Bill Feuerborn, Chair
Kansas Board of Regents
1000 SW Jackson Street
Suite 520
Topeka, Kansas 66612-1368

1 February 2021

Re: Mitigating damage induced by KBOR policy to University of Kansas, its students and alumni

Dear Regent Feuerborn:

We were extremely concerned to read that you and the Board recently approved a policy, which would damage KBOR institutions by allowing administrations to indiscriminately terminate employees without cause. All of the Regents institutions, save KU have opted not to implement the policy. While we are sure that you and the Board have the best of intentions, the students and alumni of KU will be particularly harmed if this policy is not rescinded.

We understand that you have been convinced that the severe financial difficulties being experienced at KU are due to COVID-19, and only cutting faculty slots can fix the problem. You should know that nothing could be further from the truth. The major financial problems at KU are all induced by past and current administrations that have wasted, and continue to waste, many tens (and over time, hundreds) of millions of dollars on debt service for KU's unchecked overbuilding spree, lavish expenditures on "consultants" like Huron and Shorelight, a General Counsel's office which is larger than all other Regents institutions combined, wasteful and consistent junkets via luxury travel and an administration budget that is far larger than it was a decade ago in spite of flat enrollment. From 2009 to today, the number of administrators that are paid on average $200,000/yr rose from 114 to 141. If the public knew this, they would have a fit. In the same time, the average KU faculty salary went from just below average to dead last for public AAU institutions. In 2019 KU faculty were so poorly compensated that their salary was just 74% of AAU peers outside of California. In 2009 KU faculty were paid 47¢ for every tuition dollar collected. Now it's down to 25¢. Students today pay much much more and get a lot less.

While some may have you believe that the Administration's wasteful ways can be compensated by indiscriminately slashing faculty lines, doing this will damage the rankings, accreditation, enrollment and tuition revenues far more. KU faculty pay dove from 2009 from roughly 16% of the institution's total operating budget to just over 8% today. So there's not much to save there; however, a great deal of harm can be induced by cutting. Such an action could tip KU into a precipitous unstable downward spiral potentially inducing ejection from the AAU. It is also likely to cause several of KU's schools to lose accreditation and will cement KU's reputation as a national example of a formerly first-class RO1 that was diminished by poor stewardship.

You will find attached an Advisory Letter from the AAUP National Office. This is the first action in what could very well lead to the KU Administration being placed on the AAUP Censured Administrations list. Given that dynamic, it is also quite likely that KU's schools of Medicine and Law will be unable to pass their accreditation visits which are occurring this year and next. Should KU be kicked out of the AAU, its administration censured, or its schools of Medicine and Law face accreditation challenges, the damage to the students, alumni and people of the state of Kansas would far eclipse any sum that would be saved by keeping this policy in place. Accordingly, we respectfully ask you to withdraw this policy immediately and encourage you to contact knowledgeable AAUP faculty members who are on the KU campus to tell you the unvarnished truth of campus dynamics and the administration's deeply entrenched culture of overspending, lack of transparency and waste. Till then...

Best Regards,

Janett M. Naylor-Tincknell

Professor Janett Naylor-Tincknell
President, Kansas Conference of the American Association of University Professors

cc: KBOR, L. Kelly, D. Girod, B. Bichelmeyer, Lawmakers

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January 29, 2021

VIA ELECTRONIC MAIL

Professor Janett Naylor-Tincknell
Acting President
Kansas Conference of the AAUP
Fort Hays State University
600 Park Street
Hays, Kansas 67601–4099

Dear Professor Naylor-Tincknell:

You and the other officers of the Kansas Conference of the AAUP have asked staff in the national office of the American Association of University Professors to comment on a recently adopted Kansas State Board of Regents "COVID exception" policy. This policy allows the administrations of the six state universities—Emporia State University, Fort Hays State University, Kansas State University, Pittsburg State University, University of Kansas, and Wichita State University—to develop a "framework" that would permit an administration to suspend, dismiss, or terminate from employment any employee, "including a tenured faculty member," outside of existing board and university procedures. The board cites as its rationale the "extreme financial pressures on state universities due to the COVID-19 pandemic, decreased program and university enrollment, and state fiscal issues."

The COVID exception policy states that a "[d]eclaration of financial exigency and the processes associated with declaration of financial exigency shall not be a prerequisite to any suspension, dismissal, or termination authorized by this provision, and no existing university policy hearing procedures shall apply to such decisions." You report that the board of regents enacted this policy on January 21, 2021, and gave each administration forty-five days to present a termination framework for board approval. Once approved, a framework may remain in effect until December 31, 2022. You also report that the board of regents' policy was designed and adopted without any consultation with the faculties of the six universities.

While encouraged by news that five of the six state institutions do not plan to institute the regents' policy, we are dismayed to hear that the administration of the University of Kansas does plan to do so. If the KU administration institutes the policy, it will eviscerate tenure at the institution and, along with it, the academic freedom and shared governance tenure is meant to protect.

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*, jointly formulated by the AAUP and the Association of American Colleges and Universities and endorsed by 254 scholarly societies and other higher-education groups. 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.[1]

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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 our Association's standards for terminating faculty appointments for financial reasons. In what follows, I will discuss six key provisions of Regulation 4c in connection with the Kanas State Board of Regents' COVID exception policy.

**1. Bona Fide Financial Exigency**

According to Regulation 4c(1), a bona fide financial exigency of the sort that would justify termination of tenured faculty appointments, or full-time non-tenured appointments prior to their expiration, must be "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 such terminations.[2] Regulation 4c(1) also presents a (non-exhaustive) list of less drastic alternatives to terminations that should be considered, including "expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred compensation plans, early-retirement packages, deferral of nonessential capital expenditures, and cuts to noneducational programs and services, including expenses for administration."

As noted above, the purpose of the COVID exception policy is to permit terminations of appointment without declaring financial exigency. The current definition of financial exigency in chapter II.C.5 ("Financial Exigency") of the *Kansas Board of Regents Policy*

[1] It is therefore not surprising that institution of tenure is widespread among the most reputable American universities: the Integrated Postsecondary Education Data System (IPEDS) of the United States Department of Education reports that ninety-eight percent of four-year research/doctoral institutions have a tenure system in place.

[2] This includes not only the termination of faculty appointments with indefinite tenure but also the termination of renewable appointments before the expiration of their term. Termination of an indefinite or term appointment *prior to* its expiration should not be confused with the nonrenewal of a term appointment *upon* expiration, for which different procedural standards apply.

*Manual* is already less stringent than the AAUP standard;[3] the COVID exception policy would allow administrations to circumvent even this weaker definition. The AAUP regards its recommended financial exigency standards as the only legitimate basis for terminating faculty appointments for financial reasons and would therefore consider illegitimate any terminations for financial reasons absent a bona fide condition of financial exigency, as defined in Regulation 4c.

**2. Faculty Involvement**

The procedural standards of Regulation 4c require meaningful 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. Prior to a declaration of financial exigency, "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" (4c[1]).

After financial exigency has been declared, the faculty continues to play a crucial role. 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 . . . . 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."

To ensure that the faculty has the information needed to make these decisions, the administration will provide 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" (4c[2]). Prior to making 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" (4c[2]). Under Regulation 4c(1), 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." These provisions are in keeping with principles of shared governance, which assign the faculty "primary responsibility" for decisions concerning educational policy, the curriculum, and faculty status.

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[3] Financial exigency is defined in that policy manual as

> the formal recognition by a state university that known reductions in budget or authorized number of positions have required the elimination of nontenured positions and operating expenditures to such a point that further reductions in these categories would seriously distort the academic programs of the institution; hence, further budget or position reductions would require the nonreappointment of tenured members of the faculty or the failure to meet the standards of notice for nonreappointment of faculty members.

The AAUP would regard as illegitimate an action to terminate appointments for financial reasons that resulted from a process that disregarded these widely observed standards of academic governance.

**3. Right to a Hearing**

Regulation 4c(3) requires that affected faculty members be afforded, prior to termination, "an on-the-record adjudicative hearing" before an elected faculty body similar in basic respects to what the AAUP recommends for dismissal (see Regulation 5, "Dismissal Procedures"). 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."

We note, with alarm, that the regents' COVID exception policy is woefully deficient relative to these standards. It explicitly forbids affected faculty members access to their universities' existing hearing procedures to contest the terminations of their appointments. In fact, it allows no recourse for a faculty member whose appointment is terminated other than the right to file an appeal with the state's Office of Administrative Hearings, whose members are administrative judges, not faculty members. In such an appeal, "the burden of proof . . . will be on the employee," who is nevertheless denied any right of discovery to assist in meeting that burden.[4] Additionally, the only issues that may be contested are whether the termination followed the university's regents-approved framework and whether it involved unlawful bias or discrimination or "was otherwise unreasonable, arbitrary or capricious," a narrow basis indeed. The COVID exception policy thus deprives affected faculty members of crucial academic due-process rights that are the sine qua non of tenure and academic freedom. The AAUP would accordingly regard any terminations effected without these protections as an attack on tenure requiring appropriate action on our part.

**4. 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. This reflects the fact that the AAUP regards tenure as held within an institution rather than

[4] Cf Regulation 5c(10): "The faculty member will be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. The administration will cooperate with the hearing committee in security witnesses and in making available documentary and other evidence."

within a particular academic program, and this standard helps to ensure that terminations are based on a bona fide financial exigency and not on impermissible considerations. Any university framework lacking this provision would be problematic by our standards.

**5. Prioritization of Tenured Positions**

Regulation 4c(7) provides that, under a declaration of financial exigency, a tenured faculty appointment may not be terminated before an untenured appointment "except in extraordinary circumstances where a serious distortion in the academic program would otherwise result." The COVID exception policy does not require that state university frameworks take tenure into account in the order of termination. On the contrary, termination decisions "may be based upon factors such as, but not limited to, performance evaluations, teaching and research productivity, low service productivity, low enrollment, cost of operations, or reduction in revenues for specific departments or schools," several of which are the normal means of determining whether a probationary faculty member has met the criteria for reappointment and tenure. By requiring tenured faculty members to bear the burden of demonstrating that they are qualified to continue in their positions, this provision effectively demotes them to probationary status.

Nor, under Regulation 4c(7), may new hires be made while tenured positions are being terminated, again, "except in extraordinary circumstances where a serious distortion in the academic program would otherwise result." This provision—which is designed in part to ensure that a declaration of financial exigency is bona fide—is not reflected in the regents' policy.

**6. Notice and Severance**

Regulation 4c(2) states that faculty members whose programs are being considered for discontinuance under financial exigency "will promptly be informed of this activity in writing and provided at least thirty days in which to respond to it." No such provision is contained in the board's COVID emergency policy. In addition to raising due process concerns for affected faculty members, this omission would deprive the faculty and administration of information necessary for making sound decisions of educational policy about where terminations should occur.

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 board of regents' COVID exception policy does not guarantee notice or severance rights to faculty members whose appointments are terminated, which leaves open the possibility that their university's framework might deny them these rights.

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The COVID-19 pandemic has had significant repercussions for higher education across the country.[5] However, Association-supported principles and standards have demonstrated their value in helping governing boards, administrations, and faculty to work together not only during good times but also during crises. As the Association noted in its 2006 investigative report on the effects of Hurricane Katrina,

> The relevant AAUP-supported policies—most notably those that recognize the special challenge of "financial exigency"—are sufficiently broad and flexible to accommodate even the inconceivable disaster. These policies have, in fact, been successfully invoked (as documented through AAUP experience) by institutions in situations that, while perhaps not matching the gravity of those in New Orleans in fall 2005, surpassed in severity the [situations] imagined" by the authors of these policies.

As explained above, the Kansas Board of Regents COVID exception policy appears to be fundamentally at odds with Association-supported principles and standards. Under its provisions, an administration could adopt a framework permitting the termination of faculty appointments on a financial basis that fell far short of a bona fide financial exigency, as the AAUP defines it. An administration could also decline to provide the faculty with the opportunity to participate meaningfully in decisions critical to faculty welfare and the institution's academic mission.

Of even more basic concern to our Association is that the board policy, by depriving faculty members of the due-process protections without which tenure, as the AAUP understands it, does not exist, effectively eliminates tenure at any institution that adopts it. While some regard tenure as an exalted faculty status separable from the due-process protections of the kind described here, tenure is inseparable from those due-process protections which in fact define it. An institution that fails to afford those protections cannot protect academic freedom in service of the common good.

Our concerns are not allayed because the board's enactment is—for the moment—temporary. Any terminations that would result under the temporary policy would be permanent. An institution that failed—even intermittently—to provide its faculty the essential procedural tenure protections described above would have a "tenure system" in

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[5] The AAUP is currently conducting an investigation at eight institutions nationwide where apparent violations of AAUP-supported principles and standards occurred in response to the COVID-19 crisis. See https://www.aaup.org/media-release/aaup-launches-covid-19-governance-investigation. At several of the investigated institutions, the governing board suspended the institution's financial exigency regulations in order to allow mass layoffs of faculty members, including those on indefinite tenure.

name only and, in the view of our Association, would not be entitled to represent itself as having one.

We hope that these comments prove useful to you and your colleagues. Please keep us informed of any developments as we continue to monitor the situation.

Sincerely,

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

Enclosures by electronic mail

Cc: Professor Ron Barrett-Gonzalez, Co-Chair, Kansas AAUP Conference Committee A
Professor Rob Catlett, Co-Chair, Kansas AAUP Conference Committee A
Professor Berl R. Oakley, President, University of Kansas AAUP Chapter
Professor Gamal Weheba, President, Wichita State University AAUP Chapter