IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
June 28, 2022 Session

DR. ROLLAND W. PACK ET AL. v. FREED-HARDEMAN UNIVERSITY

Appeal from the Chancery Court for Chester County
No. 2014-CV-819 James F. Butler, Chancellor

No. W2021-00311-COA-R3-CV

This is a breach of contract action brought by two tenured university professors for wrongful termination in violation of their respective contracts of employment and the university's tenure policy. The university denied breaching the contracts or its tenure policy. It insists the elimination of the tenured faculty appointments was based on two permissible grounds, "financial distress" and the "bona fide reduction or discontinuance of a program or department of instruction." The trial court found the university proved both grounds and dismissed the complaints. It also found the university complied with other relevant provisions of the tenure policy. This appeal followed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY ARMSTRONG, J., joined.

Clinton Hondo Scott and Erin Nicole England, Jackson, Tennessee, for the appellants, Rolland W. Pack and Jerry T. Thornthwaite.

John Dean Burleson, Jackson, Tennessee, and Matthew Robert Courtner, Chattanooga, Tennessee, for the appellee, Freed-Hardeman University.

OPINION

FACTS AND PROCEDURAL HISTORY

Freed-Hardeman University ("FHU") is a private, non-profit university in Henderson, Tennessee. In the mid-1990s, Dr. Rolland Pack and Dr. Jerry Thornthwaite (collectively, "Plaintiffs") joined FHU's faculty as full-time professors. Dr. Pack taught

Bible and philosophy courses, and Dr. Thornthwaite taught chemistry courses.[1] FHU's Board of Trustees approved Dr. Pack for academic tenure in 1997, and it approved Dr. Thornthwaite for academic tenure in 2004.

The terms of Plaintiffs' employment were governed by successive one-year contracts. For the 2013–14 academic year, FHU agreed to employ Dr. Pack as a tenured professor of Philosophy in the College of Arts and Sciences and Bible in the College of Biblical Studies, and it agreed to employ Dr. Thornthwaite as a tenured professor of Chemistry in the Department of Biological, Physical, and Human Sciences. In consideration for their service, FHU agreed to pay each plaintiff a salary and provide "the other benefits and privileges" in its faculty handbook.

According to § 3.2.1.8 of FHU's Faculty Handbook, "Tenure refers to the conditions and guarantees that apply to a faculty member's employment," including "the protection of a faculty member against involuntary suspension or discharge from, or termination of, the faculty member's employment by the university except upon specified grounds and in accordance with specified procedures." In particular, § 3.2.1.11(B) provides that the university may terminate a tenured faculty appointment "based on financial distress" or the "bona fide discontinuance or reduction of a program or department of instruction." Before doing so, however, FHU must "consider placing the affected faculty members in other available and suitable positions."

In separate letters dated November 18, 2013, FHU's vice president for academics and enrollment management, Dr. C.J. Vires, notified Plaintiffs that FHU was terminating their tenured faculty appointments effective at the end of the 2013–14 academic year. The letter to Dr. Pack explained that FHU was reducing its philosophy and Bible programs in response to "a period of financial distress":

> Freed-Hardeman University is in a period of financial distress and, at the direction of the Board of Trustees, is realigning its operational budget. As a result, the philosophy program within the College of Arts and Sciences and the Bible programs within the College of Biblical Studies will undergo bona fide program reductions in the 2014–2015 fiscal year.[2]

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[1] Prior to joining FHU's faculty, Dr. Pack obtained an undergraduate degree in Bible from David Lipscomb University, a master's degree in Christian doctrine from Harding School of Theology, and a doctorate degree in philosophy from Georgetown University. Dr. Thornthwaite obtained his undergraduate degree in chemistry from David Lipscomb University and his master's and doctorate degrees in chemistry and biophysics from Florida State University.

[2] FHU's fiscal year ran from June 1 to May 31.

> The purpose of this letter is to notify you of the elimination of your tenured, fulltime faculty appointment effective with the 2014–2015 fiscal year. Your employment responsibilities at Freed-Hardeman University will end on December 12, 2013. Your salary and benefits will continue through May 31, 2014, at the conclusion of your 2013–2014 contract. This notification is made in accordance with Section 3.2.1.11 of the Faculty Handbook.

Similarly, the letter to Dr. Thornthwaite stated that FHU was reducing its biochemistry and chemistry programs:

> Freed-Hardeman University is in a period of financial distress and, at the direction of the Board of Trustees, is realigning its operational budget. As a result, the biochemistry and chemistry programs within the College of Arts and Sciences will undergo bona fide program reductions in the 2014–2015 fiscal year.
>
> The purpose of this letter is to notify you of the elimination of your tenured, fulltime faculty appointment effective with the 2014–2015 fiscal year. Your employment responsibilities at Freed-Hardeman University will end on December 12, 2013. Your salary and benefits will continue through May 31, 2014, at the conclusion of your 2013–2014 contract. This notification is made in accordance with Section 3.2.1.11 of the Faculty Handbook.

On November 14, 2019, Plaintiffs filed a joint complaint against FHU for breach of contract. Plaintiffs alleged, inter alia, that FHU had not undertaken a "bona fide program reduction" because FHU had retained non-tenured adjunct faculty to teach the courses Plaintiffs previously taught. Additionally, Plaintiffs alleged that FHU was not in "financial distress" in 2013 because it had a $44 million endowment at the time. In the alternative, Plaintiffs alleged that FHU breached their contracts by failing to offer them alternative employment.

In its answer, FHU asserted that it had a legitimate basis for terminating Plaintiffs' appointments, and it argued that "the determination of financial distress was within the purview of [FHU]'s Board of Trustees" and was "not a matter appropriate for judicial review."

During a three-day bench trial in September 2019, the trial court heard testimony from ten witnesses and accepted over 90 exhibits into evidence. On February 5, 2021, the trial court issued a written ruling supported by extensive findings of fact. The court found that FHU eliminated Plaintiffs' tenured appointments as part of a "bona fide program reduction" due to "financial distress." More specifically, the trial court found that the university eliminated its philosophy and biochemistry majors after the 2013–14 academic year in a good-faith effort to address growing deficits in its annual operating budget.

Moreover, the court found that FHU did not breach its obligation to "consider placing [Plaintiffs] in other available and suitable positions" because there were no available positions at the time. Accordingly, the court dismissed Plaintiffs' claims.

This appeal followed.[3]

ISSUES

Plaintiffs raise the following issues on appeal: (1) whether the trial court committed reversible error by finding that FHU was in "financial distress"; (2) whether the trial court committed reversible error by finding that FHU undertook a "bona fide program reduction"; and (3) whether the trial court committed reversible error by finding that FHU complied with its obligation to consider placing Plaintiffs in alternative positions.[4]

STANDARD OF REVIEW

"[T]he interpretation of a contract is a question of law which we review de novo, with no presumption of correctness for the conclusions of the trial court." *Regions Bank v. Thomas*, 422 S.W.3d 550, 560 (Tenn. Ct. App. 2013) (citing *State ex rel. Pope v. U.S. Fire Ins. Co.*, 145 S.W.3d 529, 533 (Tenn. 2004)). "[T]he determination of whether a breach has occurred is a question of fact." *Id*. (citing *Carolyn B. Beasley Cotton Co. v. Ralph*, 59 S.W.3d 110, 115 (Tenn. Ct. App. 2000)). "[A]ppellate courts review the trial court's factual findings de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise." *Kelly v. Kelly*, 445 S.W.3d 685, 692 (Tenn. 2014); *see also* Tenn. R. App. P. 13(d). "For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect." *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Grp. Tr*., 209 S.W.3d 595, 599 (Tenn. Ct. App. 2006) (citations omitted).

ANALYSIS

To succeed on a breach of contract claim, a claimant must show (1) the existence of an enforceable contract, (2) nonperformance that amounts to a breach, and (3) damages caused by such a breach. *Bynum v. Sampson*, 605 S.W.3d 173, 180 (Tenn. Ct. App. 2020) (quoting *ARC Lifemed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App.

[3] After Plaintiffs filed their notice of appeal, FHU moved to seal certain trial transcripts and exhibits relating to FHU's financial affairs, student enrollment, and confidential committee and Board of Trustee meeting minutes. The trial court granted the motion. Each party subsequently filed two sets of briefs, one that is under seal and one that is redacted and available to the public.

[4] As a fourth issue, Plaintiffs contend that "the trial court committed reversible error by failing to award Dr. Pack and Dr. Thornthwaite damages for breach of contract in the amounts of $350,123.30 and $473,588.50, respectively." Our opinion pretermits that issue.

2005)). It is undisputed that each plaintiff had an enforceable contract with FHU, which incorporated the university's tenure policy by reference, that permitted the university to eliminate their tenured appointments based on "financial distress" or the "bona fide discontinuance or reduction of a program or department of instruction," so long as the school first considered placing Plaintiffs in "other available and suitable positions."

Plaintiffs contend that FHU violated its tenure policy because it had ample financial resources and continued to offer courses taught by Plaintiffs after the 2013–14 academic year.[5] Plaintiffs also contend that FHU failed to consider placing them in alternative positions. We will discuss each argument in turn.

I. FINANCIAL DISTRESS

Plaintiffs contend that the trial court erred when it found that FHU's recurrent budget deficits constituted "financial distress." Plaintiffs argue that "to define financial distress as cash flow problems . . . render[s] the employment contracts of Dr. Pack, Dr. Thornthwaite, and all other tenured faculty members meaningless." Plaintiffs maintain that the trial court should have placed more weight on factors related to FHU's overall financial health, including its low debt-to-asset ratio and its significant endowment.

FHU concedes that it had a significant endowment, but it argues that the trial court correctly construed "financial distress" as relating solely to the university's cash flow, i.e., its ability to pay operating expenses with operating revenue. FHU contends that how it "uses its endowment and other capital assets is a policy decision" that "should not be subject to judicial review."

When called upon to enforce a contract, "courts must ascertain and give effect to the intent of the contracting parties consistent with legal principles." *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.*, 566 S.W.3d 671, 688 (Tenn. 2019).[6] When doing so, courts presume that the contract's written words are the best evidence of the parties' intent. *Id.* at 694 (quoting Steven W. Feldman, 21 Tenn. Practice: Contract Law and Practice § 8:14 (June 2018)). For this reason, courts begin with the words' "usual, natural, and ordinary meaning." *Planters Gin Co. v. Fed. Compress &*

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[5] In the complaint, Plaintiffs alleged that FHU's claim of financial distress was fraudulent, but they presented no evidence that FHU acted in bad faith. Plaintiffs maintain on appeal that FHU was not in "financial distress" and did not undertake a "program reduction," but they do not contend that FHU was motivated by anything other than a good-faith desire to balance its budget. The parties have stipulated that neither Dr. Pack nor Dr. Thornthwaite was terminated for misconduct or poor job performance.

[6] "The interpretive rules used to determine what the language [in an employee handbook] means are the same as the rules used to construe contracts." *Vargo v. Lincoln Brass Works, Inc.*, 115 S.W.3d 487, 491 (Tenn. Ct. App. 2003).

Warehouse Co., 78 S.W.3d 885, 889–90 (Tenn. 2002). If a contract's language remains susceptible to more than one reasonable interpretation, courts must rely on other interpretive rules. *See id*. at 890.

Plaintiffs contend that the trial court should have applied the interpretive rule of *contra proferentem*, under which courts will construe ambiguous language against the party who drafted it. *See 101 Constr. Co. v. Hammet*, 603 S.W.3d 786, 795 n.9 (Tenn. Ct. App. 2019) (citing *Black's Law Dictionary* (9th ed. 2009)). However, "[w]here there is no obscurity or ambiguity requiring interpretation by a court, there is no occasion for applying the rule requiring a resolution of ambiguity against the draftsman." *Maynard v. Vanderbilt Univ.*, No. 01-A-01-9211-CH-00437, 1993 WL 156156, at *9 (Tenn. Ct. App. May 14, 1993) (citing *Dixon v. Gunter*, 636 S.W.2d 437, 441 (Tenn. Ct. App. 1982)).

We find it unnecessary to resort to the rule of *contra proferentem* in this case. The trial court found that financial distress "is not difficult to define," and we agree. As FHU points out on appeal, the plain meaning of financial distress is "a lack of money to pay bills and other expenses." *See Black's Law Dictionary* (11th ed. 2019) (defining "distress" as "[p]roblems and hardships caused by a lack of resources"). Still, this begs the questions: What "money" must FHU be without, and what "bills and other expenses" must go unpaid?

Although no Tennessee court has considered what aspects of a university's finances should be considered when determining whether or not the university is experiencing financial distress, other courts have.[7] *See Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978); *see also Am. Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll.*, 346 A.2d 615, 617 (N.J. Super. Ct. App. Div. 1975). We find the reasoning in *Krotkoff* particularly persuasive.

In *Krotkoff*, the plaintiff, a tenured professor, alleged that Goucher College violated the tenure provision of her contract when it terminated her position. *Id*. at 676. As with FHU in this case, Groucher College defended itself by asserting that it eliminated the position "as part of a general retrenchment prompted by severe financial problems." *Id*. The evidence at trial showed that the college had operated at a deficit for six years due to declining enrollment. *Id*. at 677. But like FHU—which has substantial assets in its endowment—Goucher College had a large endowment and valuable land. *Id.* at 680.

After a trial, the district court entered judgment for the college notwithstanding the verdict. *Id*. at 677. On appeal, the professor maintained that she was entitled to have the jury "assess the reasonableness of the trustees' belief that the college faced financial

[7] Financial hardship on the part of an educational institution is a well-established exception to the privileges of academic tenure. *See generally* 14A C.J.S. *Colleges and Universities* § 20 (Feb. 2023); Mark Strasser, *Tenure, Financial Exigency, and the Future of American Law Schools*, 59 Wayne L. Rev. 269 (2013).

exigency" in light of the college's substantial assets. *Id*. at 680. The Fourth Circuit Court of Appeals reasoned and ruled as follows:

> Courts have properly emphasized that dismissals of tenured professors for financial reasons must be demonstrably bona fide. Otherwise, college administrators could use financial exigency to subvert academic freedom. The leading case on this aspect of tenure is *American Association of College Professors v. Bloomfield College*. . . .
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> *Bloomfield*, however, establishes that the trustees' decision to sell or retain a parcel of land was not a proper subject for judicial review:
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> > **Whether . . . [the sale of land] to secure financial stability on a short-term basis is preferable to the long-term planning of the college administration is a policy decision for the institution. Its choice of alternative is beyond the scope of judicial oversight in the context of this litigation**. Hence the emphasis upon the alternative use of this capital asset by the trial judge in reaching his conclusion that a financial exigency did not exist was unwarranted and should not have been the basis of decision.
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> The same principle, we believe, should apply to the dissipation of an endowment. **The reasonableness of the trustees' decision concerning the disposition of capital did not raise an issue for the jury.** Stated otherwise, **the existence of financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets**.
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> Krotkoff has acknowledged that the trustees and other college officials did not act in bad faith. The evidence overwhelmingly demonstrates that the college was confronted by pressing financial need. As a result of the large annual deficits aggregating more than $1,500,000 over an extended period and the steady decline in enrollment, the college's financial position was precarious. Action undoubtedly was required to secure the institution's future. Because of Krotkoff's disavowal of bad faith on the part of the college and because of the unrefuted evidence concerning the college's finances and enrollment, we believe that this aspect of the case raised no question for the jury. The facts and all the inferences that properly can be drawn from them conclusively establish that the trustees reasonably believed that the college was faced with financial exigency.

Id. at 681 (alteration in original) (emphasis added) (footnote omitted) (citations omitted) (quoting *Am. Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll.*, 346 A.2d at 617).

We agree with the court in *Krotkoff* that a finding of financial exigency generally should not be predicated on the adequacy of an educational institution's endowment or capital assets. Furthermore, as *Krotkoff* reasoned, the courts should show deference to the trustees' decision concerning when and how to utilize university capital assets. *Id*. Stated another way, the scope of judicial review should be limited to whether the institution's governing body reasonably believed that the institution was facing a financial exigency, not whether the institution's termination of tenured appointments could have been averted through other means, such as liquidating assets. *See id.*; *see also* John E. Sanchez and Robert D. Klausner, St. Loc. Gov't Emp. Liab. § 7:4 (2022 ed.) ("In the absence of ill will, fraud, collusion or bad faith, courts will not substitute [their] judgment for that of the university on the question of financial exigency.").

As FHU correctly points out, this standard is consistent with the deference that Tennessee courts typically give to the policy decisions of educational institutions. *See Horne v. Cox*, 551 S.W.2d 690, 692 (Tenn. 1977) (noting deference to school's application of academic standards); *Garmon v. Fisk Univ.*, No. 01A01-9803-CH-00132, 1999 WL 118215, at *4 (Tenn. Ct. App. Mar. 9, 1999) ("Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals . . . ." (citation omitted)); *DeArk v. Belmont Coll.*, No. 88-193-II, 1988 WL 136671, at *2 (Tenn. Ct. App. Dec. 21, 1988) ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." (quoting *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985))); *see also Langland v. Vanderbilt Univ.*, 589 F. Supp. 995, 1003 (M.D. Tenn. 1984) ("[T]he opinions of those who draft criteria and work with them on a daily basis must be given great deference by courts faced with the task of interpreting those criteria." (citation omitted)).

This standard also mirrors what is commonly known as the business judgment rule, which is a presumption "that a corporation's directors, when making a business decision, acted on an informed basis, in good faith, and with the honest belief that their decision was in the corporation's best interest." *See Lewis v. Boyd*, 838 S.W.2d 215, 220–21 (Tenn. Ct. App. 1992). The business judgment rule generally applies to corporations, including those that are nonprofit. *Summers v. Cherokee Child. & Fam. Servs., Inc.*, 112 S.W.3d 486, 529 (Tenn. Ct. App. 2002). The rule is based on the principle that "[i]t is not the function of the courts to interfere with the internal workings of corporations in exercising their discretion within legal limits." *French v. Appalachian Elec. Co-op.*, 580 S.W.2d 565, 570 (Tenn. Ct. App. 1978) (citing *Gruber v. Chesapeake & O. Ry. Co.*, 158 F. Supp. 593 (D.C. Ohio 1958)). Thus, Tennessee courts have declined to substitute their judgment for that of a corporation's board of directors "when the board has acted in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Id.* (citing *Range v. Tennessee Burley Tobacco Growers Association*, 298 S.W.2d 545 (Tenn.

Ct. App. 1955); *Pace v. Garbage Disposal Dist. of Washington Co.*, 390 S.W.2d 461, 463 (Tenn. Ct. App. 1965)).

The record reveals that, in the years before Plaintiffs' termination, FHU's finances were complicated. FHU's financial situation can best be described as asset-rich but cash-poor. Its biggest asset was its endowment, which was divided into "restricted" and "unrestricted" funds. The Board of Trustees had the discretion to spend the unrestricted funds, which totaled approximately $13 million in November 2013. And FHU's audited balance sheets were healthy, showing a good debt-to-asset ratio and a positive net worth.

Despite these positive indications, Dr. Dwayne Wilson, FHU's chief financial officer and executive vice president, testified that the university had cash flow problems dating as far back as 2003, and the university's financial woes were largely the result of years of declining enrollment and increased expenses. He also explained that, to bridge the financial gap, the school had used and increased its line of credit for several years.

In 2008, in an attempt to address its financial problems, FHU hired Dr. Joe Wiley as president and tasked him with balancing the school's budget. Under Dr. Wiley's guidance, FHU switched to a cash-basis accounting method that required FHU's operating expenses to match its revenue every fiscal year.[8] Accordingly, Dr. Wiley worked with FHU's finance team to develop a cash-flow model for predicting the school's annual revenue and expenses. At the same time, Dr. Wiley asked his budget director to prepare a "cash-basis report" that showed "where [FHU's] main sources of revenue came from" and "where the expenditures went during a given fiscal year." The cash-flow model and the cash-basis reports revealed that FHU's cash balances were shrinking.

FHU's operational budget for a given fiscal year decreased by $15,000–$20,000 per loss of one full-time student. From the fiscal year ending in 2009 to the fiscal year ending in 2013, FHU's expenses increased by 23% while its full-time enrollment decreased by 13%. Consequently, FHU had operating deficits of $1.4 million in 2011 and $1.9 million in 2012. Because of these deficits, FHU was increasing its line of credit each year. The credit line ultimately reached $8 million, a figure that Dr. Wiley and the Board considered unsustainable.

FHU ended its 2012–13 fiscal year with a deficit of $2.1 million. At that time, Dr. Wiley knew that if enrollment did not improve for the 2013–14 academic year, the university would need to make significant cuts to its expenses—including payroll.

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[8] A "cash-basis accounting method" is "[a]n accounting method that considers only cash actually received as income and cash actually paid out as an expense." Accounting Method, *Black's Law Dictionary* (11th ed. 2019). In contrast, under an "accrual-basis accounting method," debits and credits are recorded "when the revenue or liability arises, rather than when the income is received or an expense is paid." *Id*.

In September 2013, Dr. Wiley learned that FHU's enrollment numbers for the fall semester were lower than expected. Accordingly, he directed FHU's vice presidents to reduce the 2013–14 budget by $800,000 and the 2014–15 budget by $1.7 million. In response, Dr. Vires instructed the dean of each college to review their academic programs and recommend faculty positions to cut. In the end, the Board of Trustees approved Dr. Wiley's recommendation to terminate twenty-three full-time employees, including seven faculty members, three of whom were tenured.

The preceding facts—which were unrebutted by Plaintiffs—reveal that FHU's expenses often exceeded its revenue during the decade leading up to Plaintiffs' termination. This condition worsened due to decreasing enrollment, resulting in increasing deficits yearly, each over one million dollars, and the last over two million dollars. As the court reasoned in *Krotkoff*, a continuous and increasing deficit and a steady decline in enrollment "overwhelmingly demonstrates that the college was confronted by pressing financial needs." 585 F.2d at 681. For these reasons, FHU was experiencing financial distress, which justified its decision to address its financial problems before they became irreversible.

Although FHU could have bailed itself out of financial trouble by encroaching on its endowment, whether to do so was a policy decision for the Board of Trustees.[9] The board's former chairman, Brett Pharr, testified that the board had a standing policy of using endowment funds only for long-term projects. The board considered this policy to be in the best interest of the university, and it decided to address FHU's problems in 2013 by cutting expenses.

The trial court acknowledged the legal principle that courts should defer to the judgment of a university's board of trustees in policy decisions:

> The Board sets policy. The Administration carries out Board policy. The Administration was mandated by President Wiley to cut the budget for the 2013–2014 and 2014–2015 school years. The persons responsible for doing that engaged in a process using their particular knowledge and expertise to recommend to their superiors, and ultimately President Wiley, how to do it. The Court also points out that conversely, the Court is ill equipped to make such decisions or to judge the manner in which such decisions are made, or the methods employed to implement those recommendations and decisions. The recommendations were accepted and implemented by persons with similar institutional knowledge and expertise as the people who made the recommendations. The University and Administration are uniquely more

[9] Dr. Wiley testified that he never asked the board to cover FHU's operating deficits because, in his words, "it is generally considered a first step to death when you start using one-time funds to cover ongoing commitments."

> qualified to analyze the relevant factors in this type [of] decision making process than the Court. The Court should not substitute its judgment for that of the Administration.

Based on these and other facts in the record, the trial court held that FHU was in financial distress in 2013, which, "if not squarely addressed by cutting the budget, could severely impact the university resulting in possible ultimate closure down the line."

As the courts reasoned in *Bloomfield* and *Krotkoff*, we find no basis for the trial court or this court to substitute our judgment for that of the FHU Board of Trustees in cutting its expenses rather than encroaching on its endowment. Accordingly, we affirm the trial court on this issue.

II. Reduction of Programs

Plaintiffs contend that the trial court erred when it found that FHU's elimination of the philosophy major and consolidation of the chemistry and biochemistry majors were "bona fide program reductions" for purposes of § 3.2.1.11. Plaintiffs argue that neither program was reduced because every course taught by Dr. Pack and Dr. Thornthwaite was still listed in FHU's 2014–15 undergraduate catalog, and most of the courses continued to be taught as part of the curriculum for other majors. They maintain that "[a] reorganization does not equal a reduction."

Under § 3.2.1.11, FHU had the right to terminate Plaintiffs' tenured appointments "based on financial distress, **or** bona fide discontinuance or reduction of a program or department of instruction." Because we have affirmed the trial court's finding that FHU was in a period of financial distress, which necessitated the elimination of tenured faculty positions, including those held by Dr. Pack and Dr. Thornthwaite, we need not address whether the court correctly held that the termination of Plaintiffs' tenured appointments was based on a "bona fide program reduction."

III. Alternative Positions

Even if the trial court correctly found that FHU was in financial distress, Plaintiffs insist that the court erred by finding that FHU did not breach its obligation to consider placing Plaintiffs in alternative positions. Plaintiffs argue that the evidence preponderates against this finding because, according to Plaintiffs, Dr. Self-Davis and Dr. Smith testified that they "did not consider any other available and suitable positions for Dr. Pack or Dr. Thornthwaite."

FHU acknowledges that Dr. Self-Davis and Dr. Smith did not consider whether there were any *suitable* positions for Plaintiffs, but FHU contends that it nonetheless complied with the contract because both deans determined that there were no *available* positions. Thus, FHU reasons, "Because there were no available positions, it made no sense

for Dr. Self-Davis and Dr. Smith to consider whether Plaintiffs were suitable for unavailable positions."

In resolving this issue, we find it significant that § 3.2.1.11(B) of FHU's Faculty Handbook is somewhat different than the model tenure policy language promulgated by the American Association of University Professors ("the AAUP").[10] In its 1968 Recommended Institutional Regulations on Academic Freedom and Tenure, the AAUP recommended that institutions of higher education adopt the following language in their tenure policies:

> (c) Where termination of appointment is based upon financial exigency, or bona fide discontinuance of a program or department of instruction, [the normal dismissal procedures] will not apply, but faculty members shall be able to have the issues reviewed by the faculty, or by the faculty's grievance committee, with ultimate review of all controverted issues by the governing board. In every case of financial exigency or discontinuance of a program or department of instruction, the faculty member concerned will be given notice as soon as possible, and never less than 12 months' notice, or in lieu thereof he will be given severance salary for 12 months. **Before terminating an appointment because of the abandonment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions.** If an appointment is terminated before the end of the period of appointment, because of financial exigency, or because of the discontinuance of a program of instruction, the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it.

AAUP, *1968 Recommended Institutional Regulations on Academic Freedom and Tenure*, 54 AAUP Bulletin 448, 449 (Winter 1968) (emphasis added).

The language adopted by FHU for § 3.2.1.11 reads:

> (B). . . Where termination of tenure or termination or reduction of appointment is based upon financial distress, or bona fide discontinuance or reduction of a program or department of instruction, the dismissal for cause procedure will not apply. The faculty member will be given at least

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[10] "In practice, most institutional grants of tenure conform to the basic parameters articulated by the AAUP." Steven G. Olswang et al., *Retrenchment*, 30 J.C. & U.L. 47, 49 (2003); *see also generally Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 Pace L. Rev. 159, 163 (2000) (providing overview of the history of academic tenure).

> one semester's notice, or to the end of the current contract, whichever is longer.
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> Faculty members will be able to have the issue reviewed by a hearing committee, as per the dismissal for cause procedure, with ultimate review of all disputed issues by the governing board or its Executive Committee.
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> **Before terminating or reducing a tenured appointment for the reasons stated above, the institution will consider placing affected faculty members in other available and suitable positions.** Such positions may not carry the same compensation and other terms of employment as those previously held.
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> If a full-time appointment is terminated or reduced before the end of the appointment, a tenured faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it.

(Emphasis added).

The language adopted by FHU differs from the AAUP model in one key respect. Under the AAUP model, an institution promises to "**make every effort** to place affected faculty members in other suitable positions." In contrast, under its policy, FHU "will **consider** placing faculty members in other available and suitable positions." The record establishes that it did so.

In an affidavit entered into evidence at trial, Dr. Self-Davis testified that there were no available positions due to the budget cuts; therefore, she did not consider "what other courses" Plaintiffs could have taught. As she explained:

> 4. Because of the required budget reductions, there was no available position for Dr. Pack or Dr. Thornthwaite to teach, even though Dr. Pack and/or Dr. Thornthwaite may be qualified to teach other courses. As such, there was not an available position for either Dr. Pack or Dr. Thornthwaite.
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> 5. Because the College of Arts and Sciences did not have the financial resources to place Dr. Pack and Dr. Thornthwaite in another position, I did not consider what other courses Dr. Pack or Dr. Thornthwaite may be able to teach. There was no benefit to consider what other positions may be suitable for Dr. Pack and Dr. Thornthwaite when no alternative positions are available due to the budget reductions of operating expenses.

In another affidavit entered into evidence, Dr. Smith—the dean of the College of Biblical Studies—testified similarly with regard to Dr. Pack:

> Because the College of Arts and Sciences did not have the financial resources to place Dr. Pack in another position, I did not consider what other courses Dr. Pack or Dr. Thornthwaite may be able to teach.[11] There was no benefit to consider other positions in which Dr. Pack may be suitable to teach with no such alternative positions available due to FHU's budget reductions of operating expenses.

Based on this evidence, the trial court found that the university did not breach its obligation:

> Both Self-Davis and Smith testified that they did not try to place Plaintiffs in other positions. Dr. Self-Davis stated in her Affidavit that because of the changes in the Philosophy and Chemistry Departments, caused by the budget reductions, she determined that the College of Arts and Sciences did not have an available, suitable position for either Pack or Thornthwaite. Smith stated that he determined, after the reductions and eliminations of teaching duties of Dr. Pack in the Philosophy Department . . . that the College of Bible Studies did not have an available, suitable position for Dr. Pack. According to Self-Davis and Smith, there were no other available positions that were suitable. The Court finds that the University did not breach this portion of the policy.

Plaintiffs contend that this result is untenable because it allows FHU to shirk its obligation based on "the existence of the very circumstances, financial distress and/or bona fide program reduction, that create the duty of consideration in the first place." They argue that this result would be contrary to the maxim that "[c]ontracts should be read in a way that no portion of them is rendered meaningless."

However, when enforcing a contract, our fundamental goal is to "ascertain and give effect to the intent of the contracting parties." *Individual Healthcare Specialists, Inc.*, 566 S.W.3d at 688. Courts are "not at liberty to make a new contract for parties who have spoken for themselves." *Id*. at 692 (quoting *Smithart v. John Hancock Mut. Life Ins. Co.*, 71 S.W.2d 1059, 1063 (Tenn. 1934)). Moreover, "courts do not concern themselves with the wisdom or folly of a contract and will not relieve parties from contractual obligations simply because they later prove to be burdensome or unwise." *Sikora v. Vanderploeg*, 212 S.W.3d 277, 286 (Tenn. Ct. App. 2006) (citations omitted).

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[11] In his testimony at trial, Dr. Smith clarified that he was not involved in the decision to terminate Dr. Thornthwaite's appointment.

Plaintiffs also contend that "each and every non-tenured faculty position at FHU for the 2014–2015 academic year was available in November of 2013" because "non-tenured faculty did not have to be notified of non-reappointment for the following year until January 15." We respectfully disagree.

Section 3.2.3.1 of FHU's Faculty Handbook provides that "[n]on-tenured full-time faculty will receive letters notifying them of **non-reappointment** for the following year by January 15." Thus, as Dr. Vires testified, non-tenured faculty members could expect to retain their positions unless FHU notified them otherwise. Granted, FHU was not contractually obligated to renew the contracts of non-tenured faculty members—but this does not mean that every non-tenured faculty position was "available," and FHU's tenure policy did not give Plaintiffs a right to demand the non-renewal of another faculty member's contract, tenured or not.

In summary, the plain language of § 3.2.1.11(B) required FHU to "consider" placing Dr. Pack and Dr. Thornthwaite in "available and suitable" positions. The trial court found there were no available and suitable positions, and the evidence does not preponderate against that finding. *See* Tenn. R. App. P. 13(d); *see also Kelly*, 445 S.W.3d at 692 ("[A]ppellate courts review the trial court's factual findings de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise.").

Having considered all issues raised by Plaintiffs, the trial court ultimately concluded that "Plaintiffs have not been able to carry the burden of proof that their contracts with FHU were breached in any material way and that Plaintiffs' claims should be denied." We agree with this conclusion. Accordingly, we affirm the trial court's decision to dismiss all claims.

IN CONCLUSION

For these reasons, the judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiffs, Dr. Rolland Pack and Dr. Jerry Thornthwaite, jointly and severally.

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FRANK G. CLEMENT JR., P.J., M.S.