decision would rest with the hiring campus' provost and hiring department, who would determine if the retrenched faculty member's qualifications matched their needs. If the position from which the faculty member was retrenched became available at USM, USM Human Resources would be responsible for offering that position to the retrenched faculty member, assuming the person chose to be on the recall list. The retrenched faculty received weekly email notifications with a link to the website of current employment opportunity throughout the System.

A few of the retrenched faculty applied for open positions. [redacted] Her curriculum vitae was reviewed by the chief academic officer and the departmental committee composed of bargaining unit members, but she was not offered the job. [redacted]

[redacted]

Besides the general notifications, Schmelz facilitated discussions between USM and the University of Maine about moving the entire Applied Medical Science program to Orono. Ultimately those discussions did not result in a transition of the program.

Differing Perspectives on the Financial Health of USM and the System.

System Vice Chancellor for Finance and Administration Wyke was the source of much of the System's presentation on the budgeting process and the factors that led up to the System Board agreeing to make available $7 million to USM to cover the projected budget deficit for Fiscal 2015, on the condition that USM present a balanced budget for Fiscal 2016. She testified that most of the conditions that led to the deficit budget in 2015 were still present when the 2016 budget was being prepared. Maine was in what she termed a "demographic winter," with the college-age population continuing to decline until 2020, when there would be a slight uptick. The System had already lost 1700 full-time equivalent students, 888 of whom had been lost at USM, 20% of its enrollment since 2006. The disproportionate loss at USM was due in part to the fact that there was greater external competition for students from other higher education providers in the southern part of the state.

To assess the relative financial health of USM, Wyke looked to the core financial ratios and composite financial index, a measurement tool for higher education institutions developed by KPMG and used by the Department of Education and Standard & Poor's. The ratios are developed annually for each of the universities in the System, and then for the System as a whole, looking back at the most recent nine fiscal years, using data from audited financial statements. The ratios are:

1. **Primary Reserve – How long could the institution function using its expendable net position?** The benchmark is .40, approximately five months. USM had been essentially level at .19 from Fiscal 2011 onward, while UMS had slowly risen during that time frame to .42 in Fiscal 2014.

2. **Net Operating Revenue – Is the University living within available resources?** The high and low benchmarks are 4 and 2, respectively. USM dropped from 4.69 in Fiscal 2011 to -.37 in Fiscal 2014. UMS dropped from 5.16 to .41 during the same period.

3. **Return on Net Position – Is the University financially better off than in the previous year based on total economic return?** The benchmark is 6. Using the same time frames, USM declined from 6.37 to -2.25, while UMS declined from 9.04 to .16.

4. **Viability - What is the University's ability to assume new debt, as measured by expendable resources?** The benchmark is 1.25. USM had improved from .49 in Fiscal 2011 to .58 in Fiscal 2014, while UMS had gone from 1.28 to 1.73.

5. **Composite Financial Index – Overall measurement of University's health.** High benchmark is 10, low is 3. USM declined from 2.4 in Fiscal 2011 to 1.0 in Fiscal 2014, while UMS went from 3.9 to 2.9. According to the evaluative tool, a rating of 1.0 indicates a need for an institution to consider substantive programmatic adjustments.

Wyke explained that the University of Maine Foundation is considered a component unit of the System for accounting purposes, because it is of sufficient relative size. Most of the funds of the Foundation are restricted, meaning they can only be spent for specific purposes, and the unrestricted funds are allocated for use in Orono by the Foundation board, not the System. None of the Foundation's funds can be used to offset operating expenses at USM. There is a much smaller USM Foundation, but only about $600,000 to $700,000 of its $22 million endowment is unrestricted.

Wyke also explained the role of depreciation in the USM budget. She stated that 100% of depreciation must be shown on financial statements as an expense, and it was Board policy that each university was to budget to spend the full 100% to deal with the deferred and current maintenance. Because sufficient funds were not available, however, USM could only afford to plan to spend 72% of the depreciation total. She said that that did not mean the difference between the 100% and 72% figures was available cash that could be used to pay faculty salaries.

Wyke spoke to the historical financial projections the System had produced, and the actual results that ensued. She recounted that in 2009 the System had projected a structural gap or deficit of $43 million over the next four years. That projection was based on the assumption that no changes were made and there would be prospective salary increases. In response, the System negotiated a collective bargaining agreement with AFUM that had no across-the-board raises, reducing the projected gap by $32 million. Other changes to how the System was doing business resulted in other savings. By 2013, the projected $43 million deficit turned into a $23 million surplus.

Wyke noted that while the Board was unwilling to provide another $7 million infusion of cash to USM to balance its Fiscal 2016 budget, the Board did agree to make $4 million available from the benefit pool to cover the cost of the USM retrenchments, and it was funding the cost of the early retirement incentives. The Board also agreed to provide USM $3m to be put towards financial aid, and student success enrollment, recruitment, and retention efforts. Another $3 million was lent so USM could replace some boilers.

USM CFO Campbell disputed that additional monies allocated to increased financial aid would produce higher enrollments in Fiscal 2016, and hence greater than budgeted tuition revenue. He noted that financial aid had been increased in the preceding years and the effect was merely to lessen the impact of continually declining enrollment levels. He also explained that it was necessary to offer enhanced aid packages to attract out-of-state students, so bringing more such students did not mean the University actually received the full out-of-state tuition levels.

Campbell testified that he was familiar with the multiyear projections the System had undertaken in the past. The long term projection for Fiscal 2010 undertaken in 2008 was a $18 million deficit, while the actual result in 2010 was a $55 million surplus. The projection for Fiscal 2011 was a $10 million deficit, and the actual result was a $80 million surplus. The Fiscal 2012 projection was a deficit of $8.6 million, and the actual result was a $38 million surplus. Finally, Campbell stated that when he projected a Fiscal 2016 deficit of $16 million, he did so based on the representation by the System that the State appropriation would be level. In January, 2015, Governor LePage issued his proposed budget for the 2016/2017 biennium that included a 3.48% increase in the appropriation for the System, a total of $14 million.

To support its argument that the financial circumstances did not justify the faculty retrenchments, AFUM offered the testimony and analysis of Dr. Leroy Dubeck. Dubeck is a retired professor of Physics and the former president of the Temple University chapter of the AAUP. He has been involved on the local and national level for many years in budget analyses of institutions of higher education and he has written and spoken extensively on the topic, largely for faculty association publications and events.

Dubeck reviewed the audited financial statements of the System going back to 2001, which he regards as the gold standard of documents reflecting the actual position of the enterprise. His fundamental point was that it is appropriate to look at the financial health of the System as a whole, as opposed to focusing on USM, because the System is a unified entity and the System Board has the authority to move resources to the individual universities. The State appropriation is given to the System, not its component units, and as has been evident from the System's decision to provide USM $7 million in Fiscal 2015, and to fund the cost of the USM retrenchments and early retirements, the System can provide funds when it chooses to do so.

It was Dubeck's conclusion that the System is financially sound and growing. Its net position has increased every year, increasing from $641 million in Fiscal 2008 to $877 million in Fiscal 2014. The System has been able to build up surpluses in its benefit pool carryover and reserve funds. Dubeck dismissed the System's reliance on the trends of the core ratios, noting that those ratios failed to include the assets of the University Maine Foundation, despite the fact that the Foundation is a component unit that must be reported as part of the annual financial statements. When the component unit resources are included, UMS's primary reserve ratio in Fiscal 2014 improves from .40 to .52; the net operating revenues ratio improves form .41 to .82; the return on net position ratio improves from .16 to 2.09; the viability ratio improves from 1.73 to 2.16; and the composite financial ratio improves from 2.9 to 3.8.

Dubeck noted that the System has historically overestimated potential fiscal challenges, repeatedly ending with surpluses instead of long-predicted deficits. On the local level, Dubeck disputed the accuracy of a projected $16 million deficit for Fiscal 2016, citing the inclusion of over a $1 million for increased student financial aid, which he declared will by economic axiom generate more enrollment and tuition dollars. He stated that the 17% gap between USM's expensing of depreciation and the amount in the budget to be spent on facilities meant more dollars were available to avoid retrenchments.

Dubeck disputed the gloomy prognostication regarding revenues. He opined that contrary to the System assertion about the limited State appropriations, he expected the State appropriation to rise in coming years. This opinion was based on his assessment of the political climate in the state towards higher education, the growing national economy, and the expectation that the Maine economy would also grow, generating increased tax revenues. Dubeck pointed to the governor's proposed 2016/2017 System appropriation as confirming the correctness of his prediction. He challenged the assessment of declining student enrollment, pointing out that the expected shrinkage in student-aged population in Maine would only continue for a few more years, after which it would start to rebound. Further, the population decline will be partially offset by the increasing percentage of high school students who will complete their high school education and the percentage of high school graduates who will enroll in college. Dubeck also stated there was no reason why USM could not compete more effectively for out-of-state students whose tuition is three times that of in-state students.

On balance, Dubeck found that USM faces some financial challenges, but it is not approaching the level of financial exigency that would justify the retrenchment of tenured and tenure-eligible faculty. He said that institutions of higher education always have financial stresses, but they survive short-term problems. Given the strength of the System, he said the resources could have been made available to preserve the faculty instead of funding the retrenchments, early retirements, and capital expansion.

<u>Battle of the Statistics and Statisticians.</u> As part of its presentation on the gender and age impact of the retrenchment selections, Susan Feiner, professor of Economics and a member of the Women and Gender Studies Program, and the president of the USM chapter of AFUM, testified. She noted that in the eleven continuing departments where faculty were retrenched, there were four in which 100% of the females were retrenched. [redacted].

Feiner asserted that her research showed that if a university wants more women to enter these fields, there have to be female faculty role models, which is why the National Science Foundation has invested millions of dollars to promote the inclusion of women into the STEM areas. [redacted] are female, [redacted] Examining the eleven faculty retrenched due to program elimination, Feiner testified that seven were older than 58, the median age for the entire USM faculty, and the salary of eight had been above the overall faculty median of $79,400.

To refute Clough's analysis of no statistically significant adverse impact, AFUM presented Professor Jonathon Goldstein, of the Economics Department at Bowdoin College. Goldstein has written and spoken about disparate impact analysis and has been involved in eight to ten legal cases. He said Clough should have used a one-tailed test, not a two-tailed test, since there was no probability of fewer women being laid off than men. He disputed the correctness of using the Fisher Exact Test, which he termed a test of association or correlation, which fails to control for confounding factors, and assumes that the selection of the people to be retrenched was random. In reality, the selection was not random, but was done by seniority, which Goldstein argued needed to be controlled for. He also asserted the LAC should have been treated as a single unit, rather than the

Arts & Humanities group being viewed separately, and that factor also needed to be controlled for.

The most significant step Goldstein undertook was to control for what he termed the seniority deficit, which he calculated to be 5.67 years of service. Using a regression analysis after controlling for the seniority deficit, he found that the odds of laying off the number of women who were retrenched for reasons other than gender was less than 5%, and hence, there was a disparate impact. In summary, he concluded that the use of the simple seniority rules in Article 17 led to a disproportionate number of women being retrenched because of their seniority deficit. His analysis regarding the LAC treated all faculty there as equally eligible for retrenchment, without looking at their subject areas.

USM countered Feiner and AFUM's expert with Frederick Holt, a consulting economist with a Ph.D. in econometrics and labor economics who has performed between fifty and 100 disparate impact analyses, almost exclusively for employers. He stated that while seniority was a criterion for selection, he disputed Goldstein's conclusion that it had a disparate impact. Holt looked at the faculty eligible for retrenchment, which he defined as those in departments being reduced or eliminated, including the particular affected department at the LAC, as opposed to the entire faculty there. He did not include the faculty who agreed to accept the early retirement offer, or who were already on a retirement plan.

Holt used a two-tailed test, which he asserted was the standard procedure, although he said he could have accepted Goldstein's one-tailed test if Goldstein had used the 2.5% significance threshold on the single tail, instead of 5%. On the pool of sixty-six eligibles, twenty-four of whom were female and forty-two were male, he performed three

Fisher Exact tests. Looking first at the pool as a whole, he concluded that the expectation would have been that 9.45 females would have been retrenched, twelve actually were, yielding a standard deviation of 1.07, which is below the 2.0 deviation that would indicate statistical significance. The second Fisher test was done to replicate Clough's work by examining the retrenchments on a department-by-department basis. While the work showed no statistically significant impact regarding gender, Holt agreed with Goldstein that the sample sizes in individual departments were too small to draw meaningful conclusions. Holt's third Fisher Exact test separated out the LAC faculty eligible for retrenchment from the rest of the university, and he found no statistically significant impact by gender in either the LAC or non-LAC faculty. Lastly, he conducted a regression analysis, agreeing with Goldstein that this is a reasonable tool given the problems with the Fisher Exact test with the small samples when looking at each department. Holt's regression analysis found no statistical significance to being female or in the LAC, but did find that one's seniority was a significant factor in determining likelihood of being retrenched. Regarding age, he determined that the average age of the retrenched faculty was 55.8, the average age of the people eligible for retrenchment was 57, and the average age of the faculty on campus as a whole was 58, so he concluded age was not a factor in the retrenchments.

Overall, Holt opined that Clough's initial analysis based on the departmental two-tailed Fisher Exact test, and then the pooled approach, was appropriate. He said her data set was largely accurate, although he felt she should not have included people who were in the retirement program, and her finding of no disparate impact was correct. In contrast, he said Goldstein's treatment of seniority as a significant factor, as opposed to a reality of the labor force, was a creative, but not an accepted, approach.

Holt criticized Feiner's presentation as an arithmetic, not a statistical, analysis. He noted that she offered conclusions regarding gender based only on retrenchments associated with departments that were reduced but not eliminated, while her age comments were based only on departments that had been eliminated. He termed this approach arbitrary, cherry-picking, and inconclusive. Holt further noted that since Goldstein's calculations regarding gender were based on the total faculty and retrenchments only in departments that were reduced, and not also on the faculty and retrenchments in departments that were eliminated, none of Goldstein's conclusions are reliable.

Affirmative Action Plan. As mentioned earlier, the most recent Affirmative Action Plan adopted by USM was from 2003. The Policy Statement in that plan reads in relevant part:

> . . . in order to address the effects of past discrimination and to meet its affirmative action obligations under federal and state law, USM will take affirmative action to recruit and hire women and minorities in selected areas in accordance with the goals outlined in this Plan. . . .
>
> . . . Personnel actions such as . . . layoff . . . will be administered without regard to race, color, religion, sex, sexual orientation, national origin, or citizenship status, age, physical or mental disability, or veterans status. . .
> . . .
> This Affirmative Action Plan outlines goals and methods for attainment for the University of Southern Maine. . .

In the section entitled "Availability and Utilization Analysis with Goals Identification of Problem Areas" the Plan provided:

> An examination of the data on utilization and availability of women and minorities suggests that the following job categories at the University of Southern Maine are problem areas.
>
> Women: Underutilization, sometimes significant (Significant is defined as an underutilization of 8% or greater), of women in some job categories but not in all job groups, specifically:
>
> . . .
>
> b. significant underutilization of women in some faculty job categories; specifically Natural Science, Business, Arts, Applied Sciences and some Social Sciences
>
> . . .
>
> Minorities: Underutilization, sometimes significant, of minorities in some categories and most job groups, specifically,
>
> . . .
>
> g. underutilization of minorities in the faculty areas of Business, Applied Sciences, Law, Public Policy Management, Social Sciences, Natural Sciences, Arts, Humanities

The Action Plan detailed in the document focused on expanding the applicant pools for future openings so that they reflect the availability of women and minorities. Related to this goal, specific requirements for conducting searches were set forth. No numerical targets for any departments were established, nor was the topic of retrenchment addressed. In a section entitled "Compliance with Sex Discrimination Guidelines" it was stated that "[n]ondiscrimination on the basis of sex is observed in the following areas: . . . 3. Seniority USM: Where they exist, seniority lines and lists are developed without reference to sex."

Finally, the Plan had a section entitled "Goal Accomplishment," which stated in part:

> Since 1995, USM has made significant progress in hiring women and minorities. In the 1995 Affirmative Action

> Plan, USM identified several areas in which there was an underutilization of women and minorities. For example, it was identified that the Social Sciences faculty had an underutilization of eight (8) women and one (1) minority and that the Natural Sciences faculty had an underutilization of five (5) women. Since 1995, the Social Sciences faculty has hired sixteen (16) women and eight (8) minorities, and the Natural Sciences has hired eleven (11) women. . .
>
> . . .
>
> The above increase has occurred as a result of the following initiatives and strategies which are specifically implemented to recruit and retain women and minorities:

There followed an enumeration of outreach efforts, targeted dissemination of job openings, coordination of the administrators responsible for diversity and equity with search committees, the implementation of a diversity plan on campus, and an "opportunity hire" policy – meaning the waiver of the requirement of a broad search – that facilitated the employment of specific people who can make a unique contribution to the university.

OPINION

Unfortunate Realities. It is indisputable that by the fall semester of 2014, the enrollment at USM had dropped by approximately 13% from the fall of 2010. The decline in out-of-state students was in excess of 15%. The percentage drops were even greater if one looked at credit hours. In absolute numbers, the headcount of undergraduate and graduate students was down by over 1200 students. The demographic projections of the relevant age groups in Maine, from which the vast majority of students were drawn, showed a shrinking population for at least five more years. The Board of Trustees, mindful of the stressed economic status of Maine families, had frozen the tuition and mandatory fee levels for three years. Grants to support academic research programs, from which the University received indirect payments, were shrinking and becoming harder to attain. The inevitable result of these factors was that USM was facing an unmistakable revenue shortfall. The continuing decline in enrollment also meant that there was an excess teaching capacity. As the numbers of students shrank but the numbers of faculty remained unchanged, class sizes got progressively smaller.

The financial pressures faced by USM were not the result of a specific building project that had run wildly over budget. They did not result from a sudden and temporary explosion of energy costs. There was no one-time, non-recurring disequilibrium that would resolve itself in a year or two. The budgetary deficit USM faced was structural, meaning that its existing and anticipated revenue structure was not sufficient to meet its on-going expenses. Nor was this situation a surprise development that caught USM and the System unaware. The problems had been building since at least 2008 and a succession of USM provosts and presidents had been forewarning that responsive measures, mostly program consolidations and eliminations, were inevitable if USM were going to be sustainable.

Over a number of years, the USM administration took a series of steps to reduce costs, including laying off 100 non-faculty employees and deferring necessary maintenance projects, but leaving the faculty largely unaffected. Despite these efforts, the budget for Fiscal 2015 showed a $9.5 million deficit. On the condition that USM find a way to cut $2.5 million from its budget, the System Board agreed to the unprecedented allocation of up to $7 million from its Budget Stabilization Fund, but stressed that this was a one-time measure. USM was told that going forward it would have to take the steps necessary to produce a balanced budget. The Core and Composite Financial Ratios for USM reflected an institution in an extremely vulnerable position.

The evidence established that USM's Fiscal 2016 budget, assuming no changes, would have had a $16 million deficit. AFUM questioned a few included items, like $1.1 million of increased student aid, but it was persuasively explained that such monies were needed to stem an even greater decline in enrollment, and hence tuition income. One might quibble at the margin, but the projected deficit was real. Hence, there can be no question that the administration of USM had to either find sufficient additional revenue or cut expenses. AFUM never put forth any realistic cost-cutting plan that did not involve faculty retrenchments. The essence of AFUM's case was that there would be sufficient tuition revenues, supplemented by more money from the System, to avoid faculty retrenchments.

Bona Fide Financial Reasons: Applicable Principle Before delving into the details of the financial information, it is important to focus on the test established by the collective bargaining agreement for determining the legitimacy of faculty retrenchments. AFUM argued that faculty at USM could not be retrenched unless the entire System is in a state of financial exigency. This represents a misreading of Article 17. The contract sets forth a far less stringent test; namely, that tenured and tenure-eligible faculty and those on continuing contracts may be retrenched "for bona fide financial or program reasons." The notion that the System may not require one of its units to stem the hemorrhaging of money, and to adjust the size of its faculty to meet the current and foreseeable enrollment levels, until the entire System is close to bankruptcy, defies common sense. Such an interpretation of the phrase "bona fide financial reasons" will not be imposed on the contract language without very clear evidence of bargaining history evidencing the parties' mutual intent. No such evidence was introduced.

What this means is that the primary focus of whether the financial reasons advanced in support of the retrenchments were "'authentic, genuine, real, true, or actual,' seemingly as opposed to 'arbitrary, capricious, or discriminatory,'" - to quote Arbitrator Sarah Garraty in the Anderson arbitration between these parties – is on the conditions that existed at USM. AFUM is correct that USM is part of the entire System, and the System as a whole receives the State appropriation. The System has discretion in how it allocates and dispenses funds. It is therefore appropriate to also examine whether System actions or inactions contributed materially to the financial condition of USM, and whether the System Board acted unreasonably in requiring USM to produce a balanced budget, instead of simply infusing sufficient funds to allow the previous level of faculty to continue to be employed.

:**<u>Additional Revenue</u>** Turning first to the issue of additional revenue, AFUM argued that projections show that by 2018, the population in the 15 to 19 year old grouping will begin to increase, and the rate of decrease in the 20 to 24 year old grouping will be much slower than experienced between 2013 and 2018. Referencing the rates of high school graduation and percentage of students enrolled in college, Dubeck opined that the enrollment decline would likely be over by 2018. Even assuming Dubeck's opinion were correct, this meant that in the fall of 2014, when preparing a budget, USM had to assume that the University would continue to experience significant enrollment shrinkage for the next four years. In any event, even by 2023, the 15 to 19 cohort was not expected to reach the level that existed in 2013, meaning enrollment is unlikely to get back to the 2014 level that could not support then current faculty. Additionally, USM experienced a major retention problem, with 40% of the entering class not returning for the subsequent years.[2]

The claimed panacea of out-of-state students filling the seats and paying tuition at three times the in-state rate is a chimera. While out-of-state enrollments increased at a number of the other campuses in the System, at USM this enrollment level fell by 15.6% between the fall of 2010 and fall of 2014, a decline that actually exceeded the 12.7% drop in in-state students. The rate of decline of out-of-state students actually doubled between the 2012-2013 and 2013-2014 academic years. Further, as testified to by Campbell, to attract out-of-state students USM has to substantially discount the nominal tuition through increased student aid, meaning the net revenue gain from such students is far less than might appear. Finally, USM is in an area where the competition for students is intense. All state schools are vying for out-of-state students and history has shown that USM had not fared well in that competition. All this data supported the conclusion that the tuition revenue shortfall at USM was a long term problem that was only likely to get worse.

Dubeck also opined that State appropriations to the System were likely to increase in Fiscal 2016 and thereafter. The most cogent piece of evidence to support that conclusion was the Governor's proposed budget for the 2016/2017 biennium, which

[2] Although this information was obviously not available at the time the budgetary and retrenchment decisions were made, it is instructive that the commitments to attend USM in the Fall 2015 were 15% below the commitment level the prior year.

showed an increase of 3.64%, or approximately $7 million a year. The problem with relying on this figure is that the budget proposal was not issued until January 9, 2015, well after USM developed its Fiscal 2016 budget and implemented the retrenchments. At the time the decisions were made, the relevant information available to USM was that the noncapital State appropriation for the System had not yet recovered to the level of Fiscal 2008. The System capital State appropriation in Fiscal 2014 was $1.9 million, a fraction of the $20.7 million received in Fiscal 04. The USM administrators had met with the legislators from the Portland area and had been told not to expect an increase in State monies. It was therefore reasonable to assume that there would be no major influx of State funds that might obviate the financial need to reduce the remaining major driver of costs, faculty salaries and benefits.

:Financial Condition of the System. The central thesis of AFUM's case was that even if USM were under financial stress, the System as a whole was in fine health. A careful examination of all the data belies that conclusion. While Dubeck belittled the significance of the Core and Composite Ratios, institutions of higher education and bond rating agencies regularly rely on these indices of financial performance. These ratios showed that in Fiscal 2014, the System was stable, but hardly robust. They indicated that the System as a whole was barely living within available resources, the net operating revenue ratio being just above 0%, well below the low benchmark of 2%. The measurement of whether the System was better or worse off than the previous years showed the System had dropped from a high of 9.04% in Fiscal 2011, well above the 6% benchmark, to a low of .16% in Fiscal 2014. The Composite Financial Index indicated the System was slightly below the low benchmark.

AFUM argued that these Ratios were misleading because they did not include the assets of the University of Maine Foundation, which as a component unit of sufficient size must be included in the Audited Financial Statements of the System. This argument ignores the reality that the vast proportion of the assets of the Foundation are expressly restricted for particular uses. Some percentage of the unrestricted portion can be expended, but only for things in Orono, and only as dictated by the board of the Foundation, not the Board of Trustees of the System. None of the University of Maine Foundation resources are available to pay the faculty salaries at USM. Nor are these fungible dollars that could be used by the System to pay ordinary operating expenses at Orono or elsewhere, freeing up other dollars that could be redirected to USM. Further, even if one included the Foundation in the Ratios, the net operating revenue ratio increased only to .82%, still well below the low benchmark of 2%; the measurement of relative financial status had fallen from 10.06% to 2.09%; and the Composite Financial Index increased 3.8%, only slightly above the low benchmark.

Another AFUM assertion was that the full amounts shown as depreciation were not spent, so there must be excess dollars available to spend on faculty. In recent years it has been Board policy that the full amount shown as depreciation should be budgeted and spent for repairs and preventative maintenance. In reality, USM and other schools have not had available cash to fully fund the depreciation in the budgets, and adjustments are made in the financial statements to reflect this fact. The result has been that deferred maintenance totals have continued to grow and the physical plant of the System has deteriorated. It does not mean that there is a pot of money that was allocated to maintenance projects but was not spent.

AFUM pointed out that the Total Net Position of the System shown on its annual financial statements has increased substantially since 2001. The Total Net Position went from $451.8 million to $877.3 million in Fiscal 2014; of the total, the Unrestricted Net Position grew from $40.5 million to $179.2 million, increasing every year. The Total Net Position includes capital appropriations and grants and income that is restricted, which is not available for operating expenses. More importantly, the unrestricted portion actually decreased between Fiscal 2013 and 2014. A more accurate picture of the state of the System's finances on an on-going basis was reflected by the data concerning the operating revenues and expenses. Total operating revenues declined every year from a high of $483.9 million in Fiscal 2011 to $453.2 million in Fiscal 2014. During that same period, total operating expenses climbed from $666.8 million to $674.9 million. The operating loss grew from $182.9 million to $221.7 million. Particularly in light of the static State appropriations over this period, it was abundantly clear that the System could not continue to operate without bringing the current budgets of its universities into balance.

The current and prospective disequilibrium was of far greater relevance than the fact that previous long term projections made by the System had proven to be overly conservative. Further, those projections were made on a *ceteris paribus* basis, assuming all other things remained as they were. The System had in fact been able to utilize those projections to take prophylactic steps, such as negotiating a multi-year collective bargaining agreement with AFUM that provided for no across-the-board raises, implementing early retirement incentives, and effecting numerous other economies. The combination of the dire demographic trends, and at best a very slowly recovering state economy, reasonably dictated that the System exercise fiscal prudence.

AFUM maintained that the System in fact allocated significant monies to USM for other purposes that could have been used to close the budget deficit and avoid retrenchments. The capacity of the System to pump money into USM must be viewed in context. For Fiscal 2015, the System drew upon its $15 million Budget Stabilization Fund for the first time. USM was allocated $7 million, a greatly disproportionate share. More than half of the enrollment lost in the System since Fiscal 2010 had occurred at USM, despite the fact that less than 30% of the total System enrollment was at USM. Although Fort Kent and Machias actually experienced a greater percentage decline in enrollment, their substantially smaller size meant the absolute dollar loss was far less. In any event, the System had to make allocations from the Stabilization Fund to those schools and to Orono, leaving a balance in the fund of just $5 million. Given investment returns far lower than long term actuarial projections it was unlikely the fund would be replenished quickly. It was apparent, therefore, that the System was reasonable in insisting on compliance with the understanding it imposed on USM in Fiscal 2015 – the $7 million transfer was to be a one-time event and USM would have to bring its budget into balance in succeeding years.

That the System agreed to shoulder the costs of the eighteen month retrenchment benefits and the early retirement incentive does not mean it should have put those funds into the Fiscal 2016 budget to avoid retrenchments. The retrenchment and retirement payouts were short term costs that would lead to long term savings. If the funds were spent to fund the salaries of the faculty who were instead retrenched, the funds would have been dispersed and the causes of the structural deficit would have remained. The System in actuality bestowed on USM and its faculty a major benefit. Had the System insisted that USM absorb the cost of the retrenchment pay and early retirement incentives in its own budget, USM would have had to cut many more faculty positions. A similar analysis applies to the $3 million the System lent to USM to pay for boiler replacements, and the allocations that were made for student recruitment and retention efforts.

The overall conclusion is that USM and the System had a good faith financial justification for the retrenchments that were announced in October, 2014. USM's budget had a structural deficit that was not going to be resolved without action short of aligning the size of the faculty with the ever-declining enrollment. The Board of Trustees of the System had an obligation to protect the viability of the entire network of institutions, not to maintain the existing employment levels at USM at all costs. In any event, while the System as a whole had attained some measure of financial stability, it was certainly not flush with resources that would have allowed it to subsidize USM for the foreseeable future.

Given the scope of the financial shortfall, the number of positions potentially affected, the need to plan and give notice of retrenchments well in advance, and the inherent imprecision of projections, one cannot expect absolute accuracy regarding dollars needed and saved, or the short term alignment of permanent faculty and class coverage. Even allowing for some good faith margin of error, however, USM is not entitled to simply lay off tenured and tenure-eligible faculty to reduce the cost of providing the necessary level of service. It is not appropriate to retrench permanent faculty and then employ them to cover their normal course load, but at less than regular contractual rates. It is also not appropriate to retrench faculty and then cover their normal course load with newly hired adjunct faculty. The retrenchment process cannot be used to undermine the negotiated contractual compensation requirements. This topic will be dealt with in greater detail subsequently, since it introduces an unfortunate level of complication to assessing the propriety of an individual retrenchment.

Good Faith Programmatic Decisions. Under Article 17.A, a university within the System can legitimately retrench faculty in a program if that program has temporarily or permanently been suspended or eliminated, separate and apart from being able to retrench program faculty due to bona fide financial reasons. A traditional right of management is to determine the services to be performed and the products to be produced – in the case of a university the programs to be offered. The collective bargaining agreement does not dictate which programs will continue to exist for the life of the contract. Rather, the only role of the Association and protection for existing programs is set forth in Article 32. That provision insures that AFUM will receive notification when the Program Elimination Procedure is initiated by a university administration, and shall be provided the "opportunity to meet and discuss." The right to eliminate programs is vested in the System Board of Trustees, and the multiple steps set forth in Section 305.5 of the Administrative Procedures Manual are designed to insure that the decision will be rational and, on balance, are in the best long term interests of the various stakeholders and the System as an entirety. The contractual requirement that retrenchment must result from a bona fide program reason insures only that the decision to eliminate a program must be made for reasons that are not arbitrary, capricious, or discriminatory, or otherwise in bad faith.

AFUM is correct that the Board seemingly failed to follow the dictates of Section 305.5.6 when it voted at meetings other than those held in January or July to retrench programs at USM. While Article 3 of the collective bargaining agreement grants to the Board the right to alter or waive existing bylaws or policies, there was no evidence that the Board voted to do so. Arguably, by going through the prescribed steps, holding public hearings, and formally voting on the USM program elimination proposals, the Board implicitly waived the July/January guideline. Regardless, however, the fact that the Board voted to eliminate programs at a meeting in September did not give rise to a contract violation under the collective bargaining agreement. The parties did negotiate one explicit time frame into the collective bargaining agreement in Article 17.C regarding retrenchments. That sole time limit is that faculty members must be notified no later than October 31 if a retrenchment notice is given in the fall semester, and USM met this contractual requirement in 2014.

That the Board's failure to vote on program eliminations only in July or January does not constitute an actionable violation of the collective bargaining agreement is supported by the actions, or inaction, of AFUM officers earlier. Multiple times since 2008, the Board voted to eliminate programs at meetings other than those held in July and January. Those eliminations affected multiple campuses, yet at no time was there a protest that such votes violated the collective bargaining agreement and were therefore invalid. In May 2014, the Board voted to eliminate five programs at USM, and the leadership of the USM chapter of AFUM did not raised any objection. One can appreciate that because no faculty member was actually impacted by the elimination of vacant programs, and the faculty bodies had supported the eliminations, there was no need to point out the deviation from Section 305.5.6. At the very least, however, AFUM's long silence regarding the need for technical compliance with this procedure represented a waiver. Having now served notice that it would contest non-compliance, the System can no longer rely on AFUM's willingness to overlook the failure to observe the procedural time line. In the future, the Board must vote on program eliminations in July or January, or explicitly waive the requirement.

In looking at the substance of USM's decision to eliminate the five chosen programs, it must be noted that their selection was hardly a precipitous decision. A succession of provosts had undertaken systematic analyses of all the academic programs and almost all of the five programs had been identified as possible targets for elimination or absorption into other programs. The programs all had very low enrollments and were relatively costly to maintain, in comparison with other programs. There may well have been good countervailing arguments, and even disagreements about the cost accounting with one of the programs. Ultimately, however, the decisions on which programs to maintain and which to eliminate were made in good faith. The USM administration, the chief academic officers, the assistant chancellor and chancellor, the subcommittee of the Board, and the full Board, were faced with the need to trim costs in the face of a structural budget deficit and they made the rational decision to do so in part through the device of paring less populated programs. There was no evidence of personal animus, retaliation, discrimination, or other bad faith motivations, so the program eliminations and resulting retrenchments must be sustained.

Affirmative Action Caveat. This case presents an interesting twist on the challenge to the selection of individuals in a reduction in force. Historically, unions fought to have layoffs conduct pursuant to strict seniority. It was felt that besides being equitable and predictable, a seniority-based layoff criterion precluded selections motivated by race, gender, or age discrimination, nepotism, or personal favoritism. Employers often argue that they want the right to lay off employees according to subjective judgments such as alleged performance differences or value to the enterprise. Here the administration looked to strict seniority and it is the union that is arguing that other considerations should have been applied in choosing which of the faculty would lose their job.

In Article 17.B.1 the parties specified seven seniority groupings that would govern retrenchments, showing the high importance the parties attached to length of service. In Subsection 4 they stated that if rankings according to Subsections 1, 2, and 3 are equal, members whose qualifications are "most essential to the mission and purpose of the retrenched unit" will be retained. Following that the parties inserted Subsection 5, stating that Subsections 1 through 4 "shall be applied in such a way as to minimize any adverse effect on affirmative action employment programs." USM has argued that the only way to interpret Subsection 5 is that where faculty are otherwise equal, the administration would look to further affirmative action programs when selecting the person to be retrenched. The problem with this argument is that the parties used the "if equally qualified" filter explicitly in Subsection 4. The absence of that filter in the immediately succeeding section must be interpreted as significant; if they had meant the two sections to be applied in the same fashion, they would have used the same language. Hence, it is necessary to assume the parties had some other intent.

The difficulty is that there was no bargaining history introduced to give insight into the parties' mutual intent when they adopted this language. Further, in forty years of arbitrating and interpreting contracts, this arbitrator has never encountered any similar language. One suspects that it was largely viewed as aspirational, and that it was adopted at a time when neither party expected there would be large scale retrenchments. Either no thought was given to how it would actually be implemented, or the parties could not agree on how the noble sentiments could be effectuated and hoped this juncture would never be reached.

Despite the lack of guidance, one cannot simply ignore the provision. It will therefore be assumed the parties at a minimum intended that the section be applied according to its literal terms. The starting point is to determine if there is some applicable "affirmative action employment program" that dictates the profile of the faculty to be employed. The only affirmative action document put into evidence was the plan adopted in 2003. While that plan references underutilization of women in disciplines such as Natural Science, Applied Science, and Social Science, the plan establishes no numerical targets or minima. The focus of the plan is on the recruitment of a more diverse faculty through expanded and targeted searches, not affirmative steps to be taken to protect the gains made in hiring women and other minorities in the event of retrenchments. Its only reference to seniority is that seniority lists are to be developed without reference to sex. Rather than support the notion that the seniority tiers established under the collective bargaining agreement are to be superseded by gender-based lists, the plan endorses gender-neutral seniority lists. It states that layoffs will be administered without regard to sex. As cogent as are Dr. Feiner's arguments about the benefits of having women faculty in the sciences and social sciences, and as much as this arbitrator would have liked to have found a vehicle to protect the only females in multiple departments, the 2003 Affirmative Action Plan and Article 17.B.5 do not provide that mechanism.

The Disparate Impact Analysis. Article 27 bars discrimination on the basis of sex or age, among other protected categories. One form of discrimination is disparate impact of a facially neutral policy. There is no purpose in elongating an already voluminous arbitration decision with a discussion of the battle of the statisticians. Suffice to say that Goldstein's novel approach of controlling for the determinative "seniority deficit" of women, and then only looking at the faculty who were retrenched from departments or programs that were not eliminated, does not disprove Holt's analysis that there was no disparate impact either as to gender or age. Nor did Feiner's arithmetic analysis of the results of the application of the seniority system on gender in remaining departments, or age in the eliminated programs.

In reality, that the System had Clough conduct a disparate impact analysis regarding the age and gender of the faculty who were retrenched in October, 2014 represented an excess of caution. Section 703(h) of Title VII precludes a finding of disparate impact discrimination in the case of a layoff where the selection of employees to be let go is driven by the application of a bona fide seniority system, absent a finding of an intention to discriminate. It was stipulated by AFUM at the arbitration that it was not claiming intentional discrimination. Certainly the creation of the seniority-based retrenchment process was not a form of intentional discrimination on the part of the System. Rather, it was the result of good faith negotiations between the System and

AFUM. The jointly adopted system was designed to achieve the benefits of equity, transparency, and predictability. It was not designed to disadvantage any protected class members. If more time had passed before retrenchments became necessary due to enrollment declines, and the affirmative recruitment and retention efforts discussed in the 2003 plan had been able to achieve even greater gains beyond those documented in the plan, the seniority system would likely produce completely gender-neutral results. That the System applied this bona fide seniority system when it came time to retrench faculty cannot be viewed as a form of intentional discrimination. Hence, there can be no finding of disparate impact discrimination.

Efforts at Finding Alternate Employment. Prior to the retrenchment notices being issued to the affected faculty, Schmelz sent instructions to the employee relations liaisons and chief academic officers at all the System universities regarding their obligations to retrenched faculty in relation to future job postings. After October 31, the retrenched faculty were sent weekly email notifications of the link to the on-line listings of employment opportunities throughout the System.

At the arbitration Schmelz was asked if he could have met individually with each retrenched faculty member, or reminded each person to be sure to update their c.v. He acknowledged that he could have, but did not. Article 17.E requires only that the University make "a reasonable effort to locate appropriate alternate or equivalent employment within the University." It does not require that every conceivable effort be undertaken, regardless how unlikely to enhance the possibility of re-employment within the System. Faculty do not have to be reminded to update their c.v., particularly when they know they will soon be out of a job. Meeting with each person individually to essentially repeat what was stated in the System-wide communications would have been a waste of time for the faculty and Schmelz. More significantly, no grievant identified any position that they might have qualified for and been interested in, but were not given appropriate consideration due to a deficiency of effort on the part of USM or System administrators. [redacted]. There is therefore no basis for finding the System, through its various administrators, failed to satisfy its obligations under Article 17.E.

Return From Sabbatical Irrelevant. AFUM argued that the fact that a faculty member returned to campus in the fall of 2014 after a sabbatical precluded the administration from retrenching that person. The theory was that a condition of getting a sabbatical is that a faculty member must return for at least one academic or fiscal year. That a returning faculty member is obligated to return for a year does not give that person a year's worth of protection from retrenchment not available to faculty who did not enjoy the benefit of a leave with pay. It does not mean the University is required to exercise its entitlement to have that person be employed. This is analogous to being out on any of the statutory leaves, such as Family Medical Leave. If a layoff occurs while a person is on such leave, and that person would otherwise have been laid off, the normal right to return to the same or similar job is superseded.

Exception to the General Finding on Selection of Individuals. A review of the testimony of the individual grievants indicates that in one case a retrenchment did not represent the implementation of a management decision to effectively reduce the level of service being offered. As previously explained, it is an inherent management prerogative to decide on how much of a product – in this case education – will be generated. Adjusting staffing to reflect that decision is also an inherent management right. What the System cannot do, however, is maintain the same level of service but get a faculty member to provide it at lesser pay and benefit levels

[redacted] Rather than being retained in [redacted] faculty position, [redacted] was paid at either the faculty overload or adjunct rate for each course. Given the fact that [redacted] was also receiving retrenchment pay, [redacted] did not suffer an actual absolute loss of earnings. [redacted] should not have been retrenched, however, and should have continued as a full-time faculty member for as long as [redacted] was teaching a full load, a fact that was not in the record. That [redacted] may not have been required to perform the research and service work normally expected of full-time faculty was a result of the University's failure to recognize [redacted] proper status, not any unwillingness on the part of [redacted]. At the point [redacted] course load was or is subsequently reduced, [redacted] eighteen months of retrenchment pay should run from that point, less the amounts [redacted] has been paid for teaching the courses. The calculation of an exact remedy is returned to the parties, since it is based on facts that are not available to the arbitrator.

AWARD

With one exception, the University did not violate the collective bargaining agreement by

1. its decision to retrench faculty members in the fall of 2014;

2. and/or, the selection of particular faculty members to be retrenched;

3. and/or, the manner in which it implemented the retrenchments.

The retrenchment of [redacted] did violate the collective bargaining agreement. As discussed in the Opinion section, [redacted] shall be made whole for any lost wages and benefits. The calculation of [redacted] remedy is returned to the parties, with jurisdiction being retained by the arbitrator if they cannot reach agreement.

Mark L. Irvings

Arbitrator

January 30, 2016