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 COMMON PLEAS COURT
 JENNIE QUILTER
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IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

UNIVERSITY OF TOLEDO CHAPTER,
 AMERICAN ASSOCIATION OF
 UNIVERSITY PROFESSORS,

Plaintiff,

v.

THE UNIVERSITY OF TOLEDO
 BOARD OF TRUSTEES, *et. al.*,

Defendants.

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Case No. CI 10-7390

Judge Gary G. Cook

JUDGMENT ENTRY

**OPINION AND JUDGMENT ENTRY SETTING FORTH FINDINGS OF FACT
 AND CONCLUSIONS OF LAW AND DENYING A PERMANENT INJUNCTION IN
 AID OF ARBITRATION**

On October 25, 2010, Plaintiff University of Toledo Chapter, American Association of University Professors ("Plaintiff") filed a Verified Complaint for Preliminary and Permanent Injunction as well as a Motion for Preliminary Injunction ("Motion") against Defendants The University of Toledo Board of Trustees ("Defendant Board") and President Lloyd Jacobs ("Defendant Jacobs") (collectively, "Defendants") in aid of arbitration under a certain collective bargaining agreement between Plaintiff and Defendant Board.¹ Both Plaintiff and Defendants, on

¹Plaintiff's Verified Complaint and Motion also requested temporary injunctive relief in aid of such arbitration. On November 1, 2010, the Court conducted a hearing on Plaintiff's request for temporary injunctive relief. However, the Court found that Plaintiff had not sufficiently demonstrated its entitlement to the requested

the record on November 1, 2010, agreed to the consolidation of the preliminary-injunction hearing with the trial of this action for permanent injunctive relief on the merits under Civil Rule 65(B)(2). Accordingly, this action was tried, to the bench, on December 2nd and 3rd of 2010.

After careful consideration of all of the testimony, exhibits, stipulations, and arguments presented at trial, the parties' filings, as well as applicable law, the Court hereby enters its Findings of Fact, Conclusions of Law, and Judgment Entry, as set forth below.

I. FINDINGS OF FACT

Plaintiff is the exclusive collective bargaining representative for certain full-time faculty at the University of Toledo ("UT"). (See Joint Stipulation of Facts, ¶ 1.) Plaintiff represents two distinct bargaining units of full-time faculty, mostly employed on the Main Campus of UT. (See *id.*, ¶ 2.) One bargaining unit is comprised of full-time tenured and tenure-track faculty, and the other bargaining unit is comprised of full-time non-tenure-track faculty called "Lecturers." (See *id.*) The majority of bargaining unit members in both groups work under nine-month contracts annually for UT and are not required to be on campus from approximately mid-May through mid-August of each year, unless they are engaged under a summer contract. (See *id.*, ¶ 3.)

Defendant Board is the governing body of UT in accordance with Ohio Revised Code §3364.01, *et seq.* (See Joint Stipulation of Facts, ¶ 4.) Defendant Jacobs is the President of UT and the designated representative of Defendant Board concerning day-to-day operational matters at UT. (See *id.*, ¶ 5.) The Faculty Senate of UT is an elected body of the faculty, with responsibility to promote the mission, function, and interests of UT and its faculty. (See *id.*, ¶ 7.) The Faculty Senate

temporary injunctive relief and denied Plaintiff's request for such relief both on the record on November 1, 2010, and via a Journal Entry filed on November 22, 2010.

is comprised of sixty-four full-time faculty members, who are elected as representatives of the faculties of the colleges, and is governed by the Faculty Senate Constitution. (See *id.*; Joint Ex. 2.)

Currently, Plaintiff and Defendant Board are parties to a certain collective bargaining agreement covering the tenured and tenure-track bargaining unit, with effective dates of July 1, 2008, through June 30, 2011 ("CBA"). (See Joint Stipulation of Facts, ¶ 6; Joint Ex. 1, Art. 2.1.)

On January 25, 2010, Defendant Board adopted Resolution 10-01-01. (See Joint Ex. 13; Joint Stipulation of Facts, ¶ 8.) That Resolution provides, in part:

WHEREAS, The University of Toledo desires to continue to grow in our commitment to excellence, service, and quality; and

* * *

WHEREAS, The University of Toledo is re-visiting or re-calibrating its Strategic Plan called Directions 2007 to create a new document called Directions 2010; and

WHEREAS, The University of Toledo has begun a comprehensive Self Study in preparation for an accreditation visit from the Higher Learning Commission * * * ;
and

WHEREAS, The University of Toledo, like other public universities, faces unprecedented fiscal uncertainties. .

NOW, THEREFORE, BE IT RESOLVED

that The University of Toledo Board of Trustees charges the President to work, as appropriate, with administrators, faculty and staff to accelerate fundamental, transformational and sustainable change to elevate the stature of undergraduate and non-professional graduate programs during fiscal years 2010-12 to create a vibrant institution thriving into the 21st century.

(Joint Ex. 13.)

On May 10, 2010, Defendant Jacobs assembled a Committee for Strategic Organization ("CSO"), which consisted of twelve administrators and faculty members, and charged the group to

“prepare an organizational structure appropriate for the 21st Century and beyond and enable us to realize our Strategic Plan.” (See Joint Ex. 3; Joint Stipulation of Facts, ¶ 9.) A member of the Faculty Senate, Dr. Jamie Barlowe, was a member of the CSO. (See Joint Stipulation of Facts, ¶ 9.) The CSO issued its proposal for reorganization in June of 2010. (See *id.*, ¶ 10; Joint Ex. 3.) On September 24, 2010, Defendant Jacobs announced a certain reorganization plan that he intended to recommend to Defendant Board for adoption (“Reorganization Plan”). (See Joint Stipulation of Facts, ¶ 11; Joint Ex. 4.)

On September 30, 2010, Plaintiff filed a grievance under the CBA regarding the Reorganization Plan (“Grievance”). (See Joint Stipulation of Facts, ¶ 13; Joint Ex. 5.) Specifically, Plaintiff’s Grievance alleges that Defendants have violated and/or will continue to violate Article 7 of the CBA, entitled “Academic Governance,” by: 1) failing to “effectively consult with and seek the advice of the Faculty Senate on matters of institutional planning” (See Joint Ex. 1, Art. 7.3); and 2) failing to “fully report[] and explain[] to the Faculty Senate in written detail” the “[d]ecisions made by the administration * * * in order to allow the Faculty Senate to understand the rationale of a given decision” (See *id.*, Art. 7.6). (Joint Ex. 5; see Joint Stipulation of Facts, ¶ 14.) Moreover, Plaintiff’s Grievance requests the following remedy:

That the [P]resident consult with and seek [the] advice of the Faculty Senate on the matter related to restructuring the University of Toledo and that President Jacobs fully report and explain the restructuring to the Faculty Senate in written detail.

Furthermore, there is to be a stay in the implementation, approval and final reporting of any reorganization plan pending consultation with the Faculty Senate and a full written report including financial implications to the [Faculty] Senate.²

²As Plaintiff conceded at the November 1, 2010, hearing, Article 7.6 of the CBA, by its terms, requires that a written report be provided to the Faculty Senate only after, not before, the underlying decision has been made, and it does not expressly impose any time frame within which this must occur.

The above is to happen before the [R]eorganization [P]lan is submitted to * * * [Defendant Board].

(Joint Ex. 5.)

On October 11, 2010, Defendant Board unanimously approved the Reorganization Plan that Defendant Jacobs had recommended. (See Joint Stipulation of Facts, ¶ 12; Joint Ex. 11; Defs. Ex. 2.) On October 19, 2010, Plaintiff's President, Harvey Wolff, asked Defendant Jacobs for written confirmation that no implementation steps for the Reorganization Plan would be taken until resolution of the Grievance.³ (See Joint Stipulation of Facts, ¶ 15; Joint Ex. 6.) On October 22, 2010, Defendant Jacobs denied Plaintiff's request for a stay of the Reorganization Plan's implementation steps, stating, among other things, that Plaintiff does not have the right or authority to stay official action taken by Defendant Board. (See Joint Stipulation of Facts, ¶ 16; Joint Ex. 7.)

On October 25, 2010, Plaintiff filed the instant Verified Complaint for Preliminary and Permanent Injunction against Defendants, seeking injunctive relief to maintain the *status quo* and/or to prohibit Defendants from implementing the Reorganization Plan pending the resolution of Plaintiff's Grievance through binding arbitration under the CBA. (Verified Compl., ¶ 13, 18-20; Pl.'s Trial Br. at 7.)

On November 12, 2010, UT's Provost denied Plaintiff's Grievance at the fourth level of the CBA's grievance procedure. (See Joint Stipulation of Fact, ¶ 17; Joint Ex. 8.) On November 18, 2010, Plaintiff notified Defendants of its intention to submit its Grievance to outside binding arbitration in accordance with Article 20 of the CBA. (See Joint Stipulation of Fact, ¶ 18; Joint Ex.

³On October 12, 2010, Defendant Jacobs announced a one-month "moratorium on significant implementation steps of the [R]eorganization [P]lan * * * for purposes of soliciting additional input on the implementation of the [R]eorganization [P]lan." (See Joint Ex. 7; see also Joint Exs. 6, 12.)

9.)

II. CONCLUSIONS OF LAW

As the Sixth District Court of Appeals recognized in *Toledo Police Patrolman's Association, Local 10, IUPA, AFL-CIO-CLC v. City of Toledo*:

The principles governing when an injunction may be issued to preserve the status quo pending arbitration were first set forth in *Boys Markets, Inc. v. Retail Clerks Union* (1970), 398 U.S. 235, * * * and *Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO* (1976), 428 U.S. 397 * * *. *Boys Markets* held that[,] where a grievance is subject to arbitration under a collective bargaining agreement, and violations of a 'no-strike' clause are causing an employer irreparable injury, a court may grant injunctive relief. *Id.* at syllabus. A 'reverse' *Boys Markets* injunction (*i.e.*, where the injunction is obtained by the union [as] opposed to the employer) was first recognized in *Aluminum Workers Intl. v. Consol. Aluminum Corp.* (C.A.6, 1982), 696 F.2d 437.

(1998), 127 Ohio App. 3d 450, 465-66 (holding that the trial court did not abuse its discretion in granting the plaintiff union's requested injunctive relief in aid of arbitration, and expressly adopting as its own the trial court's opinion with respect to such injunctive relief).

Further, following *Boys Markets* and its progeny, the Sixth District, in *Toledo Police Patrolman's Association*, held that a court must find that the following four prerequisites exist before issuing a "reverse" *Boys Markets* injunction: "(1) the controversy must involve or grow out [of] a labor dispute within the meaning of Section 4 of the Norris-LaGuardia Act[, 29 U.S.C. § 104]; (2) a full evidentiary hearing must be held; (3) the [c]ourt must find that the dispute underlying the controversy is subject to binding arbitration under the terms of the [collective bargaining] [a]greement; and (4) the traditional equitable bases for injunctive relief must be met."⁴ *Toledo*

⁴Both Plaintiff and Defendants, on the record on December 3, 2010, conceded that the second prerequisite of a full evidentiary hearing has been met here.

Police Patrolman's Assoc., 127 Ohio App. 3d at 465-66 (citing *Intl. Union Auto Workers v. Lester Engineering Co.* (C.A.6, 1983), 718 F.2d 818).

As to the "traditional equitable bases for injunctive relief," it is axiomatic that, for an injunction to issue, the plaintiff "must show that[:] '(1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the [granting of the] injunction.'" *Neal v. Manor*, 6th Dist., 2008-Ohio-257, at ¶ 11; see also *Toledo Police Patrolman's Assoc.*, 127 Ohio App. 3d at 469 ("In determining whether to grant injunctive relief, courts have recognized that no one factor is dispositive and all must be balanced with the flexibility inherent to the laws of equity."). However, regarding the first factor, the Sixth District, in *Toledo Police Patrolman's Association*, underscored that requiring a plaintiff, in the context of a *Boys Markets* injunction, "to show a likelihood of success on the merits of the grievance would usurp the arbitrator's function and constitute judicial preemption of the arbitral process."⁵ 127 Ohio App. 3d at 469-70. Accordingly, the Sixth District held that "[a] plaintiff has made a sufficient showing of a likelihood of success on the merits where

⁵As the Sixth District recognized:

"The courts have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or *determining whether there is particular language in the written instrument which will support the claim*. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious * * *."

Toledo Police Patrolman's Assoc., 127 Ohio App. 3d at 468-69 (citing *Steelworkers v. American Manufacturing Co.* (1960), 363 U.S. 564, 568). Thus, as the Sixth District held, *once arbitrability is clear, the interpretation of a collective bargaining agreement "and its applicability to the grievance at issue is left solely to the determination of the arbitrator * * *."* (Emphasis added.) *Id.* at 458, 469-70 (underscoring that "[t]he question of arbitrability is ordinarily for the court, but once arbitration is found to be applicable, the court should not address the merits of the grievance," and finding that the same factors bearing upon the court's determination of arbitrability "are sufficient to show that arbitration of the grievance * * * is not a futile endeavor" and, thus, that the plaintiff union "has a likelihood of success on the merits").

it is shown that the position to be espoused in arbitration is sound enough to prevent the arbitration from being futile." *Id.*

As set forth in its trial brief and at trial, Plaintiff essentially maintains that: 1) the parties' dispute is a "labor dispute" and is subject to mandatory arbitration under the CBA;⁶ 2) Plaintiff's position in the dispute is sufficiently sound such that arbitration would not be a futile endeavor; 3) absent the requested injunctive relief, any arbitration award favorable to Plaintiff would be a worthless remedy,⁷ thereby causing irreparable injury to Plaintiff and its members' underlying CBA rights as well as to Plaintiff's reputation for safeguarding the shared-governance principles that such rights embody and/or for effectively representing its members; and 4) the issuance of the requested injunctive relief would benefit, not harm, third parties and would serve the public interest and/or the non-issuance of the requested injunctive relief would cause more irreparable harm to Plaintiff, to its members, to third parties, and/or to the public interest than the issuance of such relief would cause

⁶Plaintiff maintains, for example, that the relevant CBA provisions are not rendered void by any allegedly conflicting state law nor do they prevent Defendant Board from exercising its exclusive authority over structural reorganization decisions.

⁷Specifically, Plaintiff contends that any favorable arbitration award compelling Defendants to "effectively consult with and seek the advice of the Faculty Senate on matters of institutional planning" would be rendered meaningless if it were issued *after* Defendants already implemented the Reorganization Plan since, at that point, the arbitrator would likely be unable or unwilling to undo the adoption and/or implementation of the Reorganization Plan.

to Defendants, to third parties, and/or to the public interest.⁸ (See *e.g.*, Pl.'s Trial Brief at 9-16; Pl.'s Exs. 1-14; Joint Exs. 1-25; see also Mot. at 2, 7-10.)

As set forth in their trial brief and at the trial, Defendants essentially maintain that: 1) the parties' dispute involves neither a "labor dispute" nor an arbitrable controversy⁹; 2) Plaintiff's position in the dispute is not sufficiently sound such that arbitration would be a futile endeavor¹⁰; 3) Plaintiff would not suffer any irreparable harm absent the requested injunctive relief in that an arbitration award favorable to Plaintiff could still be an effective remedy¹¹; and 4) the issuance of the requested injunctive relief would unjustifiably harm third parties, would not serve the public interest, and/or would cause more irreparable harm to Defendants, to third parties, and/or to the public interest than the non-issuance of such relief would cause to Plaintiff, to third parties, and/or

⁸Plaintiff essentially maintains that, by preventing any arbitration award favorable to Plaintiff from being rendered worthless and, in turn, by safeguarding Plaintiff and its members' underlying CBA rights, the shared-governance principles that such rights embody, and the academic integrity that such rights seek to maintain, the requested injunctive relief would benefit both the direct and indirect beneficiaries of such CBA rights, including the Faculty Senate, UT as a whole, and the community, and would protect the reputations of Plaintiff and the national organization to which it belongs for safeguarding shared-governance principles and/or for effectively representing members. By the same token, Plaintiff maintains that the non-issuance of the requested injunctive relief would result in irreparable harm to Plaintiff, to its members, to third parties, and/or to the public interest in these same respects. Plaintiff also contends that Defendants' claims of irreparable harm from the issuance of the requested injunctive relief are exaggerated, unsupported, speculative, and/or counterintuitive, including with respect to UT's accreditation, alleged opportunities for greater interdisciplinary collaboration via the Reorganization Plan, planning and budgeting process, and external research funding.

⁹For instance, Defendants assert that the decision to reorganize UT structurally is, by statutory law, within the exclusive province of Defendant Board and is beyond any public sector collective bargaining.

¹⁰Defendants contend that they extensively consulted with and even reported to the Faculty Senate regarding UT's structural reorganization and that the Faculty Senate was given "repeated opportunities to offer input" regarding same.

¹¹Defendants argue, for example, that an arbitration award favorable to Plaintiff still could define the rights and responsibilities of the parties under the relevant provisions of the CBA and/or could compel Defendants prospectively "to consult with the Faculty Senate regarding the effects of the [R]eorganization [P]lan and its impact on faculty members" given that the implementation of the Reorganization Plan is an evolving process that will involve thousands of decisions over an extended period of time.

to the public interest.¹² (See *e.g.*, Defs.' Trial Brief at 2-12, 14-32; Defs.' Exs. 1-7; see also Resp. at 2-27.)

Upon careful consideration of all of the testimony, exhibits, stipulations, and arguments presented at trial, the parties' filings, as well as applicable law, the Court finds that Plaintiff has failed to demonstrate sufficiently its entitlement to the requested injunctive relief, particularly when it comes to the traditional equitable bases for such relief. The Court is highly mindful of the great importance of Plaintiff and its members' underlying CBA rights, the shared-governance principles that such rights embody, and the values, such as academic integrity, that such rights seek to uphold. The Court is also greatly cognizant of the related irreparable harm that Plaintiff, its members, certain third parties, and the public interest could sustain absent the requested injunctive relief. Nevertheless, upon balancing such irreparable harm against the irreparable harm that Defendants, the students, faculty, and staff of UT as well as UT as whole, and the public interest could suffer from the issuance of the requested injunctive relief, the Court finds that the latter harm would greatly outweigh the former harm. The Court cannot equitably grant injunctive relief that would work

¹²For instance, Defendants essentially maintain that the issuance of the requested injunctive relief would negatively affect perceptions about UT's stability and direction; would hinder UT from reaping the anticipated benefits of the Reorganization Plan as discussed below; would hinder or otherwise interfere with UT's planning and budgeting process, UT's ability to obtain valuable research and government funding, and UT's ability to fill certain upcoming vacancies and/or new leadership posts; would discourage prospective students from considering admission and prospective donors from making contributions; would diminish UT's "role in boosting the region's economic prospects"; would encroach upon Defendant Board's exclusive statutory right to determine UT's organizational structure; and could negatively impact UT's rankings and/or accreditation (*e.g.*, causing UT's accreditation to be "short-cycled"). By the same token, Defendants essentially maintain that the Reorganization Plan, if it were allowed to proceed, would benefit UT by, among other things, providing opportunities for greater interdisciplinary and community collaboration and by building or otherwise improving UT's research portfolio/funding, academic stature/rankings, fiscal stability, vibrancy and modernity, and student centeredness, connectedness, enrollment/appeal, and achievement.


greater injury than the wrong that such relief seeks to redress.¹³ See *e.g.*, 56 Ohio Jurisprudence Injunctions § 38. Accordingly, the Court, in the exercise of its discretion and based upon principles of equity, finds that Plaintiff's petition for the requested injunctive relief is not well-taken.

JUDGMENT ENTRY

It is **ORDERED** that Plaintiff University of Toledo Chapter, American Association of University Professors' request for certain preliminary and/or permanent injunctive relief against Defendants The University of Toledo Board of Trustees and Lloyd Jacobs is hereby **DENIED**. SO ORDERED.

Dated: _____

12-13-10



Judge Gary G. Cook

¹³The Court notes that, upon balancing the traditional equitable bases for injunctive relief here, it finds the likelihood-of-success-on-the-merits factor to be much less significant than the other balance-of-harms factors given that the requested injunctive relief, by nature, necessarily precedes any final arbitration award on the merits of Plaintiff's Grievance and that any determination by the Court as to whether Plaintiff has demonstrated the requisite likelihood of success on the merits must not usurp the arbitrator's function by interpreting the CBA, by applying the CBA to Plaintiff's Grievance, or by otherwise weighing the merits of the Grievance.